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**THE GENETIC PRIVACY ACT  
AND  
COMMENTARY**

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**MASTER**

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## **DISCLAIMER**

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# I

## INTRODUCTION

The Genetic Privacy Act is a proposal for federal legislation. The Act is based on the premise that genetic information is different from other types of personal information in ways that require special protection. The DNA molecule holds an extensive amount of currently indecipherable information. The major goal of the Human Genome Project is to decipher this code so that the information it contains is accessible. The privacy question is, accessible to whom?

The highly personal nature of the information contained in DNA can be illustrated by thinking of DNA as containing an individual's "future diary."<sup>1</sup> A diary is perhaps the most personal and private document a person can create. It contains a person's innermost thoughts and perceptions, and is usually hidden and locked to assure its secrecy. Diaries describe the past. The information in one's genetic code can be thought of as a coded probabilistic future diary because it describes an important part of a unique and personal future.

Genetic information is powerful and personal. As the genetic code is deciphered, genetic analysis of DNA will tell us more and more about a person's likely future, particularly in terms of physical and mental well-being. The search for genetic information often involves locating predictors of

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<sup>1</sup> Annas GJ & Elias S, eds, *Gene Mapping: Using Law and Ethics as Guides*, New York: Oxford University Press, 1992, p.9.

undesirable and stigmatizing conditions - such as cancers, and conditions that lead to mental illness and dementia. This information is uniquely sensitive for a number of reasons. First, unlike ordinary diaries that are created by the writer, the information contained in the genetic code is largely unknown to the person in whose genetic material it is found. Therefore, if this information is obtained by someone else without the individual's permission, another person would learn intimate details of the individual's likely future life. A stranger could, in effect, read the future diary of an individual without the individual even knowing that the diary exists. There are many people, including insurers and employers, to whom information about an individual's likely health future would be useful.<sup>2</sup>

Second, deciphering an individual's genetic code also provides the reader of that code with probabilistic health information about that individual's family, especially parents, siblings and children. Third, since the DNA molecule is stable, once removed from a person's body and stored, it can become the source of an increasing amount of information as more is learned about how to read the genetic code. Finally, genetic information (and misinformation) has been

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<sup>2</sup> Council of State Governments, *Advances in Genetic Information: A Guide for State Policy Makers*, Lexington, Ky: Council of State Governments, 1992; Privacy Commissioner of Canada, *Genetic Testing and Privacy*, Ottawa, Ontario: Privacy Commissioner of Canada, 1992.

used by governments to viciously discriminate against those perceived as genetically unfit.

### **DNA Databanks**

We originally proposed drafting legislation to regulate DNA databanks. We thought of DNA databanks as entities that collected, stored, analyzed and controlled DNA samples and information derived from DNA samples, although the term could also include entities that either only stored DNA samples or only stored information derived from genetic analysis.<sup>3</sup> Thinking of such databanks as holders of genetic information, like computerized medical records, James Watson has said, "The idea that there will be a huge databank of genetic information on millions of people is repulsive."<sup>4</sup>

Dr. Watson's statement expresses the concern of many people who distrust both computer technology and large, bureaucratic record-keeping systems, and perceive private genetic information as uniquely personal. Such distrust also flows from the realization that current confidentiality policies and practices, which supposedly safeguard personal medical information, are inadequate to protect private genetic

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<sup>3</sup> Annas GJ, Privacy Rules for DNA Databanks, 270 JAMA 2346 (1993).

<sup>4</sup> *Domestic and International Data Protection Issues*, Hearings before the Subcommittee on Government Information, Justice, and Agriculture of the Committee on Government Operations, U.S. House of Representatives, 102d Cong., 2d Sess. (1991).

information.<sup>5</sup> New rules for DNA databanks are needed to minimize the potential harm to individual privacy and liberty that the collection, storage and distribution of genomic information could produce, and to foster personally and societally useful applications of genetic information. As the U.S. House of Representatives Committee on Government Operations rightly concluded in its study of genetic information, such rules "will be more effective and less expensive to implement if established in advance."<sup>6</sup>

Our own analysis of the privacy issues implicated by DNA

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<sup>5</sup> Current confidentiality protections are inadequate even to protect individual medical records, a circumstance widely recognized during the recent health care reform debate. See, e.g., the medical records section of *The Health Security Act* as amended in the U.S. House of Representatives, *Report on the Health Security Act*, Committee on Government Operations, Aug. 12, 1994; and *Hearings on Health Reform, Health Records, Computers and Confidentiality*, Committee on Government Operations, U.S. House of Representatives, 103d Cong. 1st Sess., Nov. 4, 1993; and *Hearings on Fair Health Information Practices Act of 1994*, April 20, May 4-5, 1994. See also, Wilker NL, Stawski S, Lewontin R, Billings PR, DNA Data Banking and the Public Interest, in Billings PR, ed, *DNA on Trial: Genetic Information and Criminal Justice*, Cold Spring Harbor, NY: Cold Spring Harbor Laboratory Press, 1992, pp. 141-149; Yates JRW, Malcom S, Read AP, Guidelines for DNA Banking: Report of the Clinical Genetics Society Working Party on DNA Banking, 16 *J. Med. Genet.* 245 (1989); Ad Hoc Committee on DNA Technology, American Society of Human Genetics, DNA Banking and DNA Analysis: Points to Consider, 42 *Am. J. Hum. Genet.* 781 (1986); and Andrews LB, DNA Testing, Banking and Individual Rights, in Knoppers BM & Laberge GM, eds, *Genetic Screening: From Newborns to DNA Typing*, Amsterdam: Excerpta Medica, 1990, pp. 217-242.

<sup>6</sup> *Designing Genetic Information Policy: The Need for an Independent Policy Review of the Ethical, Legal and Social Implications of the Human Genome Project*, Committee on Government Operations, U.S. House of Representatives, 102d Cong, 2d Sess., Rep. No.16, April 2, 1992, p.25.

databanks has persuaded us that it is not feasible to protect genetic privacy by limiting regulation to places called DNA databanks. One reason is that it is difficult even to define precisely a DNA databank. Entities that only store medical records seem to qualify, but are not the major focus of concern regarding the new genetics. There are already many entities that store genetic materials, including the FBI and individual state programs that store DNA samples from convicted sex offenders and other criminals, the U.S. Army's DNA sample storage program, and private medical research projects. The FBI is primarily interested in using DNA to identify criminal suspects, while medical research programs might conduct future analysis of DNA samples to further decipher the genetic code. Other entities could qualify as DNA banks because they collect and store large amounts of biological material, even though they have no current intent to conduct genetic analysis. Such programs include the Red Cross and other blood banks, private sperm, ovum and embryo banks, and state facilities that store blood samples that have been used for phenylketonuria (PKU) testing.

#### **Collection, Analysis and Storage of DNA and Genetic Information**

Focusing solely on any or all of these types of DNA databanks assumes that the DNA samples have been legitimately obtained and analyzed, and the only issues are the proper storage of genetic information, and rules governing the

disclosure of the genetic information by DNA databanks. But meaningful privacy protection must regulate the collection, analysis and storage of DNA samples, as well as the storage and disclosure of the genetic information derived from the analysis of these samples, no matter who performs that analysis. It is, after all, the DNA samples that contain the individual's private genetic information. Control of these samples enables the custodian to analyze and reanalyze them to derive increasing amounts of genetic information as new tests are developed. It is also possible to obtain biological material for the purpose of DNA analysis without the person knowing that such material was obtained or analyzed. For example, DNA can even be obtained from hair samples left on a barber's floor or from saliva found on a licked stamp.

Therefore, to effectively protect genetic privacy unauthorized collection and analysis of individually identifiable DNA must be prohibited. As a result, the overarching premise of the Act is that no stranger should have or control identifiable DNA samples or genetic information about an individual unless that individual specifically authorizes the collection of DNA samples for the purpose of genetic analysis, authorizes the creation of that private information, and has access to and control over the dissemination of that information.

The rules protecting genetic privacy must be clear and known to the medical, scientific, business and law enforcement

communities and the public. The purpose of the Genetic Privacy Act is to codify these rules. It has been drafted as a federal statute to provide uniformity across state lines. However, the Act could be adopted by individual states and used as guidelines by professional societies, at least until such time as Congress acts.<sup>7</sup>

Under the Act, each person who collects a DNA sample (e.g., blood, saliva, hair or other tissue) for the purpose of performing genetic analysis is required to:

- provide specific information verbally prior to collection of the DNA sample;
- provide a notice of rights and assurances prior to the collection of the DNA sample;
- obtain written authorization which contains required information;
- restrict access to DNA samples to persons authorized by the sample source;
- abide by a sample source's instructions regarding the maintenance and destruction of DNA samples.

Special rules regarding the collection of DNA samples for genetic analysis are set forth for minors, incompetent persons, pregnant women, and embryos. DNA samples may be collected and analyzed for identification for law enforcement purposes if authorized by state law, and for identifying dead bodies, without complying with the authorization provisions of

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<sup>7</sup> Congress has recently acted to protect genetic information derived from DNA samples held by law enforcement agencies for identification purposes. See, Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322 § 210305. This law would not be affected by the Genetic Privacy Act.

the Act. Research on individually identifiable DNA samples is prohibited unless the sample source has authorized such research use, and research on nonidentifiable samples is permitted if this has not been prohibited by the sample source. Pedigree research and research involving DNA from minors are also governed by specific provisions of the Act.

Individuals are prohibited from analyzing DNA samples unless they have verified that written authorization for the analysis has been given by the sample source or the sample source's representative. The sample source has the right to:

- determine who may collect and analyze DNA;
- determine the purposes for which a DNA sample can be analyzed;
- know what information can reasonably be expected to be derived from the genetic analysis;
- order the destruction of DNA samples;
- delegate authority to another individual to order the destruction of the DNA sample after death;
- refuse to permit the use of the DNA sample for research or commercial activities; and
- inspect and obtain copies of records containing information derived from genetic analysis of the DNA sample.

A written summary of these principles and other requirements under the Act must be supplied to the sample source by the person who collects the DNA sample. The Act requires that the person who holds private genetic information in the ordinary course of business keep such information confidential and prohibits the disclosure of private genetic

information unless the sample source has authorized the disclosure in writing or the disclosure is limited to access by specified researchers for compiling data.

The Genetic Privacy Act protects individual privacy while permitting medical uses of genetic analysis, legitimate research in genetics, and genetic analysis for identification purposes.

### **Acknowledgements**

This project had its genesis at a meeting in Cold Spring Harbor in November 1989 at which one of the drafters (GJA) gave a presentation on the privacy issues involved in DNA banking. Fourteen months later, he and Dr. Sherman Elias co-hosted an NIH-sponsored workshop in Bethesda, Maryland the purpose of which was to suggest a prioritized research agenda for the Ethical, Legal & Social Implications (ELSI) program of the Human Genome Project. Protecting genetic privacy was ranked as one of the two highest priority issues at that workshop (regulating the introduction of new genetic tests into clinical practice was ranked slightly higher). Shortly thereafter the Director of the ELSI program for the U.S. Department of Energy, Michael Yesley, asked us to draft guidelines to protect the privacy of individuals whose DNA was stored at DNA banks. We agreed, and began this project in June of 1993, with Dr. Daniel Drell of the U.S. Department of

Energy (Health Effects and Life Sciences Research Division, Office of Health and Environmental Research, Office of Energy Research) as the project monitor.

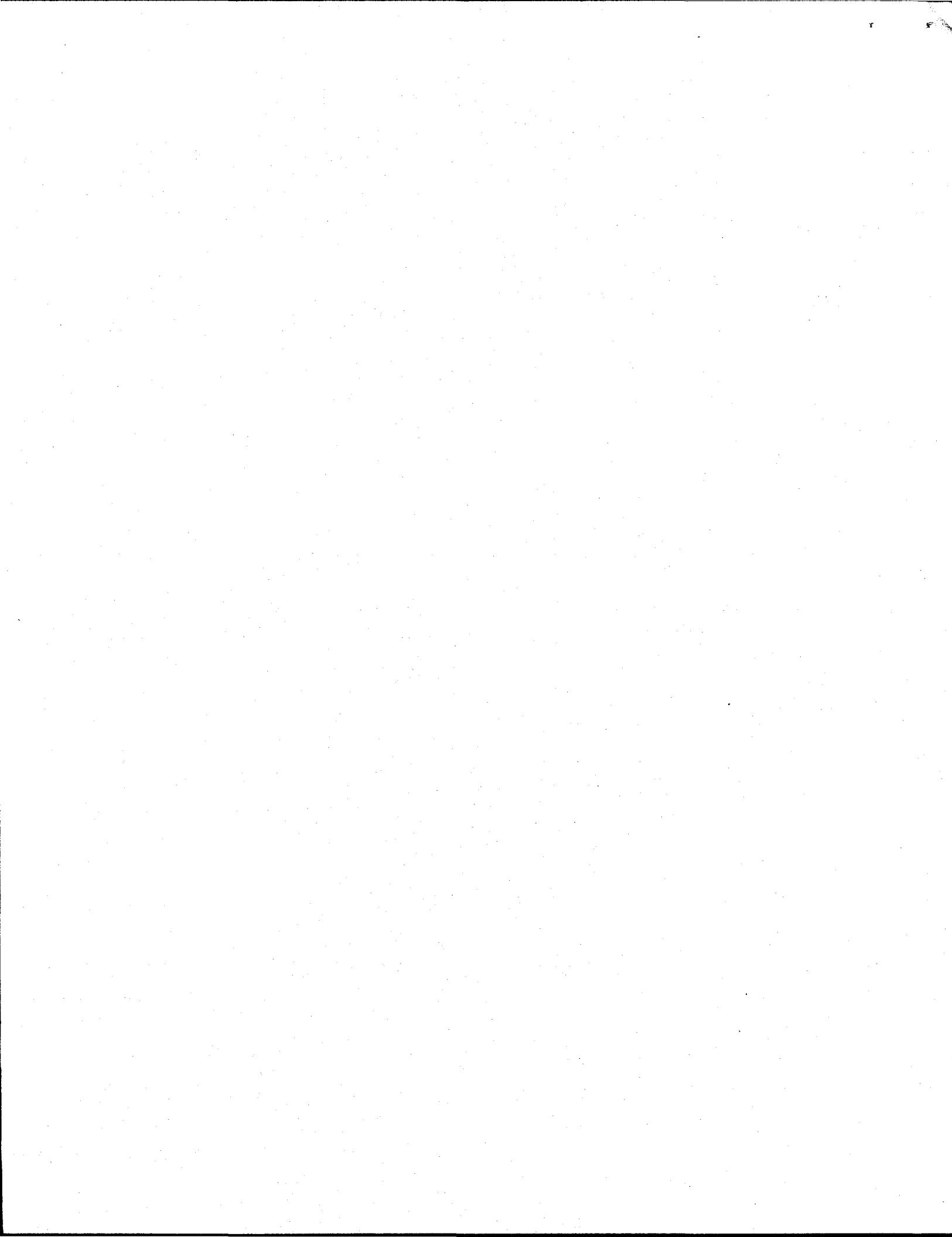
In the course of the first year of research we concluded that it was necessary to broaden the scope of the project, and presented the rationale for this change to the ELSI Working Group in June of 1994. They concurred. The first draft of the Genetic Privacy Act was completed in late September 1994, and presented to the ELSI Working Group in December 1994.

Many people, in addition to the members of the ELSI Working Group, contributed in substantial ways to the final product. These included our research assistants, Nan Elster, Sue Yeu, Chris Hager, and Alex Klickstein, as well as our support staff, especially the Administrative Coordinator of the Health Law Department, Marilyn Ricciardelli, and the Department's Secretary, Deborah Darling. The Director of the Boston University School of Public Health, Dr. Robert F. Meenan, was especially supportive of our work. We are grateful for the generous and thoughtful comments of our colleagues who reviewed drafts and provided needed insight to both legal and genetic issues. Sherman Elias was our primary genetics consultant, and his advice was invaluable. Robert Gellman's thoughtful comments and advice helped us to avoid many legislative drafting pitfalls. Lori Andrews worked especially hard to make sure we had taken all of the genetic privacy issues into account.

Others who provided valuable comments and input include Wendy Mariner, Michael Grodin, Philip Reilly, Jean McEwen, Wendy Parmet, Bernard Dickens, Margaret Somerville, Alan Westin, Judy Garber and Margaret Dreyfus. The final product, of course, is our responsibility.

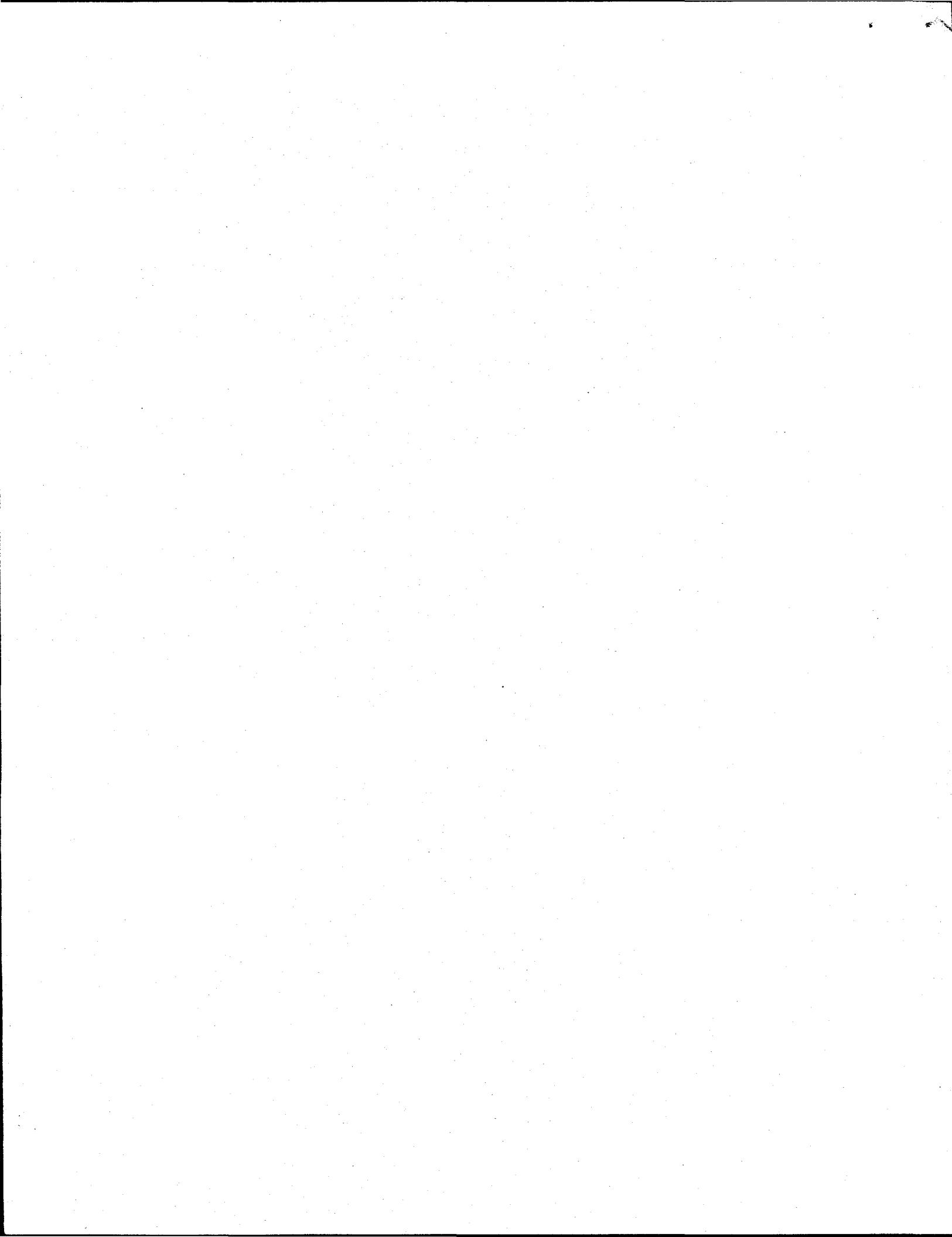
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February, 1995



II

**THE GENETIC PRIVACY  
ACT**



**A BILL**

To protect the genetic privacy of individuals.

*Be it enacted by the Senate and House of Representatives  
of the United States of America in Congress assembled,*

**Sec. 1. SHORT TITLE; TABLE OF CONTENTS**

10 (a) SHORT TITLE. - This act may be cited as the "Genetic  
11 Privacy Act."

12 (b) TABLE OF CONTENTS. - The table of contents for this  
13 Act is as follows:

14 Sec. 1. Short title; table of contents.

## 15 Sec. 2. Findings and purposes.

### 16 Sec. 3. Definitions.

## PART A - - COLLECTION AND ANALYSIS OF DNA SAMPLES

19 Sec. 101. Collection of DNA samples.

20 Sec. 102. Analysis of DNA samples.

21 Sec. 103. Authorization for collection and storage of

22 individually identifiable DNA samples for genetic  
23 analysis.

24 Sec. 104. Ownership and destruction of DNA samples.

25 Sec. 105. Notice of rights and assurances.

**PART B - - DISCLOSURE OF PRIVATE GENETIC INFORMATION**

### Sec. 111. Disclosure of private genetic information.

Sec. 112. Authorization for disclosure of private genetic information.

Sec. 113. Inspection and copying of records containing private genetic information.

Sec. 114. Amendment of records.

Sec. 115. Disclosures pursuant to compulsory process.

9

**PART C - - EXCEPTIONS FOR IDENTIFICATION AND COURT-ORDERED GENETIC ANALYSIS**

Sec. 121. Identification of dead bodies.

Sec. 122. Identification for law enforcement purposes.

15 Sec. 123. Collection and analysis of DNA samples pursuant to  
16 court ordered analysis.

17

#### PART D - - RESEARCH ACTIVITIES

19 Sec. 131. Research involving genetic analysis.

20 Sec. 132. Disclosure of private genetic information for  
21 research purposes.

22 Sec. 133. Exceptions for DNA samples collected from deceased  
23 persons.

**PART E - - MINORS AND INCOMPETENT PERSONS**

Sec. 141. Authorization for collection and analysis of DNA from minors.

Sec. 142. Authorization for disclosure of private genetic information about minors.

Sec. 143. Authorization for collection and analysis of DNA samples from incompetent persons.

Sec. 144. Authorization for private genetic information about incompetent persons.

**PART F - - PREGNANT WOMEN, FETUSES, AND EXTRACORPOREAL EMBRYOS**

Sec. 151. Authorization for collection and analysis of DNA from pregnant women and fetuses.

Sec. 152. Authorization for disclosure of private genetic information about pregnant women and fetuses.

Sec. 153. Authorization for collection and analysis of DNA samples from extracorporeal embryos.

**PART G - - MISCELLANEOUS PROVISIONS**

Sec. 161 Notification of privacy provisions.

Sec. 162 Transfer of ownership, discontinuation of services.

## **PART H - - ENFORCEMENT**

### Sec. 171 Civil remedies.

Sec. 172 Civil penalties and injunctive relief.

1   **PART I - - EFFECTIVE DATE; APPLICABILITY; AND RELATIONSHIP TO**  
2   **OTHER LAWS**

3   Sec. 181   Effective Date.

4   Sec. 182   Applicability.

5   Sec. 183   Relationship to other laws.

6

7   **Sec. 2.   FINDINGS AND PURPOSES**

8       (a)   **FINDINGS.** - The Congress finds as follows:

9               (1)   The DNA molecule contains information about  
10   one's probable medical future, and this information is written  
11   in a code that is currently being broken at a rapid pace.

12               (2)   Genetic information has a history of being used  
13   by governments to harm individuals.

14               (3)   Genetic information is uniquely private and  
15   personal information that should not be collected or disclosed  
16   without the individual's authorization.

17               (4)   The improper use and disclosure of genetic  
18   information can lead to significant harm to the individual,  
19   including stigmatization and discrimination in areas such as  
20   employment, education, health care, and insurance.

21               (5)   An analysis of an individual's DNA provides  
22   information not only about an individual, but also about that  
23   individual's parents, siblings and children, thus implicating  
24   family privacy.

1 (6) Genetic information is uniquely tied to  
2 reproductive decisions which are among the most private and  
3 intimate decisions that an individual can make.

4 (7) Current legal protections for medical  
5 information, tissue samples, and DNA samples are inadequate to  
6 protect genetic privacy.

7 (8) Uniform rules for the collection, storage and  
8 use of identifiable DNA samples and private genetic information  
9 obtained from them are needed both to protect individual  
10 privacy and to permit legitimate genetic research.

11 (b) PURPOSES. — The purposes of this Act are as follows:

12 (1) To define the circumstances under which DNA  
13 samples may be collected, stored and analyzed.

14 (2) To define the circumstance under which private  
15 genetic information may be created, stored and disclosed.

16 (3) To define the rights of individuals whose DNA  
17 samples are collected, stored, and analyzed.

18 (4) To define the rights of individuals whose  
19 genetic information is stored and disclosed.

20 (5) To define the responsibilities of persons who  
21 collect, analyze and use DNA samples and the genetic  
22 information derived from them.

23 (6) To establish effective mechanisms to enforce the  
24 rights and responsibilities defined in this Act.

1      **Sec. 3.    DEFINITIONS**

2      For purposes of this Act:

3                (a)    **COMPULSORY DISCLOSURE.** — The term "compulsory  
4    disclosure" means any disclosure of private genetic information  
5    mandated or required by federal or state law in connection with  
6    a judicial, legislative, or administrative proceeding,  
7    including but not limited to, disclosure required by subpoena,  
8    subpoena duces tecum, request or notice to produce, court  
9    order, or any other method of requiring a person maintaining  
10   private genetic information to produce private genetic  
11   information under the criminal or civil discovery laws of any  
12   state or the federal law.

13               (b)    **DISCLOSE.** — The term "disclose", when used with  
14   respect to private genetic information, means to provide access  
15   to the information, or the verification of the information, but  
16   only if such access or verification is provided to a person  
17   other than the sample source or the sample source's  
18   representative.

19               (c)    **DISCLOSURE.** — The term "disclosure" means the act or  
20   an instance of disclosing.

21               (d)    **DNA.** — The term "DNA" means deoxyribonucleic acid.

22               (e)    **DNA SAMPLE.** — The term "DNA sample" means any human  
23   biological specimen from which DNA can be extracted, or DNA  
24   extracted from such specimen.

25               (f)    **DNA TYPING.** — The term "DNA typing" means a  
26   scientifically reliable method for characterizing and comparing

1 sequences of DNA, and applying a statistical analysis of  
2 population frequency to determine that if the DNA sequences  
3 match, the probability that the match occurs by chance.

4 (g) IDENTIFIABLE INDIVIDUAL. — The term "identifiable  
5 individual" means any individual whose name, address, Social  
6 Security number, health insurance identification number, or  
7 similar identifying information is known, available, or can be  
8 determined with reasonable accuracy either directly or by  
9 reference to other available information.

10 (h) INDIVIDUAL IDENTIFIER. — The term "individual  
11 identifier" means a name, address, Social Security number,  
12 health insurance identification number, or similar information  
13 by which the identity of a sample source can be determined with  
14 reasonable accuracy, either directly or by reference to other  
15 available information. The term does not include characters,  
16 numbers, or codes assigned to an individual or a DNA sample  
17 which cannot be used to determine the identity of a sample  
18 source.

19 (i) INDIVIDUALLY IDENTIFIABLE DNA SAMPLE. — The term  
20 "individually identifiable DNA sample" means any DNA sample  
21 linked to an individual identifier.

22 (j) INDIVIDUALLY IDENTIFIABLE RECORD. — The term  
23 "individually identifiable record" means any record that  
24 contains private genetic information linked to an individual  
25 identifier.

(k) INSTITUTIONAL REVIEW BOARD. - The term "Institutional Review Board" means a board established in accordance with 45 CFR 46.102(g) (1992) as such regulation may be amended.

(1) PERSON. — The term "person" shall include an individual, a corporation, partnership, association, joint venture, government, governmental subdivision or agency, and other legal or commercial entity.

(m) PRIVATE GENETIC INFORMATION. — The term "private genetic information" means any information about an identifiable individual that is derived from the presence, absence, alteration, or mutation of a gene or genes, or the presence or absence of a specific DNA marker or markers, and which has been obtained:

(1) from an analysis of the individual's DNA; or

(2) from an analysis of the DNA of a person to whom  
individual is related.

17 (n) SAMPLE SOURCE. - The term "sample source" means the  
18 individual from whose body the DNA sample originated.

19 (o) SAMPLE SOURCE'S REPRESENTATIVE. — The term "sample  
20 source's representative" means any person who has the legal  
21 authority to make health care decisions concerning a minor or  
22 an incompetent person, or the administrator or executor of a  
23 deceased person's estate, if any, otherwise the next of kin of  
24 a deceased person.

1           **PART A - - COLLECTION AND ANALYSIS OF DNA**  
2            **SAMPLES**  
3

4           **Sec. 101. COLLECTION OF DNA SAMPLES**

5           (a) REQUIREMENT OF WRITTEN AUTHORIZATION. — Except as  
6           otherwise provided in sections 121, 122, and 123, no person may  
7           collect or cause to be collected an individually identifiable  
8           DNA sample for genetic analysis without the written  
9           authorization of the sample source or the sample source's  
10           representative.

11           (b) REQUIRED INFORMATION. — Prior to the collection of a  
12           DNA sample from a sample source for genetic analysis, the  
13           person collecting the sample or causing the sample to be  
14           collected shall verbally inform the sample source or the sample  
15           source's representative:

16            (1) that consent to the collection or taking of the  
17           DNA sample is voluntary;

18            (2) that consent to the genetic analysis is  
19           voluntary;

20            (3) of the information that can reasonably be  
21           expected to be derived from the genetic analysis;

22            (4) of the use, if any, that the sample source or  
23           the sample source's representative will be able to make of the  
24           information derived from the genetic analysis;

25            (5) of the right to inspect records that contain  
26           information derived from the genetic analysis;

27            (6) of the right to have the DNA sample destroyed;

(7) of the right to revoke consent to the genetic analysis at any time prior to the completion of the analysis;

(8) that the genetic analysis may result in information about the sample source's genetic relatives which may not be known to such relatives but could be important, and if so the sample source will have to decide whether or not to share that information with relatives;

(9) that in the future someone else may ask if the sample source has obtained genetic testing or analysis and condition a benefit on the disclosure of information regarding such testing or analysis;

(10) that the collection and analysis of the DNA sample, and the private genetic information derived from the analysis is protected by this Act; and

(11) of the existence of genetic counseling.

## Sec. 102. ANALYSIS OF DNA SAMPLES

(a) ANALYSIS PROHIBITED WITHOUT AUTHORIZATION. — Except as otherwise provided in sections 121, 122, and 123, genetic analysis of an individually identifiable DNA sample is prohibited unless specifically authorized in writing by the sample source or the sample source's representative.

(b) ASCERTAINMENT OF AUTHORIZATION. — No person may analyze an individually identifiable DNA sample without ascertaining that written authorization for the analysis has been obtained.

1        Sec. 103. AUTHORIZATION FOR COLLECTION AND STORAGE OF  
2                    INDIVIDUALLY IDENTIFIABLE DNA SAMPLES FOR GENETIC  
3                    ANALYSIS

4                (a) WRITTEN AUTHORIZATION. — To be valid, the  
5                    authorization required by sections 101 and 102 must satisfy  
6                    each of the following requirements:

7                        (1) WRITING. — The authorization must be in writing,  
8                        signed by the sample source or the sample source's  
9                        representative, and dated on the date of such signature;

10                        (2) COLLECTOR IDENTIFIED. — The authorization must  
11                        identify the person who collects the DNA sample or causes the  
12                        DNA sample to be collected;

13                        (3) ANALYZER IDENTIFIED. — The authorization must  
14                        identify the facility in which the analysis will be performed;

15                        (4) STORAGE FACILITY IDENTIFIED. — The authorization  
16                        must identify the facility in which the DNA sample will be  
17                        stored;

18                        (5) COLLECTION DESCRIBED. — The authorization must  
19                        state the manner in which the sample is to be collected;

20                        (6) AUTHORIZED USE. — The authorization must include  
21                        a description of all authorized uses of the DNA sample;

22                        (7) STATEMENT REGARDING STORAGE AFTER COMPLETION OF  
23                        ANALYSIS. — The authorization must indicate whether or not the  
24                        sample source permits the sample to be maintained or stored in  
25                        an identifiable form after the analysis is completed;

26                        (8) STATEMENT REGARDING USE OF UNIDENTIFIABLE DNA  
27                        SAMPLES FOR RESEARCH OR COMMERCIAL PURPOSES. — The

1 authorization form must include a provision that enables the  
2 sample source or the sample source's representative to prohibit  
3 the use of the DNA sample for research or commercial purposes  
4 even if the sample is not in an individually identifiable form.

5 (b) RETENTION OF AUTHORIZATION. — The authorization for  
6 the collection and analysis of an individually identifiable DNA  
7 sample shall be retained at least as long as the DNA sample is  
8 retained.

9 (c) COPY. — A copy of the authorization shall be provided  
10 to the sample source or the sample source's representative.

11

12 **Sec. 104. OWNERSHIP AND DESTRUCTION OF DNA SAMPLES**

13 (a) OWNERSHIP OF THE DNA SAMPLE. — An individually  
14 identifiable DNA sample is the property of the sample source.

15 (b) RIGHT TO ORDER DESTRUCTION OF THE DNA SAMPLE. —  
16 Except when a DNA sample has been collected pursuant to section  
17 122 or 123 of this Act, the sample source or the sample  
18 source's representative shall have the right to order the  
19 destruction of the DNA sample.

20 (c) ROUTINE DESTRUCTION OF SAMPLES OR IDENTIFIERS. — An  
21 individually identifiable DNA sample must be destroyed on  
22 completion of genetic analysis unless:

23 (1) the sample source or the sample source's  
24 representative, has directed otherwise in writing, or

25 (2) all individual identifiers linking the sample to  
26 the sample source are destroyed.

1        Sec. 105. NOTICE OF RIGHTS AND ASSURANCES

2        A person who collects or stores DNA samples for genetic  
3        analysis shall provide a sample source or a sample source's  
4        representative prior to the collection, storage, or analysis of  
5        a DNA sample, and any other person upon request, with a notice  
6        of rights and assurances that contains the following  
7        information and assurances that:

8                (a) a DNA sample will only be used as authorized in  
9        the written authorization;

10               (b) an individually identifiable DNA sample is the  
11        property of the sample source;

12               (c) unless specifically prohibited by the sample  
13        source or sample source's representative, researchers may be  
14        granted access to DNA samples that cannot be linked to  
15        individual identifiers;

16               (d) the sample source or the sample source's  
17        representative has the right to order the destruction of the  
18        individually identifiable DNA sample at any time;

19               (e) the individually identifiable DNA sample will be  
20        destroyed on the completion of the analysis unless the sample  
21        source or the sample source's representative has previously  
22        directed otherwise in writing;

23               (f) the sample source can designate another  
24        individual as the person authorized to make decisions regarding  
25        the individually identifiable DNA sample after the death of the  
26        sample source; and if any person is so designated, the sample

1 source should notify the facility in which the DNA sample is  
2 stored;

3 (g) the sample source or the sample source's  
4 representative has the right to examine the records containing  
5 private genetic information, to obtain copies of such records  
6 and to request correction or amendment of them;

7 (h) private genetic information may be disclosed to  
8 researchers who qualify for such access under this Act;

9 (i) the collection and analysis of the DNA sample  
10 and the private genetic information derived from the analysis  
11 is protected by this Act, and anyone whose rights under this  
12 Act have been violated can seek civil remedies, including  
13 damages, as provided in this Act; and

14 (j) genetic counseling exists.

15

## 16 **PART B - - DISCLOSURE OF PRIVATE GENETIC 17 INFORMATION**

18

### 19 **Sec. 111. DISCLOSURE OF PRIVATE GENETIC INFORMATION**

20 (a) REQUIREMENT OF WRITTEN AUTHORIZATION. — Except as  
21 provided in section 115 and section 132(b) no person who, in  
22 the ordinary course of business, practice of a profession, or  
23 rendering of a service, creates, stores, receives or furnishes  
24 private genetic information may by any means of communication  
25 disclose private genetic information except in accordance with  
26 a written authorization as provided for in section 112.

(b) REDISCLOSURE PROHIBITED. - Rediscovery of private genetic information which has been disclosed to any person pursuant to a valid written authorization is prohibited.

**Sec. 112. AUTHORIZATION FOR DISCLOSURE OF PRIVATE GENETIC INFORMATION**

8 (a) WRITTEN AUTHORIZATIONS. - To be valid, an  
9 authorization for disclosure of private genetic information  
10 must satisfy each of the following requirements:

11 (1) WRITING. - The authorization must be in writing,  
12 signed by the sample source or the sample source's  
13 representative and dated on the date of such signature;

14 (2) SAMPLE SOURCE OR REPRESENTATIVE IDENTIFIED. -  
15 The authorization must identify the individual granting  
16 authorization and the individual's relationship to the sample  
17 source:

18 (3) PERSON MAKING DISCLOSURE IDENTIFIED. - The  
19 authorization must identify the person permitted to make the  
20 disclosure:

21 (4) INFORMATION DESCRIBED. — The authorization must  
22 describe the specific genetic information to be disclosed:

23 (5) RECIPIENT IDENTIFIED. - The authorization must  
24 identify the person to whom the information is to be disclosed

25 (6) PURPOSE DESCRIBED. - The authorization must  
26 describe the purpose for which the disclosure is being made;

5 (8) REVOCATION STATEMENT. - The authorization must  
6 include a statement that the authorization is subject to  
7 revocation at any time before the disclosure is actually made.

8 (b) COPY. - A copy of the authorization shall be provided  
9 to the person making the authorization.

10 (c) REVOCATION OR AMENDMENT OF AUTHORIZATION. - A sample  
11 source or the sample source's representative may revoke or  
12 amend the authorization, in whole or in part, at any time.

13 (d) NOTICE OF REVOCATION. — A sample source may not  
14 maintain an action against a person for disclosure of private  
15 genetic information made in good faith reliance on a valid  
16 authorization if the person had no notice of the revocation of  
17 the authorization at the time the disclosure was made.

18 (e) IDENTIFICATION OF INFORMATION AS PROTECTED BY LAW. -  
19 Each disclosure made with the written authorization described  
20 in subsection (a) must be accompanied by the following written  
21 statement:

22 "This information has been disclosed to you from  
23 confidential records protected under the Genetic Privacy  
24 Act and any further disclosure of the information without  
25 specific authorization is prohibited."

(f) EFFECT OF GENERAL AUTHORIZATION FOR RELEASE OF MEDICAL RECORDS. - A general authorization for the release of medical records or medical information shall not be construed as an authorization for disclosure of private genetic information.

**Sec. 113. INSPECTION AND COPYING OF RECORDS CONTAINING PRIVATE GENETIC INFORMATION**

17 (b) RESPONSE TO REQUEST EXAMINATION AND COPYING OF  
18 INFORMATION. — Upon receipt of a written request from a sample  
19 source or the sample source's representative to inspect or copy  
20 all or part of records containing private genetic information,  
21 a person as promptly as required under the circumstances but no  
22 later than 30 business days after receiving the request, shall  
23 make the information available to the sample source or the  
24 sample source's representative for inspection during regular  
25 business hours or provide a copy, if requested, to the  
26 individual.

27 (c) EXPLANATION OF TERMS AND CODES. - A person shall  
28 provide an explanation of terms and any code or abbreviations

1 used in records containing the private genetic information upon  
2 request of the sample source or the sample source's  
3 representative.

4 (d) FEE. - A person may charge a reasonable fee, not to  
5 exceed the person's actual duplication cost, for copies of  
6 records which are provided.

7

8 **Sec. 114. AMENDMENT OF RECORDS**

9 (a) IN GENERAL. - Within 45 days of receipt of a written  
10 request by a sample source or a sample source's representative  
11 to correct or amend in whole or in part any record containing  
12 private genetic information, a person who maintains records  
13 containing private genetic information shall:

14 (1) make the correction or amendment requested;  
15 (2) inform the individual that the correction or  
16 amendment has been made;

17 (3) make reasonable efforts to inform any person to  
18 whom the uncorrected or unamended portion of the information  
19 was previously disclosed of the correction or amendment that  
20 has been made; and

21 (4) at the request of the individual, make  
22 reasonable efforts to inform any known source of the  
23 uncorrected or unamended portion of the information about the  
24 correction or amendment that has been made.

25 (b) REASONS FOR REFUSAL AND REVIEW PROCEDURES. - If  
26 correction or amendment is refused, the person maintaining the

1 records shall inform the sample source or the sample source's  
2 representative of:

3 (1) the reasons for the refusal of the person to  
4 make corrections or amendment;

5 (2) any procedures for further review of such  
6 refusal; and

7 (3) the individual's right to file with the person a  
8 concise statement setting forth the requested correction or  
9 amendment and the individual's reasons for disagreeing with the  
10 refusal of the person to make the correction or amendment.

11 (c) STANDARDS FOR CORRECTION OR AMENDMENT. — A person  
12 maintaining records containing private genetic information  
13 shall correct or amend information in accordance with a request  
14 made under subsection (a) if the information is not accurate or  
15 complete for the purposes for which the information may be used  
16 or disclosed by the person.

17 (d) STATEMENT OF DISAGREEMENT. — After a sample source or  
18 a sample source's representative has filed a statement of  
19 disagreement under subsection (b) (3), the person, in any  
20 subsequent disclosure of the disputed portion of the  
21 information, shall include a copy of the individual's statement  
22 and may include a statement of the reasons for not making the  
23 requested correction or amendment.

24

25 **Sec. 115. DISCLOSURES PURSUANT TO COMPULSORY PROCESS**

26 (a) PROCEEDINGS IN WHICH AVAILABLE. — No person who  
27 maintains private genetic information may be compelled to

1 disclose such information pursuant to a request for compulsory  
2 disclosure in any judicial, legislative, or administrative  
3 proceeding, unless:

4 (1) The person maintaining the genetic information  
5 has received the authorization of the sample source or the  
6 sample source's representative to release the information in  
7 response to such request for compulsory disclosure;

8 (2) The sample source or the sample source's  
9 representative is a party to the proceeding and the private  
10 genetic information is at issue; or

11 (3) The genetic information is for use in a law  
12 enforcement proceeding or investigation in which the person  
13 maintaining the information is the subject or party;

14 (b) NOTICE. — If genetic information is sought under  
15 subparagraph (2) of subsection (a), or in a proceeding or  
16 investigation pursuant to subparagraph (3) of subsection (a),  
17 the person requesting compulsory disclosure shall serve upon  
18 the person maintaining the genetic information, and upon the  
19 sample source, the sample source's representative, or on the  
20 sample source's attorney, the original or a copy of the  
21 compulsory disclosure request at least thirty days in advance  
22 of the date on which compulsory disclosure is requested, and a  
23 statement of the right of the sample source or sample source's  
24 representative, and of the person maintaining the genetic  
25 information, to have any objections to such compulsory  
26 disclosure heard by such court or governmental agency prior to

1 the issuance of an order for such compulsory disclosure, and  
2 the procedure to be followed to have any such objections heard.  
3 Such service shall be made by certified mail, return receipt  
4 requested, or by hand delivery, in addition to any form of  
5 service required by applicable state or federal law.

6 (c) CERTIFICATION. — Service of compulsory process or  
7 discovery requests upon a person maintaining private genetic  
8 information must be accompanied by a written certification,  
9 signed by the person seeking to obtain the private genetic  
10 information or his or her authorized representative,  
11 identifying at least one subparagraph of subsection (a) under  
12 which compulsory process or discovery is being sought. The  
13 certification must also state, in the case of information  
14 sought under subparagraphs (2) or (3) of subsection (a), that  
15 the requirements under subsection (b) for notice have been met.  
16 A person may sign the certification only if the person  
17 reasonably believes that the subparagraph of subsection (a)  
18 identified in the certification provides an appropriate basis  
19 for the use of discovery or compulsory process. A copy of the  
20 written certification shall be maintained as a permanent part  
21 of the records of private genetic information.

22 (d) STANDARD FOR ISSUANCE OF ORDER. — An order under this  
23 section may only be entered by a court of competent  
24 jurisdiction after a hearing and determination that good cause  
25 exists. To make this determination the court must find that:

1 (1) other ways of obtaining the private genetic  
2 information are not available or would not be effective; and

3 (2) there is a compelling need for the private  
4 genetic information which outweighs the potential harm to the  
5 privacy interest of the subject of the information.

6 (e) CONTENT OF ORDER. - An order under this section which  
7 authorizes disclosure of private genetic information must:

11 (2) limit disclosure to those persons whose need for  
12 the information is the basis of the order;

13 (3) require the deletion of individual identifiers  
14 from any documents made available to the public; and

15 (4) include such other measures as are necessary to  
16 limit disclosure for the protection of the subject of the  
17 information including, but not be limited to, sealing from  
18 public scrutiny the record or any portion of the record of any  
19 proceeding for which disclosure of the information has been  
20 ordered.

**PART C - - EXCEPTIONS FOR IDENTIFICATION  
AND COURT-ORDERED GENETIC ANALYSIS**

## Sec. 121. IDENTIFICATION OF DEAD BODIES

26 Notwithstanding any other provisions of this Act, a person  
27 may provide access to an individually identifiable DNA sample,

1 or to data derived from DNA typing, to assist in the  
2 identification of a dead body, provided further that the  
3 analysis of any sample so provided and the analysis of a DNA  
4 sample from the dead body is limited to that which is necessary  
5 to determine the identity of the dead body.

6

7 **Sec. 122. IDENTIFICATION FOR LAW ENFORCEMENT PURPOSES**

8 Nothing in this Act shall be construed to prohibit  
9 federal, state or local law enforcement authorities from  
10 collecting, storing or typing DNA samples, when:

11 (a) the collection, storage and typing of DNA samples is  
12 authorized under federal or state law;

13 (b) collection, storage and typing of such samples is  
14 limited to the purpose of matching DNA samples in criminal  
15 investigations; and

16 (c) access to such DNA samples is limited to authorized  
17 law enforcement agencies, prosecutors, defense counsel,  
18 defendants, accused individuals, suspects, and their authorized  
19 agents.

20

21 **Sec. 123. COLLECTION AND ANALYSIS OF DNA SAMPLES PURSUANT TO**  
22 **COURT ORDERED ANALYSIS**

23  
24 (a) IN GENERAL.— Nothing in this Act shall be construed  
25 to prohibit the collection or analysis of an individually  
26 identifiable DNA sample pursuant to Rule 35 of the Federal  
27 Rules of Civil Procedure or comparable rules of other courts or

1 administrative agencies in connection with litigation or  
2 proceeding to which the sample source is a party and in which  
3 the genetic condition of the sample source has been placed at  
4 issue, provided that the conditions in section (b) have been  
5 met.

6 (b) ISSUANCE OF ORDERS. — An order under Rule 35 of the  
7 Federal Rules of Civil Procedure or comparable rules may only  
8 be made:

9 (1) upon motion for good cause shown and upon notice  
10 to the sample source or the sample source's representative and  
11 all parties; and

12 (2) the order must specify:

13 (A) the manner of collection of the DNA sample;

14 (B) the person or persons authorized to collect  
15 and analyze the sample;

16 (C) the purpose of the genetic analysis;

17 (D) that the genetic analysis is limited to  
18 that which is necessary to fulfill the purpose of the order;  
19 and

20 (E) that the person conducting the analysis  
21 destroy the sample at the earliest possible opportunity  
22 consistent with the purpose of that order.

23

24

## **PART D - - RESEARCH ACTIVITIES**

## Sec. 131. RESEARCH INVOLVING GENETIC ANALYSIS

(a) CONDITIONS FOR A GENETIC ANALYSIS. - Except as provided in section 133 no individually identifiable DNA sample shall be analyzed as part of a research project unless an Institutional Review Board has determined that:

(1) use of individually identifiable DNA samples is essential to the research project;

10 (2) the potential benefit of the research project  
11 outweighs the potential risks to the subjects including  
12 psychosocial risks and intrusion into the privacy of the  
13 subjects that would result from analysis of individually  
14 identifiable samples;

### (3) the research protocol

16 (A) contains adequate safeguards to protect  
17 against disclosure of private genetic information that is  
18 generated by the research;

19 (B) requires that research subjects will be  
20 given the applicable information set forth in section 101 of  
21 this Act in addition to the informed consent requirements  
22 contained in 45 CFR 46.116 (1992) as such regulation may be  
23 amended;

24 (C) requires the written authorization of  
25 research subjects that includes the applicable requirements of  
26 section 103 of this Act; and

1 (D) prohibits inclusion of research records in  
2 medical records unless the sample source or the sample source's  
3 representative authorizes such inclusion in writing.

4 (b) SAFEGUARDS AGAINST DISCLOSURES OF PRIVATE GENETIC  
5 INFORMATION. — For purposes of subparagraph (3)(A) of  
6 subsection (a) of this section, adequate safeguards against  
7 disclosure of private genetic information include but are not  
8 limited to:

19 (c) FURTHER LIMITATIONS ON RESEARCH INVOLVING INDIVIDUALS  
20 UNDER 18. - No research shall be conducted on individually  
21 identifiable DNA samples when the sample source is under 18  
22 years of age unless:

23 (1) a parent or guardian is given the applicable  
24 information set forth in section 101 of this Act;

25 (2) a parent or guardian executes an authorization  
26 that includes the applicable requirements of section 103 of

1 this Act and which specifically states that the parent or  
2 guardian understands and agrees that unless the analysis  
3 reveals a genetic condition which in reasonable medical  
4 judgment can only be effectively ameliorated, prevented or  
5 treated while the sample source is under 18 years of age, the  
6 results of the analysis will not be disclosed to the parent or  
7 guardian of the sample source; and

8 (3) any provisions for soliciting the assent of  
9 minors as contained in 45 CFR § 46.408 as such regulation may  
10 be amended which the Institutional Review Board determines to  
11 be applicable are met.

12 (d) DESTRUCTION OF DNA SAMPLES OR IDENTIFIERS.

13 (1) GENERALLY.-- In the absence of a specific  
14 authorization to maintain an individually identifiable DNA  
15 sample, individually identifiable DNA samples collected, stored  
16 or analyzed in connection with a research project shall be  
17 destroyed upon completion of the project or withdrawal of the  
18 sample source from the project, whichever occurs first.

19 (2) EXCEPTION.-- Whenever the authorization for  
20 collection, storage or analysis of an individually identifiable  
21 DNA sample does not contain a prohibition against research use  
22 of the sample when it is no longer linked to any individual  
23 identifier, the person in possession of the sample may destroy  
24 all individual identifiers linking the sample to the sample  
25 source instead of destroying the sample as required by  
26 subsection (1).

1 (e) PEDIGREE ANALYSIS AND FAMILY LINKAGE STUDIES. - When  
2 a research project includes analysis of DNA from family members  
3 for pedigree analysis or linkage analysis-

10 (B) that as far as practicable separate records  
11 are maintained on each subject.

12 (2) Prior to their participation, and in addition to  
13 the disclosures required by section 101 of this Act, subjects  
14 shall be-

15 (A) informed that one risk of their  
16 participation is that by the end of the project other family  
17 members may learn private genetic information about them;

18 (B) informed of what will be done with records  
19 and data generated during the project;

20 (C) informed that the project may determine  
21 that some members of their family are not genetic relatives.

22 (f) SUBJECTS RIGHT TO OBTAIN INFORMATION. — When  
23 complying with the provisions of section 113 of this Act, no  
24 person shall provide an individual in the pedigree with private  
25 genetic information about another person without that other  
26 person's authorization.

(g) USE OF UNIDENTIFIABLE DNA SAMPLES NOT PROHIBITED. —

2 Except as provided in section 103(a)(8), nothing in this Act  
3 shall be construed as prohibiting or limiting research on a DNA  
4 sample that cannot be linked to any individual identifier.

5

**Sec. 132. DISCLOSURE OF PRIVATE GENETIC INFORMATION FOR RESEARCH PURPOSES**

14 (1) an Institutional Review Board has approved the  
15 conduct of the research program or study; and

16 (2) the sample source or the sample source's  
17 representative has specifically consented to the access or  
18 disclosure of such information in an authorization that meets  
19 the requirements of section 112 of this Act.

20 (b) LIMITED ACCESS FOR STATISTICAL USE. — Notwithstanding  
21 the provisions of subsection (a), a person who stores or  
22 maintains private genetic information may grant access to such  
23 information solely for the purpose of inspection or review of  
24 records containing the information provided that

25 (1) the inspection or review is for the purpose of  
26 compiling data for statistical or epidemiological studies and  
27 private genetic information is not to be copied, removed from  
28 the records, or redisclosed in any way; and

(2) the person conducting the inspection or review certifies in writing:

with; and (A) that these limitations will be complied with; and (B) to an awareness of their liability for violations of this Act.

Sec. 133. EXCEPTION FOR DNA SAMPLES PREVIOUSLY COLLECTED FROM DECEASED PERSONS

(a) ANALYSIS PERMISSIBLE. — Notwithstanding the provisions of section 131, an individually identifiable DNA sample which was collected from a sample source who died prior to the effective date of this Act may be analyzed as part of a research project, but no individually identifiable genetic information may be disclosed without the authorization of the sample source's representative.

(b) DISCLOSURE TO RELATIVES. - If the analysis of a DNA sample permitted by subsection (a) determines that a relative of a deceased sample source is at risk for a genetic disease which in reasonable medical judgment can be effectively ameliorated, prevented, or treated, nothing in this Act shall be construed as prohibiting researchers from contacting such relatives and informing them of such risk provided that private genetic information about the sample source is not disclosed.

1       **PART E - - MINORS AND INCOMPETENT PERSONS**

2

3       **Sec. 141. AUTHORIZATION FOR COLLECTION AND ANALYSIS OF DNA FROM**  
4       **MINORS**

5

6               (a) INDIVIDUALS UNDER 16. — Except as provided in  
7       sections 131(c) and 151, the individually identifiable DNA  
8       sample of a sample source who is under 16 years of age shall  
9       not be collected or analyzed to determine the existence of a  
10      gene that does not in reasonable medical judgment produce signs  
11      or symptoms of disease before the age of 16, unless:

12               (1) there is an effective intervention that will  
13       prevent or delay the onset or ameliorate the severity of the  
14       disease; and

15               (2) the intervention must be initiated before the  
16       age of 16 to be effective; and

17               (3) the sample source's representative has received  
18       the disclosures required by section 101 of this Act and has  
19       executed a written authorization which meets the requirements  
20       of section 103 of this Act and which also limits the uses of  
21       such analysis to those permitted by this section.

22               (b) INDIVIDUALS AGE 16 OR 17. — Except as otherwise  
23       provided in sections 131(c) and 143, the individually  
24       identifiable DNA sample of a sample source who is 16 or 17  
25       years of age may be collected and analyzed provided that—

(1) the sample source receives the information required by section 101 of this Act while accompanied by a parent or other adult family member; and

(2) the sample source executes a written authorization which meets the requirements of section 103 of this Act.

(c) DESTRUCTION OF DNA SAMPLES OF INDIVIDUALS UNDER 16. -  
A sample source's representative may, on behalf of a sample source who is under 16 years of age, order the destruction of a DNA sample collected pursuant to subsection (a) of this section.

**Sec. 142. AUTHORIZATION FOR DISCLOSURE OF PRIVATE GENETIC INFORMATION ABOUT MINORS**

(a) AUTHORIZATION REGARDING INDIVIDUALS AGE 16 OR 17. -  
Except as provided by section 144, private genetic information about an individual who is age 16 or 17 shall not be disclosed unless the sample source has executed a written authorization which meets the requirements of section 112.

(b) AUTHORIZATION REGARDING INDIVIDUALS UNDER 16. -  
Except as provided in section 152, private genetic information about a minor who is under 16 years of age shall not be disclosed unless a parent or other sample source's representative has executed a written authorization that meets the requirements of section 112.

1       **Sec. 143. AUTHORIZATION FOR COLLECTION AND ANALYSIS OF DNA**  
2       **SAMPLES FROM INCOMPETENT PERSONS**  
3

4               (a) **LIMITATIONS ON COLLECTION AND ANALYSIS.** — The  
5       individually identifiable DNA sample of a sample source who  
6       lacks the ability to understand the information disclosed  
7       pursuant to section 101 and the information contained in an  
8       authorization under section 103 shall not be collected or  
9       analyzed unless—

10               (1) the analysis is necessary:

11                       (A) to diagnose the cause of incompetence; or  
12                       (B) to diagnose a genetic condition which in  
13       reasonable medical judgment can only be effectively  
14       ameliorated, prevented or treated while the sample source is  
15       incompetent; or

16                       (C) to diagnose a genetic disease of a parent,  
17       sibling, child or grandchild of the sample source provided that  
18       the disease in reasonable medical judgment can be effectively  
19       ameliorated, prevented, or treated;

20               (2) the analysis is limited to that which is  
21       necessary for such diagnosis; and

22               (3) the sample source's representative has executed  
23       an authorization which meets the requirements of section 103 of  
24       this Act.

25               (b) **DESTRUCTION OF SAMPLES COLLECTED PRIOR TO**  
26       **INCOMPETENCY.** — Whenever a sample source while competent has,  
27       either in an authorization under section 103 of this Act, or in

1 an exercise of the sample source's rights under section 104(b)  
2 of this Act, ordered the destruction of a DNA sample, and the  
3 sample source becomes incompetent before the occurrence of the  
4 date or event which was designated by the sample source to  
5 cause the destruction of such sample, the sample source's  
6 representative may order the earlier destruction of such  
7 sample, but is not empowered to cancel or override any such  
8 destruction unless the postponement of the destruction is to  
9 enable an analysis of the DNA sample for a purpose provided for  
10 in subsection (a) of this section.

11

12 **Sec. 144. AUTHORIZATION FOR DISCLOSURE OF PRIVATE GENETIC**  
13 **INFORMATION ABOUT INCOMPETENT PERSONS**

14  
15 Private genetic information about an incompetent person  
16 shall not be disclosed unless:

17 (a) the information—

18 (1) is necessary for the diagnosis of a genetic  
19 condition which in reasonable medical judgment is effectively  
20 ameliorated, prevented or treated while the person is  
21 incompetent; or

22 (2) is necessary for the purpose of genetic  
23 counselling for a relative of the person;

24 (b) the information disclosed is limited to that which is  
25 necessary to conduct such treatment or counselling; and

26 (c) the sample source's representative executes an autho-  
27 rization that meets the requirements of section 112 of this  
28 Act.

1           **PART F - - PREGNANT WOMEN, FETUSES, AND**  
2           **EXTRACORPOREAL EMBRYOS**  
3

4           **Sec. 151. AUTHORIZATION FOR COLLECTION AND ANALYSIS OF DNA FROM**  
5           **PREGNANT WOMEN AND FETUSES**

6           Regardless of her age, a pregnant woman shall have all the  
7           rights and authority of an adult sample source in regard to her  
8           DNA sample and the DNA sample of her fetus unless she is  
9           otherwise incompetent under the provisions of section 143.

10

11           **Sec. 152. AUTHORIZATION FOR DISCLOSURE OF PRIVATE GENETIC**  
12           **INFORMATION ABOUT PREGNANT WOMEN AND FETUSES**

13

14           Regardless of her age, a pregnant woman shall have all the  
15           rights of an adult sample source in regard to records  
16           containing private genetic information as provided in section  
17           113, 114, and 115 of this Act, and in regard to disclosure of  
18           genetic information resulting from an analysis of her DNA  
19           sample or the DNA sample of her fetus, unless she lacks the  
20           ability to understand the information contained in an  
21           authorization under section 112.

22

23           **Sec. 153. AUTHORIZATION FOR COLLECTION AND ANALYSIS OF DNA FROM**  
24           **EXTRACORPOREAL EMBRYOS**

25

26           (a)    **RELINQUISHMENT OF DONOR'S RIGHTS.** — Whoever donates a  
27           gamete for the reproductive purposes of a person or persons  
28           other than the gamete donor relinquishes all rights regarding

1 the collection and analysis of a DNA sample of an embryo  
2 subsequently created using the donated gamete.

3 (b) CONDITIONS FOR COLLECTION AND ANALYSIS. — Prior to  
4 the collection and analysis of a DNA sample from an  
5 extracorporeal embryo created for reproductive purposes, the  
6 person collecting or causing to be collected the DNA sample of  
7 such embryo shall:

8 (1) make the disclosures required by section 101 of  
9 this Act to the person or persons who intend to use the embryo  
10 for reproduction; and

11 (2) shall obtain the written authorization of such  
12 person or persons that meets the requirements of section 103 of  
13 this Act.

14 (c) DISCLOSURE OF RESULTS. — The results of a genetic  
15 analysis of a DNA sample of an extracorporeal embryo shall be  
16 disclosed to the person or persons who intend to use the embryo  
17 for reproductive purposes.

18

## 19 **PART G - - MISCELLANEOUS PROVISIONS**

20

### 21 **Sec. 161. NOTIFICATION OF PRIVACY OBLIGATIONS**

22 Not less than annually every person who maintains  
23 individual identifiable DNA samples or individual identifiable  
24 records containing private genetic information shall notify  
25 their employees of their responsibilities under this Act and  
26 the penalties for violating them.

1        Sec. 162. TRANSFER OF OWNERSHIP, DISCONTINUANCE OF SERVICES

2                (a) ACTIVITIES INVOLVING DNA SAMPLES. — Any person in  
3        possession of individually identifiable DNA samples who intends  
4        to discontinue a program, business, enterprise, or service in  
5        which such DNA samples were collected, stored, or analyzed or  
6        who intends to transfer control of such program, business,  
7        enterprise, or service to a person who intends to use such DNA  
8        samples for a substantially different purpose than was  
9        authorized at the time of collection, storage, or analysis of  
10      such DNA samples must:

11                (1) no less than 45 days prior to the effective date  
12        of the discontinuance or transfer of control, mail a notice to  
13        the last known address of each sample source or the sample  
14        source's representative informing such individuals of the  
15        intended change, and

16                (A) in the case of an intended discontinuance  
17        of activities, give the individual the opportunity to direct  
18        that the DNA sample be returned to the individual prior to the  
19        date on which the discontinuance is effective and informing  
20        them of the date on which such direction must be received to  
21        effectuate such request; or

22                (B) in the case of an intended transfer of  
23        control, give the individual the option of agreeing to the  
24        transfer, or requiring the destruction or return of the DNA  
25        sample prior to the effective date of the transfer, and

1 informing the individual of the date on which such a  
2 requirement must be received to be effectuated;

3 (2) In the event that no response is received from  
4 the individual by the date specified in the notice, the person  
5 in possession of such DNA sample:

6 (A) in the case of a discontinuance shall  
7 destroy such DNA samples; and

8 (B) in the case of transfer of control shall  
9 either;

10 (i) destroy such DNA samples, or

11 (ii) remove all individual identifiers from  
12 such DNA samples.

13 (b) RECORDS CONTAINING PRIVATE GENETIC INFORMATION. — Any  
14 person in possession of individually identifiable records that  
15 contain private genetic information who intends to discontinue  
16 a program, business, enterprise, or service in which the  
17 private genetic information was created or obtained, and any  
18 person who maintains records other than medical records that  
19 contain private genetic information who intends to transfer  
20 control of a program, business, enterprise, or service in which  
21 the private genetic information was created or obtained shall:

22 (1) no less than 45 days prior to the effective date  
23 of the discontinuance or transfer of control, mail a notice to  
24 the last known address of each sample source or the sample  
25 source's representative informing such individuals of the  
26 intended change, and

(A) in the case of an intended discontinuance, inform the individual of

(i) their right to order return of the records prior to the discontinuance and informing them of the date on which such direction must be received to effectuate such order, or

(B) in the case of an intended transfer of

8 control, provide the name of the person who will be in control  
9 of the records after the transfer, and inform the individual of  
10 their right to order return of the records to the individual or  
11 to a person designated by that individual, or to agree to the  
12 intended transfer.

(A) in the case of discontinuance, shall

(i) destroy the records, or

(ii) seal and securely store the records

19 for no longer than 3 years; or

(B) in the case of an intended transfer, may transfer of control of the records.

## **PART H - - ENFORCEMENT**

## Sec. 171. CIVIL REMEDIES

(a) PRIVATE RIGHT OF ACTION. - Any person whose rights under this Act have been violated may maintain a civil action for damages or equitable relief as provided for in this section.

(b) JURISDICTION. — An action to enforce the liabilities under this section may be brought in the district courts of the United States or a state court of competent jurisdiction.

(c) RELIEF. — In any action brought under this section, a court may order a person to comply with the provisions of this Act and may order any other appropriate equitable relief.

(d) LIABILITY FOR NEGLIGENT VIOLATIONS. — Any person who through negligence collects a DNA sample in violation of this Act, analyzes a DNA sample in violation of this Act, or discloses private genetic information in violation of this act, shall be liable to the sample source and any other person injured by each such violation in an amount equal to:

(1) any actual damages sustained as a result of the collection, analysis, or disclosure, or \$25,000, whichever is greater; and

(2) in any case where such violation has resulted in profit or monetary gain, treble damages; and

25 (3) in the case of a successful action to enforce  
26 any liability under this section, the costs of the action

1 together with reasonable attorneys' fees as determined by the  
2 court.

3 (e) LIABILITY FOR WILLFUL VIOLATIONS. — Any person who-

4 (1) through a request, the use of persuasion, under  
5 threat, or with a promise of reward, willfully induces a person  
6 to collect a DNA sample in violation of this Act, analyze a DNA  
7 sample in violation of this Act, or disclose private genetic  
8 information in violation of this Act, or

9 (2) willfully collects a DNA sample in violation of  
10 this Act, willfully analyzes a DNA sample in violation of this  
11 Act, or willfully discloses private genetic information in  
12 violation of this Act, shall be liable to the sample source and  
13 any other person injured by each such violation in an amount  
14 equal to:

15 (A) any actual damages sustained as a result of  
16 the collection, analysis, or disclosure, or \$50,000, whichever  
17 is greater;

18 (B) punitive damages as the court may allow;  
19 and

20 (C) in the case of a successful action to  
21 enforce any liability under this section, the costs of the  
22 action together with reasonable attorneys' fees as determined  
23 by the court.

24 (f) STATUTE OF LIMITATIONS. — Except for subsection (g)  
25 any action under this section must be brought within two years

1 of when the alleged violation was or should have been  
2 discovered.

3 (g) TOLLING OF LIMITATIONS. - If the person entitled to  
4 an action under this section is a minor, or is incapacitated by  
5 reason of mental illness when the right to bring an action  
6 first occurs, the action may be commenced up to 2 years after  
7 the disability is removed.

8

9 **Sec. 172. CIVIL PENALTIES AND INJUNCTIVE RELIEF**

10 Whenever the attorney general has reason to believe that  
11 any person is using or is about to use any method, act or  
12 practice in violation of the provisions of this Act, and that  
13 proceedings would be in the public interest, the attorney  
14 general may bring an action against such person to restrain by  
15 temporary restraining order or preliminary or permanent  
16 injunction the use of such method, act or practice. The action  
17 may be brought in the district court of the jurisdiction in  
18 which the person resides or has a principal place of business.  
19 The court may issue temporary restraining orders or preliminary  
20 or permanent injunctions and make such other orders or  
21 judgments as may be necessary to prevent harm or to remedy harm  
22 suffered by any person as a result of the use or employment of  
23 such method, act or practice in violation of this Act. If the  
24 court finds that a person has employed any method, act or  
25 practice which he knew or should have known to be in violation  
26 of this Act, the court may require such person to pay a civil

1      penalty of not more than \$50,000 for each such violation and  
2      may also require the said person to pay reasonable costs of  
3      investigation and litigation of such violation, including  
4      reasonable attorneys fees.

5      **PART I - - EFFECTIVE DATES; APPLICABILITY;**  
6      **AND RELATIONSHIP TO OTHER LAWS**  
7

8      **Sec. 181. EFFECTIVE DATES**

9      This Act, and the amendments made by this Act, shall take  
10     effect on \_\_\_\_\_, 199\_\_.

11

12     **Sec. 182. APPLICABILITY**

13        (a) AUTHORIZATION FOR ANALYSIS OF DNA SAMPLES COLLECTED  
14        PRIOR TO EFFECTIVE DATE. — In order to comply with the  
15        provisions of this Act, any person who, prior to the effective  
16        date of this Act, is in possession of an individually  
17        identifiable DNA sample must, prior to performing any genetic  
18        analysis on the DNA samples:

19                (1) make the disclosures required by section 101  
20                (c); and obtain a written authorization that meets the  
21                requirements of section 112; or

22                (2) take all steps necessary to ensure that the DNA  
23                sample is no longer linked to any individual identifier.

24        (b) AUTHORIZATIONS FOR DISCLOSURES. — An authorization  
25        for the disclosure of private genetic information that is  
26        executed before \_\_\_\_\_, 199\_\_, and which does not meet the  
27        requirements of section 103, but which is valid under State law

1 on \_\_\_\_\_, 199\_\_, shall remain valid until thirty days after  
2 the effective date of this Act, or the expiration date  
3 specified in the authorization, whichever occurs earlier.

4

5 **Sec. 183. RELATIONSHIP TO OTHER LAWS**

6 (a) No state may establish or enforce any law or  
7 regulation concerning the collection, storage, or analysis of  
8 DNA samples except to the extent that such law or regulation:

9 (1) prohibits or further restricts the collection,  
10 storage, or analysis of DNA samples; or  
11 (2) provides additional protection to the privacy  
12 interests of the individual who is a sample source.

13 (b) Effective as of the effective date of this Act, no  
14 State may establish or enforce any law or regulation concerning  
15 the disclosure of private genetic information except to the  
16 extent that such law or regulation:

17 (1) prohibits or further restricts the disclosure of  
18 such information;

19 (2) prohibits or further restricts the use of such  
20 information; or

21 (3) provides additional protection to the privacy  
22 interests of the individual who is a sample source or the  
23 subject of the genetic information.

24 (c) Nothing in this Act shall be construed as limiting or  
25 prohibiting the pursuit of any other remedies available under  
26 common or statutory law in regard to the collection, storage,  
27 analysis of DNA samples, and the disclosure of private genetic  
28 information.

**III**

**COMMENTARY**



This commentary explains why and how decisions were made about provisions of the Genetic Privacy Act to help readers understand both its scope and the intent of the drafters. Those parts of the Act that are self-explanatory are not referenced in this section.

### Sec. 3. DEFINITIONS

(m) PRIVATE GENETIC INFORMATION. - The term "private genetic information" means any information about an identifiable individual that is derived from the presence, absence, alteration, or mutation of a gene or genes, or the presence or absence of a specific DNA marker or markers, and which has been obtained:

- (1) from an analysis of the individual's DNA; or
- (2) from an analysis of the DNA of a person to whom the individual is related.

The term "Private Genetic Information" is the key to the Act because it defines the information that is protected by it. This definition recognizes that not all genetic information needs or warrants legal protection, and limits the Act's protection to information derived from DNA analysis. The Act, accordingly, does not protect genetic information derived from medical examinations, family histories, or pedigrees.

Like other kinds of personal information, some genetic information is more sensitive than other genetic information. Control of some genetic information is more critical for the exercise of personal autonomy, and publication or disclosure of some genetic information can be more damaging or stigmatizing than

disclosure of other genetic information. For instance, although height, eye and skin color, and other physical characteristics are inherited and therefore genetic information, such externally-expressed genetic information is not private. On the other hand, knowledge about the presence of a gene that makes it probable that the individual will suffer a debilitating disease later in life is private information, at least until a point in time when symptoms become manifest or the individual intentionally discloses the information.

We wanted to draft a definition that is based on a principled distinction between "private" and other genetic information, and at the same time susceptible to practical application. The manner in which genetic information is created contributes to its private nature. Genetic analysis of an individual's DNA, such as testing for a specific disease gene, particularly if signs and symptoms of the disease are not manifested, is an obvious source of such private information. Similarly, if an analysis reveals that an individual is the carrier of a recessive disease gene which could be passed on to offspring, this carrier status is private information if derived from a DNA analysis. Carrier status could also be inferred from a genetic condition in an individual's child. Therefore, another source of private genetic information about an individual is the analysis of the DNA of a close relative of the individual.

Private genetic information can also be obtained from a family history of a genetic disease. Physicians who inquire about

the incidence of a particular condition in a patient's family acquire private genetic information on a regular basis. This source of private genetic information is the least susceptible to regulation and control because it is virtually impossible to distinguish such private genetic information from other family medical history in any principled way.

Development of a genetic medical history can be a complex process involving review of medical records of several family members, or it can result simply from asking the patient a few questions about specific relatives. Regardless of the nature of the inquiry, the purpose is the same: to determine an individual's risk of having inherited a gene. For example, developing a family pedigree or history can be used to determine whether or not a woman is likely to have inherited a breast cancer gene. The prediction that an individual family member has inherited the gene may be based solely on the patient's report of the age and relationship of other women in the family who have developed cancer.<sup>1</sup>

Although one process uses DNA analysis and the other does not, both lead to the creation of the same private genetic information: the prediction of a predisposition to disease. Nonetheless, distinguishing between "private genetic information" derived from a family history and other medical information derived from a

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<sup>1</sup> See discussion of the use of family history by physician to conclude that an individual suffered from breast-ovarian carcinoma syndrome despite no manifested symptoms of disease in *Katskee v. Blue Cross/Blue Shield of Nebraska*, 245 Neb. 808, 515 N.W.2d 645 (1994), discussed in Annas, GJ, When Should Preventive Treatment be Paid for by Health Insurance? 331 New Eng. J. Med. 1027 (1994).

family history is problematic. For example, it is difficult, if not impossible, to distinguish between the prediction of having inherited the breast cancer gene, based on disease occurrence in the family, and establishing a person's risk for other diseases, such as heart disease or diabetes, based on the prevalence of these diseases in a family.

Inclusion of family history-based risk information in the definition of "Private Genetic Information" would protect information that has historically been collected and disclosed as ordinary medical information, and virtually all medical records would be subject to the provisions of the Act. Extending the umbrella of protection through such an expansive definition would necessitate the overhaul of well established medical information practices and policies.

A similar analysis leads to the same conclusion regarding biochemical tests that detect the presence or absence of a protein that indicates the presence or absence of a particular gene. By not including genetic information derived from family histories, biochemical tests, or methods other than DNA analysis, we recognize that some genetic information will escape the protection of the Act. We have opted to exclude this type of genetic information to avoid the enormous practical problems presented by including it. Despite this underinclusiveness, we believe our definition is consistent with the goal of protecting information developed within the context of the Human Genome Project as a result of mapping the human genome: information derived from DNA analysis is

subject to uniform and comprehensive privacy protection.

(n) SAMPLE SOURCE. - The term "sample source" means the individual from whose body the DNA sample originated.

(o) SAMPLE SOURCE'S REPRESENTATIVE. - The term "sample source's representative" means any person who has the legal authority to make health care decisions concerning a minor or an incompetent person, or the administrator or executor of a deceased person's estate, if any, otherwise the next of kin of a deceased person.

"Sample Source" refers to the individual from whom a DNA sample has been collected. It is necessary to have a term that distinguishes the individual from whom the DNA originates from other persons who may have possession of, or interest in, a DNA sample. We considered suggestions by reviewers of early drafts to utilize a term that was less de-humanizing, such as sample source person, human source, or source individual. However, despite the desirability of preserving the sense of person in regard to individuals who have DNA analyzed, alternatives were either awkward in the context of the statutory provisions, or did not maintain the connection between the DNA sample and the person from whom it originated in a clear and succinct way. We also considered using terms that were familiar from use in statutes like the Uniform Anatomical Gift Act and medical records acts. However, because only some genetic information is medically relevant, they were found to be of limited applicability in discussing DNA.

"Donor," a term associated with blood collection and organ harvesting, was also considered. However, it has not been used in

conjunction with the collection of biological specimens for purposes other than selling them or giving them away, and consequently it would only be accurate if the DNA samples were intended to be used by others.

The term "depositor" was also considered, and would be consistent with the concept of DNA banking. While it is a term used by others such as the Ad Hoc Committee on DNA Technology of the American Society of Human Genetics,<sup>2</sup> its relevance and utility are diminished when banking is not the focus of the activity that is to be regulated. "Depositor" is only accurate when referring to someone who leaves tangibles with another person for storage, safekeeping or transfer to a third party and it assumes that a voluntary act is involved. However, the Act regulates the collection and analysis of DNA whether or not it involves a voluntary act of depositing. While the term would be applicable to circumstances where DNA samples are temporarily stored or maintained "as is," and where the recipient only functions as a custodian, such storage alone is not the activity that we are primarily concerned with controlling. Furthermore, although suggesting a role of stewardship on the part of the recipient, it fails to acknowledge the connection that the depositor would still have with the information contained in the deposited DNA sample.

In comparison to these terms, "sample source" clarifies that the individual referred to is the one from whom the DNA has been

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<sup>2</sup> Ad Hoc Committee on DNA Technology, American Society of Human Genetics, DNA Banking and DNA Analysis: Points to Consider, 42 Am. J. Hum. Genetics 781 (1988).

extracted, without being unnecessarily wordy or conjuring up images and associations that are inconsistent with the nature of the sample itself or the information it contains. It avoids reference to how the person storing or analyzing the sample came into possession of the sample, and is the simplest term available.

If the sample source does not have the legal capacity to exercise the rights granted by this Act, they can be exercised by the "sample source's representative." This is the person who is legally authorized under state law to make health care decisions for such persons. For minors, the sample source's representative will usually be a parent or legally appointed guardian. For an incompetent person, the representative could be a guardian, or a person appointed under a health care proxy or similar legal instrument, to act on behalf of the incompetent person. The term also encompasses those who are authorized to make decisions regarding deceased persons or a deceased person's estate.

An executor or administrator, who is authorized to act on behalf of a decedent and the decedent's estate, could authorize disclosure of private genetic information about the sample source. Samples collected prior to death may, as property of the sample source, be included in his or her estate, and consequently, the executor or administrator would be responsible for authorizing the storage, transfer or destruction of such samples in accordance with the decedent's wishes.

(f) DNA TYPING. - The term "DNA Typing" means a scientifically reliable method for characterizing and

comparing sequences of DNA, and applying a statistical analysis of population frequency to determine that if the DNA sequences match, the probability that the match occurs by chance.

"DNA typing" refers to what some commentators term "DNA profiling" or "DNA fingerprinting." "Typing" was selected because it is the most accurate term for identifying the process used in forensics to determine if one DNA sample "matches" another sample, and calculating the probability that a match is due to chance. It is our intent to clarify that this identification process, unlike other kinds of DNA analysis, yields genetic information that has no independent meaning and is only useful for matching purposes in much the same way that an individual's fingerprint provides no more information than the identity of the individual.<sup>3</sup>

(g) IDENTIFIABLE INDIVIDUAL. - The term "identifiable individual" means any individual whose name, address, Social Security number, health insurance identification number, or similar identifying information is known, available, or can be determined with reasonable accuracy either directly or by reference to other available information.

(h) INDIVIDUAL IDENTIFIER. - The term "individual identifier" means a name, address, Social Security number, health insurance identification number, or similar information by which the identity of a sample source can be determined with reasonable accuracy, either directly or by reference to

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<sup>3</sup> Office of Technology Assessment, U.S. Congress, *Genetic Witness: Forensic Uses of DNA Tests*, Washington, D.C.: U.S. Government Printing Office, 1990, p.132.

For detailed descriptions of the process and procedures used in DNA typing see Thompson, WC, Evaluating the Admissibility of New Genetic Identification Tests: Lessons from the "DNA War", 84 J. Crim. L. 22 (1993); Committee on DNA Technology in Forensic Science, "DNA Typing Technical Considerations" in *DNA Technology in Forensic Science*, National Academy Press, Washington, D.C., 1992, pp.51-73.

other available information. The term does not include characters, numbers, or codes assigned to an individual or a DNA sample which cannot be used to determine the identity of a sample source.

(i) INDIVIDUALLY IDENTIFIABLE DNA SAMPLE. - The term "individually identifiable DNA sample" means any DNA sample linked to an individual identifier.

(j) INDIVIDUALLY IDENTIFIABLE RECORD. - The term "individually identifiable record" means any record that contains private genetic information linked to an individual identifier.

Throughout the Act the words "sample," "records," and "individual" are often modified by the terms "individually identifiable" or "identifiable." This is necessary to distinguish samples and records which are linked to individual identifiers from those which are not. The choice of "linked" to express the connection between the sample and the identifiers is meant to be as broad and inclusive as possible. No matter how loose or indirect the linkage may be, if there is a way to connect a sample to an individual, the sample is not anonymous. Only when the numbers or characters assigned to samples simply distinguish one sample from another, are otherwise meaningless, and cannot be matched with any identifiable person, are the samples no longer individually identifiable. The term "individual identifier" as defined here is intended to include any name, number or code that can be used to learn the identity of an individual.

This distinction between samples that are individually identifiable and those that are not is significant, since the goal of the Act is to protect the privacy interests of individuals. Unless DNA samples are linked to an individual, use of the samples

and use of the information derived from the samples does not implicate informational privacy interests. Consequently, regulation of the use of such samples or information is not within the domain of the Act.

## PART A

### COLLECTION AND ANALYSIS OF DNA SAMPLES

#### Sec. 101. COLLECTION OF DNA SAMPLES

(a) REQUIREMENT OF WRITTEN AUTHORIZATION. — Except as otherwise provided in sections 121, 122, and 123, no person may collect or cause to be collected an individually identifiable DNA sample for genetic analysis without the written authorization of the sample source or the sample source's representative.

(b) REQUIRED INFORMATION. — Prior to the collection of a DNA sample from a sample source for genetic analysis, the person collecting the sample or causing the sample to be collected shall verbally inform the sample source or the sample source's representative:

- (1) that consent to the collection or taking of the DNA sample is voluntary;
- (2) that consent to the genetic analysis is voluntary;
- (3) of the information that can reasonably be expected to be derived from the genetic analysis;
- (4) of the use, if any, that the sample source or the sample source's representative will be able to make of the information derived from the genetic analysis;
- (5) of the right to inspect records that contain information derived from the genetic analysis;
- (6) of the right to have the DNA sample destroyed;
- (7) of the right to revoke consent to the genetic analysis at any time prior to the completion of the analysis;
- (8) that the genetic analysis may result in information about the sample source's genetic relatives which may not be known to such relatives but could be important, and if so the sample source will have to decide whether or not to share that information with relatives;
- (9) that in the future someone else may ask if the

sample source has obtained genetic testing or analysis and condition a benefit on the disclosure of information regarding such testing or analysis;

(10) that the collection and analysis of the DNA sample, and the private genetic information derived from the analysis is protected by this Act; and

(11) of the existence of genetic counselling.

This section sets forth the general prohibition against collection of identifiable DNA samples without the written authorization of the sample source or that person's representative. In addition, this section requires that particular information be verbally communicated before an authorization is obtained. These requirements are designed to foster a knowledgeable and voluntary decision to proceed with the collection and analysis of a DNA sample. A perfunctory recitation should be discouraged, despite the fact that mere delivery of the information would technically satisfy the requirement of this section. Those who collect DNA samples should be encouraged to expand upon the minimum information required by providing additional information they believe to be beneficial to individuals who plan to have their DNA analyzed.

The information that must be provided under this Act is similar to the kind of information that must be disclosed before obtaining consent for diagnostic tests that reveal highly private and sensitive information. For example, several state laws require that anyone undergoing an HIV test must first be told about the information that the test can yield, the reliability of the test, and how the information can be used by the individual that is tested, in addition to how the information may be used by

others who become aware of it.<sup>4</sup> Such requirements are warranted because, if disclosed, information on HIV status could result in economic, social or psychological harm. Similarly, genetic information may be used to preclude the sample source from obtaining an economic or social service benefit.

Disclosure of genetic information can also have a harmful effect because it can also indicate the presence or absence of a stigmatizing condition or disease. The sample source should therefore be told that others may ask if the sample source has had a DNA analysis, and the results obtained.

An additional disclosure, required by section 101(b)(8), is intended to address the fact that the results of genetic analysis can reveal that others are likely to be affected by the same genetic condition or disease as the individual whose DNA is to be analyzed. This section, therefore, also requires that the person be informed:

that the genetic analysis may result in information about the sample source's genetic relatives which may not be known to such relatives but could be important and if so the sample source will have to decide whether or not to share the information with relatives.

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<sup>4</sup> See, e.g., Cal. Ins. Code § 799.03 (Deering 1994) (requiring that prior to execution of consent for HIV related test, insurers must provide printed materials on HIV, information on what the subject can do with the results, a list of available counseling services and sources of additional help); N.Y. Pub. Health Law § 2781 (Consol 1993) (requiring that person ordering an HIV related test explain the nature of the illness, and provide information about discrimination problems that might result); Pa. Cons. Stat. § 7605 (1993) (requiring that explanation of HIV related test and information on the availability of information about exposure and transmission and suggestion that subject may desire pre-test counseling be communicated prior to test).

DNA analysis may reveal that other relatives are likely to be gene carriers, to have a gene that codes for disease, or to be predisposed to developing a particular disease or condition by reason of their genetic relationship to the sample source. In effect, the uncollected DNA of family members is indirectly analyzed. This aspect of genetic analysis raises questions about whether such family members should be told about their possible risks and if so, by whom and how? One suggestion is that access to genetic testing in some circumstances be made conditional on a prior agreement to disclose information to other family members who become identified as at risk.<sup>5</sup> This suggestion, however, has not been widely supported for several reasons, including the fact that it would deter individuals from seeking information about themselves.<sup>6</sup>

Creating either a contractual or statutory obligation for individuals to share such information with their family members would be not only unprecedented, but inadvisable. The creation of new substantive rights or duties of family members is not our intention and is beyond the scope of this Act. However, because the Act creates rules that govern the use and disclosure of information, it is imperative that individuals be informed of the

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<sup>5</sup> President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Screening and Counseling for Genetic Conditions* Washington, D.C.: U.S. Government Printing Office, 1983, p.43.

<sup>6</sup> Chapman M, Invited Editorial: Predictive Testing for Adult Onset Genetic Disease: Ethical and Legal Implications of the Use of Linkage Analysis for Huntington Disease, 47 Am. J. Hum. Genet. 1, 2 (1990).

fact that by seeking genetic information about themselves through genetic analysis, they may also become privy to information about other family members who would also want and/or need such information. A person seeking genetic analysis will not always be able to anticipate the nature of the information that can result and must therefore be informed of this possibility before the analysis is authorized. While it will be an individual choice as to whether or not to share that information with others, this disclosure should instigate discussion between the sample source and the collector of the sample.

For example, if as a result of the analysis of the DNA of the sample source it could be determined that the person's sibling is also the carrier of a genetic condition, and could pass the condition to offspring, or could suffer in the future from a genetic condition that can be ameliorated or treated, the sample source must be informed that he or she will have to decide whether or not to share that information with the sibling once the results are known. Despite the absence of a legal obligation to do so, the sample source should be encouraged out of moral obligation to share as much of the information as would provide the sibling, or other relatives, with the opportunity to obtain information about their own condition or risk. Since this is a foreseeable and a relatively common burden resulting from DNA analysis, its disclosure is necessary. This issue is discussed in more detail in the Appendix.

Genetic counseling can also provide the sample source with help in deciding how and when to initiate discussion with relatives, and in determining how much information about their own status they are comfortable sharing with others. Consequently, in addition to disclosing the nature and scope of the information that the analysis will produce, section 101(b)(11) requires that the person who collects the sample must provide information on the existence of such counseling. This requirement can be fulfilled by telling the individual about genetic counselors whose expertise is to help individuals understand what genetic information that can be derived from DNA analysis means, and plan in light of such information. The person could suggest how a genetic counselor could be located by those who decide a consultation would be desirable. The person collecting the sample is not, however, required to provide such counseling, nor would they be obligated to take any steps to ensure that the individual is referred to a specific counselor.

This limited requirement will not be burdensome, since it would be rare for anyone who regularly collects and analyzes DNA samples not to have information about genetic counseling services. Research and clinical programs that conduct DNA analysis often utilize such services, receive references from such services or at least recommend that subjects or patients take advantage of the assistance counselors can give. Anyone collecting and analyzing DNA samples as a regular part of their business or practice should have some awareness of this emerging field, and requiring some

discussion about the availability of genetic counseling is consistent with present practices of many programs.

This requirement is supported by the recommendations of other experts who have studied the effects of genetic information.<sup>7</sup> Research and experience with Huntington Disease linkage studies and other genetic testing has demonstrated that pre-test counseling as well as post-test counseling is needed for those who face the choice of having DNA analyzed and the possibility of sharing such information with others.<sup>8</sup> Test results can have an impact, not only on the self perception of the individual who has been tested, but on family relationships as well. Particular attention has been focused on the effect of information about the inheritance of

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<sup>7</sup> Chapman M, Canadian Experience with Predictive Testing for Huntington Disease: Lessons for Genetic Testing Centers and Policy Makers, 42 Am. J. Hum. Genet. 491, 493 (1992); The Institute of Medicine's Committee on Assessing Genetic Risks recommends more stringent requirements in regard to genetic counseling and believes that "genetic counseling and education must be an integral part of genetic testing; anyone who is offering, or referring for, genetic testing must provide--or refer for --appropriate genetic counseling and education prior to testing and follow-up after testing." *Assessing Genetic Risks*, Andrews LB, Fullarton JE, Holtzman NA & Motulsky G, eds., Washington, D.C. National Academy Press, 1994, p.170.

As more primary care physicians provide and use genetic tests, they are the likely candidates to perform such counseling. However, before they will be adequately prepared to do so effectively, research and education on appropriate counseling methods must be undertaken. *Id.* at 173.

<sup>8</sup> Chapman, *supra* note 7, at 492; For discussion of issues that arise in the different contexts in which genetic counseling takes place, including pre-natal testing and screening for late onset disorders see IOM Report on *Assessing Genetic Risks*, *supra* note 7, Chap. 4, "Issues in Genetic Counseling."

this disease on family relationships and personal identity.<sup>9</sup> Although Huntington Disease is an extreme example because the disease itself is devastating, it presents issues that are typical in genetic testing and analysis.<sup>10</sup>

#### Sec. 102. ANALYSIS OF DNA SAMPLES

(a) ANALYSIS PROHIBITED WITHOUT AUTHORIZATION. - Except as otherwise provided in sections 121, 122 and 123, genetic analysis of an individually identifiable DNA sample is prohibited unless specifically authorized in writing by the sample source or the sample source's representative.

(b) ASCERTAINMENT OF AUTHORIZATION. - No person may analyze an individually identifiable DNA sample without ascertaining that written authorization for the analysis has been obtained.

This section prohibits conducting any analysis of an individually identifiable DNA sample without specific written authorization. When DNA is collected in a clinical setting for diagnosis of disease or determination of an appropriate course of treatment, the collection process will not differ from taking blood or other specimens for other types of testing or screening.

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<sup>9</sup> Huggins M, et al, Ethical and Legal Dilemmas Arising During Predictive Testing for Adult-Onset Disease: The Experience of Huntington Disease, 47 Am. J. Human Genet. 4 (1990); Chapman, *supra* note 7 at 493; Assessing Genetic Risks, *supra* note 7, at 88-89.

<sup>10</sup> See Chapman, *supra* note 7, at 492; Huggins M. et al, Predictive Testing for Huntington Disease in Canada: Adverse Effects and Unexpected Results in Those Receiving a Decreased Risk, 42 Am. J. Med. Genet. 508, 514-515 (1992). These commentators view the role of genetic counseling as particularly warranted in predictive testing since results will be an expression of altered risk and the individual who is tested may not appreciate the significance, for example, between being at 11% as opposed to 50% increased risk of having a particular gene or disease and act on such misunderstanding with harmful results.

Consequently, the collection of a sample may begin with a physician ordering that the sample be taken by other personnel, such as a phlebotomist, and sent to a lab for analysis. Under the provisions of the Act, even if the physician is the one responsible for informing the sample source and obtaining the written authorization, if he fails to do so, a laboratory may not proceed with conducting the analysis. This is because section 102(b) prohibits DNA analysis, unless the person conducting the analysis ascertains that the authorization has been obtained. If they fail to do so, they, as well as the person who initiated collection of the sample without written authorization, face the penalties for noncompliance with the statutory requirements. How this "person" verifies that the authorization has been obtained is, however, not dictated by the statute, but will be governed by the person's own administrative policies and procedures.

This section does not require the phlebotomist who draws blood under orders from a physician, or a lab technician who receives a sample for analysis to obtain the sample source's consent. This would be unrealistic and disruptive to established roles and protocols in which the collection or analysis of DNA might take place. Instead, the Act requires everyone to refrain from proceeding with their role in the process until proper authorization has been obtained.

This section does not describe these responsibilities as applying to specific personnel because, in the future, collection and analysis of DNA samples might take place outside a clinical

setting, such as a commercial facility or free standing laboratory, where the person collecting samples is not a health care professional. DNA can be extracted from different kinds of specimens, including strands of hair, so collecting a DNA sample does not always involve technical medical skills or knowledge. These requirements are applicable to all collection situations and mandate that the necessary disclosures are made and written authorization is obtained from all sample sources. Since these responsibilities have been delegated to the "person" who collects the sample or causes the sample to be collected, and to the "person" who performs an analysis, regardless of whether the facility in which this takes place is a health care facility, this "person" will have to establish procedures and protocols to ensure compliance with these requirements. The effect of the Act should be the same in all instances and settings, regardless of who ultimately obtains the written authorization.

Compliance with the rules in sections 101 and 102 prevents secret collection and analysis of DNA and ensures that before an individual authorizes an analysis he or she should know: why the analysis is being suggested, required or recommended; what information will likely result from the analysis; how the information can be useful to them; and that genetic counselors can be consulted for help in making a decision to go ahead with an analysis, or in understanding the results of the analysis.

**Sec. 103. AUTHORIZATION FOR COLLECTION AND STORAGE OF INDIVIDUALLY IDENTIFIABLE DNA SAMPLES FOR GENETIC ANALYSIS**

(a) WRITTEN AUTHORIZATION. — To be valid, the authorization required by sections 101 and 102 must satisfy each of the following requirements:

(1) WRITING. — The authorization must be in writing, signed by the sample source or the sample source's representative, and dated on the date of such signature;

(2) COLLECTOR IDENTIFIED. — The authorization must identify the person who collects the DNA sample or causes the DNA sample to be collected;

(3) ANALYZER IDENTIFIED. — The authorization must identify the facility in which the analysis will be performed;

(4) STORAGE FACILITY IDENTIFIED. — The authorization must identify the facility in which the DNA sample will be stored;

(5) COLLECTION DESCRIBED. — The authorization must state the manner in which the sample is to be collected;

(6) AUTHORIZED USE. — The authorization must include a description of all authorized uses of the DNA sample;

(7) STATEMENT REGARDING STORAGE AFTER COMPLETION OF ANALYSIS. — The authorization must indicate whether or not the sample source permits the sample to be maintained or stored in an identifiable form after the analysis is completed;

(8) STATEMENT REGARDING USE OF UNIDENTIFIABLE DNA SAMPLES FOR RESEARCH OR COMMERCIAL PURPOSES. — The authorization form must include a provision that enables the sample source or the sample source's representative to prohibit the use of the DNA sample for research or commercial purposes even if the sample is not in an individually identifiable form.

(b) RETENTION OF AUTHORIZATION. — The authorization for the collection and analysis of an individually identifiable DNA sample shall be retained at least as long as the DNA sample is retained.

(c) COPY. — A copy of the authorization shall be provided to the sample source or the sample source's representative.

An authorization which includes the details set forth should facilitate compliance with the requirements and goals of section 101. Any forms which are drafted to meet the requirements of this

section should contain clear language and not undermine the purposes or process of obtaining informed authorization.<sup>11</sup> Those who develop authorization forms are urged to include additional details and information that they believe to be helpful.

The person who collects the sample, the person who will analyze the sample, and the person who will store the DNA sample, must all be identified in the authorization [section 103(a) (2) - (4)]. Because the individual has the right to order the destruction of a DNA sample that has been collected [section 104(b)] and to inspect records containing information that results from an analysis [section 113], it is important for the individual to know who is, or may be, in possession of the DNA sample and the information that is developed through analysis.

The form must also indicate the manner in which the sample will be collected, describe all authorized uses of the sample, and indicate whether or not the sample source permits storage of the individually identifiable sample after the analysis is completed. [section 103(a) (5) - (8)] These requirements are intended to give the individual maximum control over their DNA. They also provide a mechanism for documenting that authorization to conduct particular tests, or to store samples for a specific period of time, has been

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<sup>11</sup> If discussion and forms are to be understandable by the average individual, considerable effort should go into their development. As a recent study at Johns Hopkins Oncology Center in Baltimore revealed, the average form for experimental therapies required at least an 11th grade reading level, despite the fact that most specialists recommend that important documents should be written at or below an 8th grade level. McFarling UL, Medical Notebook, Cancer Consent Forms Found Difficult to Read, Boston Globe, October 13, 1994, p.3.

obtained.

Finally, the authorization must allow for the inclusion of a prohibition against use of the sample, even in non-identifiable form, for research or commercial use so that individuals who want to prohibit such use can do so. Because individuals have different attitudes toward supporting or participating in research or commercial ventures that utilize human DNA, this provision accommodates the expression of such differences.

#### **Sec. 104. OWNERSHIP AND DESTRUCTION OF DNA SAMPLES**

**(a) OWNERSHIP OF THE DNA SAMPLE.** - An individually identifiable DNA sample is the property of the sample source.

**(b) RIGHT TO ORDER DESTRUCTION OF THE DNA SAMPLE.** - Except when a DNA sample has been collected pursuant to section 122 or 123 of this Act, the sample source or the sample source's representative shall have the right to order the destruction of the DNA sample.

**(c) ROUTINE DESTRUCTION OR REMOVAL OF IDENTIFIERS.** - An individually identifiable DNA sample must be destroyed on completion of genetic analysis unless:

- (1) the sample source or the sample source's representative has directed otherwise in writing, or
- (2) all individual identifiers linking the sample to the sample source are destroyed.

Some individuals will want to take maximum advantage of the evolving nature of knowledge about the human genome, and will welcome the opportunity to have their DNA collected, stored or analyzed. Others are wary of the potential harm that can result from information derived from genetic analysis, and will want reassurance that they alone control when their DNA is analyzed and who has access to their samples and information. The provisions of

this section are intended to preserve the autonomy of all individuals regardless of their varying views on the benefits and dangers of genetic information.

Giving individuals control over their DNA is accomplished first by establishing that an individually identifiable DNA sample is the property of the sample source. Since the sample source has this property right, control of a sample can be transferred to another individual through a will or other legal instrument. Consequently, individuals who do not want their DNA analyzed during their own lifetime may nevertheless have a sample collected and stored for the benefit of others. Descendants to whom control over DNA samples is transferred could thus benefit from future developments in genetics which require analysis of DNA from multiple generations. Until the complete genome is mapped, locating genes through linkage analysis will be dependent upon the availability of such samples. This provision can promote this availability.

In addition to being able to transfer ownership of a sample, the sample source also has the right, except in limited circumstances, to order the destruction of a sample that has been collected. [section 104(b)] This gives those who want to limit the availability of such samples reassurance that once authorized analysis has been completed, the sample itself can be destroyed, preventing any additional unauthorized analysis. In some circumstances, a sample source's representative, such as the parent of a minor, can exercise this right on behalf of the individual from whom the sample has been collected. However, this right is not

exercisable by either the sample source or a sample source's representative when samples have been collected for identification use in law enforcement (section 122), or when the sample has been collected pursuant to a court-ordered analysis (section 123). Requiring that the person analyzing such samples destroy them at the direction of a sample source would directly conflict with the compulsory nature of collection and analysis in these situations.

Finally, section 104 provides for routine destruction of DNA samples or removal of identifiers, after the completion of the authorized analysis. This routine destruction can be overridden by the explicit directions of the sample source or the sample source's representative. [section 104(c)] Routine destruction would not result in an irreplaceable loss, since each individual is the source of an abundant supply of DNA samples. If an individual anticipates having a series of analyses conducted, and wants to avoid what is perceived as the inconvenience of collecting multiple samples, the authorization for collection of a specimen containing DNA can include specific directions for storage of the sample for analysis in the future, provided, of course, that storage services are offered by the collector or analyzer.

**Sec. 105. NOTICE OF RIGHTS AND ASSURANCES.** — A person who collects or stores DNA samples for genetic analysis shall provide a sample source or a sample source's representative prior to the collection, storage, or analysis of a DNA sample, and any other person upon request, with a notice of rights and assurances that contains the following information and assurances that:

(a) a DNA sample will only be used as authorized in the written authorization;

- (b) an individually identifiable DNA sample is the property of the sample source;
- (c) unless specifically prohibited by the sample source or sample source's representative, researchers may be granted access to DNA samples that cannot be linked to individual identifiers;
- (d) the sample source or the sample source's representative has the right to order the destruction of the individually identifiable DNA sample at any time;
- (e) the individually identifiable DNA sample will be destroyed on the completion of the analysis unless the sample source or the sample source's representative has previously directed otherwise in writing;
- (f) the sample source can designate another individual as the person authorized to make decisions regarding the individually identifiable DNA sample after the death of the sample source; and if any person is so designated, the sample source should notify the facility in which the DNA sample is stored;
- (g) the sample source or the sample source's representative has the right to examine the records containing private genetic information, to obtain copies of such records and to request correction or amendment of them;
- (h) private genetic information may be disclosed to researchers who qualify for such access under this Act;
- (i) the collection and analysis of the DNA sample and the private genetic information derived from the analysis is protected by this Act, and anyone whose rights under this Act have been violated can seek civil remedies, including damages, as provided in this Act; and
- (j) genetic counseling exists.

Individuals who authorize the collection and analysis of their DNA may not be aware of their rights under this Act and therefore be unable to exercise them. To enhance the knowledge of one's rights, this section requires that persons who collect DNA samples provide written notice to the individual when authorization for collection, storage and analysis of the DNA sample is obtained. This notice is similar in function and content to notices of fair

information practices required by other informational privacy statutes.<sup>12</sup> However, since the Act has provisions relating to the collection and analysis of samples, in addition to provisions that govern the information that results from such activities, the notice required by section 105 is more inclusive than other information practices.

A notice prepared under this section does not contain contractual assurances, but will consist of a series of statements regarding the legal responsibilities of those who collect, store and analyze samples, and the legal rights of the sample source.

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<sup>12</sup> See, e.g., 42 CFR 2.22 (1993) (requiring that at the time of admission for alcohol or drug abuse treatment, patients receive notice of the federal law and regulations that protect the confidentiality of such treatment records); Uniform Health Care Information Act § 5-101, 9 U. L. A. 509 (1988) (requiring that a health care provider post a notice of information practices); Health Information Model Legislation § 106 (Am. H. Info. Manag. Assoc.) (requiring those who receive health care information from patients to provide patients with a statement of the recipient's fair information practices); Insurance Information and Privacy Model Act § 4 (N.A.I.C. 1989) (requiring insurance institutions and agents to provide a notice of information practices to applicants).

## PART B

### DISCLOSURES OF PRIVATE GENETIC INFORMATION

#### Sec. 111. DISCLOSURE OF PRIVATE GENETIC INFORMATION

(a) REQUIREMENT OF WRITTEN AUTHORIZATION. - Except as provided in section 115 and section 132(b) no person who, in the ordinary course of business, practice of a profession, or rendering of a service, creates, stores, receives or furnishes private genetic information may by any means of communication disclose private genetic information except in accordance with a written authorization as provided in section 112.

(b) REDISCLOSURE PROHIBITED. - Rediscovery of private genetic information which has been disclosed to any person pursuant to a valid written authorization is prohibited.

This section states the general rule that any person who creates, maintains or furnishes private genetic information as part of their ordinary business or professional activities may disclose such information only in accordance with written authorization. (Exceptions to this general rule are presented in sections 115 and 132(b) and are discussed below.) These provisions apply to health care providers, lab technicians, genetic counselors, researchers, insurers and anyone else whose activities fall within the description in this section, regardless of the number of individuals on whom they have information. Section 111 also prohibits rediscovery of information received pursuant to a valid authorization.

Not all disclosures of private genetic information are prohibited by this or any other section of the Act. For example, nothing in the language of this statute prohibits a friend, neighbor, relative or any other person not engaged in such

business activities from repeating genetic information that is learned directly or indirectly from a sample source or someone knowledgeable about the sample source. Consequently, anyone who wants to recover for unauthorized disclosures of information by such individuals will have to look to common law torts or other statutes for a cause of action and a remedy.

The Act does not carve out an exception for disclosures of genetic information without the individual's authorization, as do some other statutes that deal with medical information. Where some statutes governing medical information permit breaches of confidentiality by professionals in emergency circumstances to prevent harm to another individual,<sup>13</sup> the Act does not permit disclosure of private genetic information without authorization, regardless of how well-intentioned the purpose of the contact with another individual. A full discussion of the common law on this issue appears in the Appendix.

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<sup>13</sup> See, e.g., The Health Security Act, H.R. 3600, 103d Cong. 2d Sess. § 5137 (permitting disclosures without patient's authorization if it is believed that the disclosure will avoid or minimize imminent danger to the health or safety of any individual), Uniform Health Care Information Act § 2-104 (additionally permitting disclosures to immediate family members, unless prohibited by the patient); and 42 U.S.C. § 290dd-2(b)(2) (permitting disclosures of substance abuse treatment information to medical personnel in bona fide emergencies).

It should be noted that the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research also recognizes that a genetic counselor's ethical duty of confidentiality can be overridden if several conditions are met, including a determination of a high probability of harm from withholding of the information, that the information will actually be used to avert the harm, and that only genetic information necessary for diagnosis or treatment of disease is disclosed. *Screening and Counseling for Genetic Conditions*, *supra* note 5 at 44. This issue is discussed in detail in the Appendix.

Therefore, when it is anticipated that the analysis of one person's DNA will reveal that a second individual (usually a close relative) is or may be at risk, the individual who has authorized an analysis should be encouraged to share the information with other family members who might benefit from it.

**Sec. 112. AUTHORIZATION FOR DISCLOSURE OF PRIVATE GENETIC INFORMATION**

**(a) WRITTEN AUTHORIZATIONS.** — To be valid, an authorization for disclosure of private genetic information must satisfy each of the following requirements:

(1) WRITING. — The authorization must be in writing, signed by the sample source or the sample source's representative and dated on the date of such signature;

(2) SAMPLE SOURCE OR REPRESENTATIVE IDENTIFIED. — The authorization must identify the individual granting authorization and the individual's relationship to the sample source;

(3) PERSON MAKING DISCLOSURE IDENTIFIED. — The authorization must identify the person permitted to make the disclosure;

(4) INFORMATION DESCRIBED. — The authorization must describe the specific genetic information to be disclosed;

(5) RECIPIENT IDENTIFIED. — The authorization must identify the person to whom the information is to be disclosed;

(6) PURPOSE DESCRIBED. — The authorization must describe the purpose for which the disclosure is being made;

(7) EXPIRATION DATE. — The authorization must state the date upon which the authorization will expire, which in no event shall be longer than 30 days after the date of the authorization; and

(8) REVOCATION STATEMENT. — The authorization must include a statement that the authorization is subject to revocation at any time before the disclosure is actually made.

(b) COPY. — A copy of the authorization shall be provided to the person making the authorization.

(c) REVOCATION OR AMENDMENT OF AUTHORIZATION. — A sample source or the sample source's representative may revoke or amend the authorization, in whole or in part, at any time.

(d) NOTICE OF REVOCATION. — A sample source may not maintain an action against a person for disclosure of private genetic information made in good faith reliance on a valid authorization if the person had no notice of the revocation of the authorization at the time the disclosure was made.

(e) IDENTIFICATION OF INFORMATION AS PROTECTED BY LAW. — Each disclosure made with the written authorization described in subsection (a) must be accompanied by the following written statement:

"This information has been disclosed to you from confidential records protected under the Genetic Privacy Act and any further disclosure of the information without specific authorization is prohibited."

(f) EFFECT OF GENERAL AUTHORIZATION FOR RELEASE OF MEDICAL RECORDS. — A general authorization for the release of medical records or medical information shall not be construed as an authorization for disclosure of private genetic information.

This section sets forth the requirement for a valid authorization which must be specific and in writing. The purpose is to prevent disclosures of genetic information under blanket releases of information and overly broad and unnecessary access to highly personal information.

The individual who authorizes the disclosure may revoke it at any time. However, anyone who does not receive notice of a revocation, and who makes a disclosure in good faith reliance on the authorization, will not be liable for violating this Act [section 112(d)]. The individual may only be able to express a revocation orally, so a written revocation is not required. However, when possible and to prevent the holder of the

authorization from denying awareness of revocation, it would make sense for any individual who intends to revoke authorization, or to amend the provisions of an authorization, to do so in writing.

Those governed by the provisions of sections 111 and 112 would, at a minimum, include researchers, independent databanks, clinical laboratories, medical care providers and insurers. Although few insurers at the present time routinely request or require DNA analysis in the course of processing applications, some insurers are interested in obtaining access to private genetic information that already exists.<sup>14</sup> They can do so by directly asking applicants if they have had genetic analysis and by obtaining information contained in medical records. While most applicants are not likely to have had any DNA analysis done prior to an application for insurance, this may change in the future.

This change could be precipitated by several factors, including the identification of genes that predispose individuals to common diseases such as cancer and the development of readily available and cost effective predictive testing for such disorders.<sup>15</sup>

When an individual has had a DNA analysis and the resultant private genetic information is entered into medical records, an authorization for disclosure that meets the requirements of this

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<sup>14</sup> McEwen J, McCarty K & Reilly P, A Survey of Medical Directors of Life Insurance Companies Concerning Use of Genetic Information, 53 Am. J. Hum. Genet. 33 (1993).

<sup>15</sup> Marshall E, Genetic Testing Set for Takeoff, 265 Science 464 (1994).

Act is required before such information can be disclosed. The Act specifically provides that a general authorization for disclosure of medical information does not fulfill this requirement [section 112(f)]. Consequently, a provider disclosing medical information to an insurer, an employer, or any other person, must be careful that private genetic information is not disclosed along with other information unless it has been specifically authorized. Those who maintain medical records that include private genetic information as defined by the Act, must develop record keeping policies and procedures that adequately guard against wrongful disclosures of such information under general releases of medical information.

A rule that would require complete segregation of private genetic information from medical records would facilitate compliance with these provisions. Nonetheless, we believe such a statutory requirement is neither practical nor advisable. At least some private genetic information may be necessary for the provision of adequate and appropriate medical treatment. Inclusion of such information in medical records is, therefore, left to the discretion of providers and the developing standards of care. Disclosure of such information, on the other hand, is not discretionary and can only be made when the individual specifically authorizes it, and when the purpose of the disclosure has been explicitly documented. Nothing in these provisions, however, would require that providers disclose private genetic information, if to do so would conflict with any other law or professional ethics.

Accommodating the provisions of these sections should not be burdensome on those who maintain such information whether or not it is incorporated in medical records. Developing authorization forms that meet these requirements should not be any more difficult than development of forms and procedures so as to comply with federal regulations governing the confidentiality of alcohol and substance abuse treatment, as well as other laws governing medical records.<sup>16</sup> Since most medical records in the future are likely to be maintained in electronic format, it should be feasible to program record keeping so that private genetic information can be deleted from records prior to release under a general authorization.

**Sec. 113. INSPECTION AND COPYING OF RECORDS CONTAINING PRIVATE GENETIC INFORMATION**

**(a) INSPECTION OF RECORDS.** — Except as otherwise provided in section 131(c)(2) and 131(f), a person who maintains private genetic information shall upon written request permit the sample source or the sample source's representative to inspect records containing private genetic information and shall provide a copy of any such records upon request by the sample source or the sample source's representative.

**(b) RESPONSE TO REQUEST EXAMINATION AND COPYING OF INFORMATION.** — Upon receipt of a written request from a sample source or the sample source's representative to inspect or copy all or part of records containing private genetic information, a person as promptly as required under the circumstances but no later than 30 business days after receiving the request, shall make the information available to the sample source or the sample source's representative for inspection during regular business hours or provide a copy, if requested, to the individual.

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<sup>16</sup> See, 42 CFR § 2.31 (1993) for contents of written consent to disclosure of substance abuse treatment information under the regulations and a sample form.

(c) EXPLANATION OF TERMS AND CODES. - A person shall provide an explanation of terms and any code or abbreviations used in records containing the private genetic information upon request of the sample source or the sample source's representative.

(d) FEE. - A person may charge a reasonable fee, not to exceed the person's actual duplication cost, for copies of records which are provided.

This section requires that anyone maintaining records that include private genetic information permit a sample source or that individual's representative to inspect and obtain copies of such records. These information practices echo the provisions of state laws governing access to medical records and proposed federal legislation.<sup>17</sup> However, the Act differs from such models in one significant respect. Several laws grant health care providers discretion to deny inspection of medical information in particular circumstances. For instance, under some statutes, it is within the discretion of a provider to withhold inspection of records that include mental health or psychiatric information, and to provide a summary to the patient instead, or to allow inspection by a representative of the patient.<sup>18</sup> The presumption behind such

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<sup>17</sup> See, e.g., Uniform Health Care Information Act §§ 3-101, 3-102, 9 U. L. A. 499, 501 (1988) (requiring that health care providers permit patients examine and copy records except in particular circumstances); Health Information Model Legislation § 106(b)(6) (Am. H. Info. Manag. Assoc.) (providing that patients may have access to health care information); Mass. Gen. Laws Ann. ch. 112 § 12CC (West 1993); Fair Health Information Practices Act §§ 111,112, H. R. 4077 103Rd Cong. 2d Sess. (1994) (requiring health information trustees to permit individuals to inspect and copy most health information).

<sup>18</sup> See, e.g., Mass. Gen. Laws Ann. ch. 112 § 12CC (permitting provider to withhold inspection of psychotherapy records when in the exercise of reasonable professional judgment, seeing these

discretion is that the provider is able to determine if, and when, access to such information would be harmful to the patient.

In contrast, the Act's general obligation on the holder of private genetic information to permit a sample source or that individual's legal representative to inspect records containing such information, is modified by two narrow exceptions that apply only to research activities. These sections, 131(f) and 131(c)(2) are discussed below.

#### Sec. 114. AMENDMENT OF RECORDS

(a) IN GENERAL. — Within 45 days of receipt of a written request by a sample source or a sample source's representative to correct or amend in whole or in part any record containing private genetic information, a person who maintains records containing private genetic information shall:

(1) make the correction or amendment requested;

(2) inform the individual that the correction or amendment has been made;

(3) make reasonable efforts to inform any person to whom the uncorrected or unamended portion of the information was previously disclosed of the correction or amendment that has been made; and

(4) at the request of the individual, make reasonable efforts to inform any known source of the uncorrected or unamended portion of the information about the correction or amendment that has been made.

(b) REASONS FOR REFUSAL AND REVIEW PROCEDURES. — If correction or amendment is refused, the person maintaining the records

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records would adversely affect the patient's well being; on request of the patient, however, the total record is to be made available to an attorney or another therapist.) In its Report on the Health Security Act, H.R. 3600, the Committee on Government Operations recommended amendment to include provisions of H.R. 4077 which allow withholding of seven categories of information from patients who request record inspection, H.R. Rptr. No. 601, 103d Cong., 2d Sess. Pt. 5, pp.25-26 (1994).

shall inform the sample source or the sample source's representative of:

(1) the reasons for the refusal of the person to make corrections or amendment;

(2) any procedures for further review of such refusal; and

(3) the individual's right to file with the person a concise statement setting forth the requested correction or amendment and the individual's reasons for disagreeing with the refusal of the person to make the correction or amendment.

(c) STANDARDS FOR CORRECTION OR AMENDMENT. — A person maintaining records containing private genetic information shall correct or amend information in accordance with a request made under subsection (a) if the information is not accurate or complete for the purposes for which the information may be used or disclosed by the person.

(d) STATEMENT OF DISAGREEMENT. — After a sample source or a sample source's representative has filed a statement of disagreement under subsection (b)(3), the person, in any subsequent disclosure of the disputed portion of the information, shall include a copy of the individual's statement and may include a statement of the reasons for not making the requested correction or amendment.

This section includes provisions for processing requests for correction or amendment of information in records that contain private genetic information. The specific details in this section have been adapted from similar provisions in the Fair Health Information Practices Act of 1994.<sup>19</sup> They require the holder of records to make corrections or inform the individual of any reason for refusal to do so. Records should be corrected if the

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<sup>19</sup> H.R. 4077. After introduction by Rep. Gary Condit in March, 1994, hearings were held by the Subcommittee on Information, Justice, Transportation and Agriculture, Committee on Government Operations, U.S. House of Representatives. The provisions of this bill form the basis for the Fair Health Information Practices Part of amendments to the Health Security Act (H.R. 3600) as reported in H.R. Rep. No. 601, 103d Cong., 2d Sess., Pt. 5, p.101 (1994).

information is not accurate or complete for the purposes for which it may be used or disclosed. When the holder refuses to amend or correct records, the sample source must be informed of further procedures that are available for review of the refusal, and in the event that the dispute is not resolved subsequent disclosures of the information must be accompanied by a statement of the sample source's disagreement with the accuracy of the information.

Most people will not know enough about genetics or DNA analysis to be able to question the correctness of private genetic information. Awareness of an inaccuracy may occur when the sample source has had more than one genetic analysis done and the results of both are incompatible or contradictory, placing the accuracy of at least one test in question. Because others may make decisions regarding the sample source based on this information, and records containing private genetic information may not be governed by any other rules that require correction of information, it is important that mechanisms be in place to ensure the accuracy of such information and prevent hardships due to disclosure of inaccurate records.

#### Sec. 115. DISCLOSURES PURSUANT TO COMPULSORY PROCESS

(a) PROCEEDINGS IN WHICH AVAILABLE. — No person who maintains private genetic information may be compelled to disclose such information pursuant to a request for compulsory disclosure in any judicial, legislative, or administrative proceeding, unless:

(1) The person maintaining the genetic information has received the authorization of the sample source or the sample source's representative to release the information in response to such request for compulsory disclosure;

(2) The sample source or the sample source's representative is a party to the proceeding and the private genetic information is at issue; or

(3) The genetic information is for use in a law enforcement proceeding or investigation in which the person maintaining the information is the subject or party.

(b) NOTICE. - If genetic information is sought under subparagraph (2) of subsection (a), or in a proceeding or investigation pursuant to subparagraph (3) of subsection (a), the person requesting compulsory disclosure shall serve upon the person maintaining the genetic information, and upon the sample source, the sample source's representative, or on the sample source's attorney, the original or a copy of the compulsory disclosure request at least thirty (30) days in advance of the date on which compulsory disclosure is requested, and a statement of the right of the sample source or sample source's representative, and of the person maintaining the genetic information, to have any objections to such compulsory disclosure heard by such court or governmental agency prior to the issuance of an order for such compulsory disclosure, and the procedure to be followed to have any such objections heard. Such service shall be made by certified mail, return receipt requested, or by hand delivery, in addition to any form of service required by applicable state or federal law.

(c) CERTIFICATION. - Service of compulsory process or discovery requests upon a person maintaining private genetic information must be accompanied by a written certification, signed by the person seeking to obtain the private genetic information or his or her authorized representative, identifying at least one subparagraph of subsection (a) under which compulsory process or discovery is being sought. The certification must also state, in the case of information sought under subparagraphs (2) or (3) of subsection (a), that the requirements under subsection (b) for notice have been met. A person may sign the certification only if the person reasonably believes that the subparagraph of subsection (a) identified in the certification provides an appropriate basis for the use of discovery or compulsory process. A copy of the written certification shall be maintained as a permanent part of the records of private genetic information.

(d) STANDARD FOR ISSUANCE OF ORDER. - An order under this section may only be entered by a court of competent jurisdiction after a hearing and determination that good cause exists. To make this determination the court must find that:

(1) other ways of obtaining the private genetic

information are not available or would not be effective; and

(2) there is a compelling need for the private genetic information which outweighs the potential harm to the privacy interest of the subject of the information.

(e) CONTENT OF ORDER. - An order under this section which authorizes disclosure of private genetic information must:

(1) limit disclosure to those parts of records containing such information which are essential to fulfill the objective of the order;

(2) limit disclosure to those persons whose need for the information is the basis of the order;

(3) require the deletion of individual identifiers from any documents made available to the public; and

(4) include such other measures as are necessary to limit disclosure for the protection of the subject of the information including, but not be limited to, sealing from public scrutiny the record or any portion of the record of any proceeding for which disclosure of the information has been ordered.

Despite the fact that an individual discloses personal information to others with the expectation and intention that the recipient of the information will keep it confidential, the law may not recognize the information as privileged and therefore beyond compelled discovery in legal proceedings. Even communications to a physician, psychotherapist or other health care professionals which often fall under the protection of a state statutory privilege, are not absolutely protected from compelled disclosure. In some circumstances courts have determined that a litigant's need for medical information outweighs the patient's privacy interest, and that claims of privilege, even when they can be invoked, do not always protect records containing such

information from discovery.<sup>20</sup>

Just as discovery of medical records has been sought in the past, there will be situations in which an individual or entity will seek to obtain records containing private genetic information through compulsory process. Under the Act, disclosure of private genetic information contained in any records, however, can be compelled only in limited circumstances. First, if the sample source has authorized release of the information in response to a request for the compulsory disclosure, the holder of the information can be compelled to comply with the request. [section 115(a)(1)] Additionally, when the sample source is a party to a proceeding and the private genetic information is at issue, the disclosure can be compelled. [section 115(a)(2)] For instance, in an action for medical malpractice or negligent DNA analysis, this information may be necessary to prove or disprove the validity of the claim.

Finally, the disclosure may be compelled if the person who holds the information is under investigation for committing a crime. [section 115(a)(3)] Fraud is the most likely crime in which the holder of private genetic information would be under investigation and prosecution. The standards applied by particular courts in Medicare and Medicaid fraud cases are helpful in developing an appropriate standard for compelled discovery of

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<sup>20</sup> See, e.g., *Terre Haute Regional Hospital v. Trueblood*, 600 N.E.2d 1358 (Ind. 1992) (permitting discovery of medical records of non-party patients but nonetheless requiring that identity of patients be redacted from them).

private genetic information and balancing the state's interest against the privacy interests of the individual subjects of the information.

Assertion of a statutory physician-patient privilege, or psychotherapist-patient privilege, so as to bar compelled production in fraud cases has had various degrees of success in protecting private patient information. A few courts that have determined that the state interest in preventing fraud warrants compelled disclosures of otherwise privileged information have also sought to protect patient privacy by limiting the specific information that must be disclosed, and rejected requests for entire records. Even in cases involving psychotherapy records, however, which are sometimes afforded special protection out of deference to the extremely personal nature of the communication, courts have not applied consistent and explicit standards to protect patient privacy.

In resolving the conflict between federal Medicaid law and the psychotherapist-patient privilege, a Massachusetts court held that production of psychotherapy records can be compelled in a prosecution for fraud, but only to the extent that they are "necessary fully to disclose the extent of the services provided."<sup>21</sup> Records that meet this criterion were further determined to include documentation of the time and lengths of appointments, fees, diagnoses, treatment plans, recommendations and somatic therapies. In contrast, records reflecting the patient's

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<sup>21</sup> Commonwealth v. Kobrin, 479 N.E.2d 674 (Mass. 1985).

thoughts and feelings could not be compelled since they were of no concern to the legitimate investigation. Other courts have viewed the disclosure of patient records as an all or nothing matter, and not bothered to distinguish between kinds of information contained in the records sought.<sup>22</sup>

To avoid similar inconsistency and overly broad compulsory disclosure in cases where private genetic information is sought, the Act sets forth specific requirements for those seeking such disclosure, and the standard for courts to apply in considering objections to such disclosures. The provisions of section 115(b) - (e) establish notice procedures for those who seek disclosure of private genetic information through compulsory process for use in criminal investigations and for proceedings in which the genetic condition of a party is at issue. They are intended to ensure that the individual who is the subject of the information has the opportunity to object to the disclosure and protect his or her individual interests. To avoid abrogation of the privacy interests of the sample source, the Act further requires that prior to compelled disclosure, the court must find that there is no other available and effective way to get the information that is sought, and that there is a compelling need for the information. [section 115(d)]

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<sup>22</sup> Khajezadeh D, Patient Confidentiality Statutes in Medicare and Medicaid Fraud Investigations, 13 Am. J. L. & Med. 105, 120-121 (1987) In some cases the court has simply noted that disclosures are limited to the purposes connected to the plan's administration without any specific guidance as to which informational components of patient records meet particular purposes of the plan.

Additionally, even when such findings have been made, the subsequent order must direct that all individual identifiers be deleted from documents which will be available to the public and any other measures that the court determines are necessary to protect the privacy of the sample source. [section 115(e)]

## PART C

### EXCEPTIONS FOR IDENTIFICATION AND COURT-ORDERED GENETIC ANALYSIS.

#### Sec. 121. IDENTIFICATION OF DEAD BODIES

Notwithstanding any other provisions of this Act, a person may provide access to an individually identifiable DNA sample, or to data derived from DNA typing, to assist in the identification of a dead body, provided further that the analysis of any sample so provided and the analysis of a DNA sample from the dead body is limited to that which is necessary to determine the identity of the dead body.

#### Sec. 122. IDENTIFICATION FOR LAW ENFORCEMENT PURPOSES.

Nothing in this Act shall be construed to prohibit federal, state or local law enforcement authorities from collecting, storing or typing DNA samples, when:

(a) the collection, storage and typing of DNA samples is authorized under federal or state law;

(b) collection, storage and typing of such samples is limited to the purpose of matching DNA samples in criminal investigations; and

(c) access to such DNA samples is limited to authorized law enforcement agencies, prosecutors, defense counsel, defendants, accused individuals, suspects, and their authorized agents.

These sections contain two related exceptions to the general rule which requires written authorization prior to the collection, storage and analysis of DNA. Both exceptions are allowed because

of the limitation on the kind of DNA analysis which can be conducted and consequently on the kind of information that is created. The genetic analysis which is permitted is referred to in the statute as "DNA typing" and has been discussed in the comments on the definitions used in this statute. DNA typing is a method used for purposes of identification and should not create any other information about the person who is the source of the DNA. Consequently, the privacy concerns raised by creation and disclosure of other genetic information do not apply to this specific type of analysis and the resultant profile.

Section 121, therefore, permits the performance of DNA typing on samples solely for the purpose of identifying a dead body. Reliance on this exception will rarely be necessary for practical reasons. First, it would only be applicable when there is reason to believe that the sample source is the decedent and a DNA sample had been collected from the suspected individual before discovery of the unidentified body. Secondly, it is likely that currently utilized methods of identification, such as matching of dental records with remains, will continue to be more readily available and cost effective than DNA typing. However, to accommodate those rare instances in which other methods are unavailable, not practicable, or more burdensome than DNA typing, the Act allows DNA typing for this purpose, and permits access to the results of DNA typing without individual authorization.

The second area in which DNA typing is permitted without the authorization of the sample source (or that person's legal

representative), is when the analysis is in relation to criminal law enforcement activities. As of the drafting of this Act, 19 states have enacted laws which authorize the creation of forensic DNA banks for storage of DNA samples and data. These laws vary, both in terms of the circumstances under which individuals can be required to submit to the collection of samples, and the evidentiary use of the genetic profiles that result.<sup>23</sup>

The public benefit versus the threat to individual privacy that will ultimately be realized from creation of DNA banks for such forensic use has been widely argued. Controversy surrounds not only the reliability of the technology involved, and the admissibility of evidence derived from such techniques,<sup>24</sup> but also the erosion of privacy that is seen as the inevitable creation of national DNA databanks.<sup>25</sup> Although such concerns may be well founded, it is not within the scope of this Act to resolve all the legal and policy issues presented by the provisions in a particular state statute or the concept of forensic DNA banking in general. The provisions contained in section 122 are, however, intended to specify when collection and analysis of DNA for forensic use does not implicate privacy interests, and consequently could be conducted without infringing on the individual rights created by

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<sup>23</sup> For description of the range of law enforcement activities in which collection and analysis is allowed under various state laws see McEwen J & Reilly P, A Review of State Legislation on DNA Forensic Databanking, 54 Am. J. Hum. Genet. 941 (1994).

<sup>24</sup> See generally, Thompson, *supra* note 3.

<sup>25</sup> Shapiro ED & Weinberg ML, DNA Data Banking: The Dangerous Erosion of Privacy, 38 Cleve. St. L. Rev. 455, 477 (1990).

this Act. Indeed, the fact that DNA in the custody of forensic DNA databanks cannot be lawfully analyzed except for identification purposes under the provisions of the Act, may make the existence of such forensic DNA data banks less troubling. In addition, the Violent Crime Control and Law Enforcement Act of 1994 (P.L.103-322, sec. 120305) prohibits the disclosure or obtaining of personally identifiable DNA information from samples held for law enforcement purposes, with a fine of up to \$100,000 for violations.

Although the word "fingerprinting" is often used in regard to the kind of analysis that is involved in law enforcement, it is misleading to perpetuate the use of this benign term in regard to genetic analysis. Consequently, we have intentionally chosen to use the term DNA typing in these provisions. Traditional fingerprinting consists of copying lines from fingertips and examining them to see if they match another print. There is no other use that can be made of the material that makes up the "print," and no other information except identification can be obtained from it. DNA typing, by contrast, is one of several kinds of analysis or methods for deciphering information encoded in the material that is collected. In regard to the privacy interests of the person whose DNA is collected, this distinction is of extreme significance. Fingerprinting is only useful for identification, whereas DNA can be analyzed for a multitude of purposes.<sup>26</sup>

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<sup>26</sup> U.S. v. Laub Baking Company, 283 F.Supp. 217 (1968) (rejecting claims that fingerprinting violates rights against self-incrimination, unreasonable search and seizure, and right of privacy).

In recognition of these distinctions, this section states that nothing in the Act shall be construed as prohibiting the collection, storage or typing of DNA samples when three criteria have been met. First, the collection, storage and typing of the DNA samples must be authorized by other federal or state law. This exception would therefore not be applicable to local law enforcement use in the approximately 30 states which have yet to authorize forensic DNA banking. Secondly, the purpose for which the applicable law authorizes such activities is restricted to the matching of samples in criminal investigations. Lastly, the access to collected samples must be limited to authorized law enforcement agencies, prosecutors, defense counsel, defendants, accused individuals, suspects, and their authorized agents.

These restrictions will prevent law enforcement authorities from obtaining private genetic information about individuals. A state law which is invoked as the basis for this exception cannot authorize a DNA analysis which reveals the presence of disease genes or markers associated with a disease. Nor could it permit use of DNA samples to create suspect profiles through use of probes for any other genetic characteristic.<sup>27</sup>

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<sup>27</sup> Private genetic information could be developed under such laws because state statutes that authorize the establishment of forensic DNA databanks differ in defining the scope of authority to conduct DNA analysis in connection with such banking. For example, while Michigan identifies the process that is authorized as "DNA identification profiling" which is a "validated scientific method of analyzing components of deoxyribonucleic acid molecules for the purpose of identifying the pattern of the components' chemical structure that is unique to an individual" Mich. Comp. Law § 28.172 (1992), not all states are as specific. Alabama's statute, which authorizes the establishment of that state's forensic databank,

Sec. 123. COLLECTION AND ANALYSIS OF DNA SAMPLES PURSUANT TO COURT ORDERED ANALYSIS

(a) IN GENERAL.— Nothing in this Act shall be construed to prohibit the collection or analysis of an individually identifiable DNA sample pursuant to Rule 35 of the Federal Rules of Civil Procedure or comparable rules of other courts or administrative agencies in connection with litigation or proceeding to which the sample source is a party and in which the genetic condition of the sample source has been placed at issue, provided that the conditions in section (b) have been met.

(b) ISSUANCE OF ORDERS. — An order under Rule 35 of the Federal Rules of Civil Procedure or comparable rules may only be made:

(1) upon motion for good cause shown and upon notice to the sample source or the sample source's representative and all parties; and

(2) the order must specify:

(A) the manner of collection of the DNA sample;

(B) the person or persons authorized to collect and analyze the sample;

(C) the purpose of the genetic analysis;

(D) that the genetic analysis is limited to that which is necessary to fulfill the purpose of the order; and

(E) that the person conducting the analysis destroy the sample at the earliest possible opportunity consistent with the purpose of that order.

This section applies to situations in which the genetic condition of an individual has been raised as an issue in a court proceeding and the individual, who is a party to the proceeding,

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states that "the Alabama Department of Forensic Sciences should be authorized and empowered to analyze, type and record any and all genetic markers contained in or derived from DNA and to create a statewide DNA database system for collection, storage and maintenance of genetic identification information as the same may pertain to the identification of criminal suspects." Code of Ala. 36-18-20 (1994).

will not voluntarily submit to genetic analysis to resolve the disputed facts. When the physical or mental condition of a party to a proceeding is at issue, the authority of the court to order the individual to submit to an examination is governed by Rule 35 of the Federal Rules of Civil Procedure or a comparable state procedural rule. This section restates the provisions of the federal rule with some modification to accommodate the special privacy concerns that are raised by DNA analysis regardless of whether or not it is voluntarily undertaken.

A special section regarding paternity cases and court ordered genetic tests to determine paternity is unnecessary because section 123 applies to all cases in which the genetic condition of a party is at issue. If one or more of the parties to the action does not voluntarily submit to testing, then in the language of section 123 (a), "nothing in this Act shall be construed to prohibit the collection or analysis of an individually identifiable DNA sample pursuant to Rule 35 or the Federal Rules of Civil Procedure or comparable rules of other courts or administrative agencies... provided the conditions in section (b) have been met."<sup>28</sup>

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<sup>28</sup> The only circumstance in which paternity tests involving genetic analysis would fall outside of this provision, and this Act could be construed as prohibiting them, would be if an order for such tests was not issued under Rule 35 or what was considered a "comparable rule". Paternity actions are routinely brought as civil actions in most states. Even when paternity is one element to be proven in a criminal action for failure to pay support by an enforcement agency, the civil rules of procedure are often applied. Some states, such as Ohio, have specific statutes regarding authority to issue orders for paternity testing on motion to the court. For example, ORCA § 2317.47 (referring to blood tests in paternity actions) and ORCA § 3111.09 (containing similar provisions for genetic tests in paternity actions). The

Section 123(a) clarifies that genetic analysis can be ordered by a court in circumstances similar to those in which a physical examination can be ordered. However, an order that issues under this rule must be specific in regard to the manner of collection of the DNA sample, the person who is authorized to collect and analyze the sample, and the purpose of the genetic analysis. [section 123(b)(2)(A)-(C)] Additionally, to prevent creation and disclosure of irrelevant genetic information, the analysis that is ordered must be limited to that which is necessary to fulfill the purpose of the order [section 123(b)(2)(D)] and the person who is conducting the analysis must destroy the DNA sample at the earliest possible opportunity consistent with the purpose of the order.

It should be noted that these provisions do not authorize compulsory collection and analysis of DNA. Rather, failure to comply with court mandated DNA testing would lead to the dismissal of the lawsuit of the plaintiff who refuses testing or a finding against the defendant based on other available evidence and inference drawn from the refusal to comply.

A recent example of a case in which this section would have applied, if it had already been enacted, arose in California. A

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consequences of willful failure to obey a court order under these circumstances includes having the refusal disclosed in trial or permitting the court to issue an order determining paternity without genetic testing. ORCA § 3111.09

Most DNA identification tests are currently done to determine paternity; more than 100,000 a year for paternity and less than 10,000 for use in a criminal proceeding. Bishop JE, How DNA Scientists Help Track Criminals and Clear the Innocent, Wall St. J., Jan. 6, 1995, p.1.

woman filed suit against a former employer claiming that her son's developmental disability stems from her workplace exposure during pregnancy to a solvent called methylethylketone (MEK). The defense has contended that a genetic condition, Fragile X syndrome, and not the exposure, is the cause of his difficulties, and the judge has ordered that the son undergo genetic tests to determine whether an inherited gene or her exposure to the solvent, caused his disability.<sup>29</sup> If the order had issued pursuant to section 123 of the Act, it would have specified that the purpose of the analysis was to determine the presence of Fragile X, and the analysis itself would have been limited to that which is necessary to determine the presence of the gene or gene markers responsible for Fragile X. The analysis could not, for example, have utilized any multiplex test which would produce information on any other gene or genetic condition. In addition, if the determination could have been made by chromosomal examination, without an actual DNA analysis, then it would have been limited to that process.

This is probably the first personal injury case in which a court has ordered genetic analysis. It is, however, likely that as more is known about the genetic component of diseases, particularly cancers that are also associated with exposure to toxic substances, more defendants will seek genetic analysis of plaintiffs.

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<sup>29</sup> Lewis, Under a Genetic Cloud, Boston Globe, August 14, 1994, p.A1. The named plaintiff, Le Ann Sevenson, filed suit in Santa Clara against KTI Chemicals, Inc.

## PART D

### RESEARCH ACTIVITIES

#### Sec. 131. RESEARCH INVOLVING GENETIC ANALYSIS

(a) CONDITIONS FOR A GENETIC ANALYSIS. — Except as provided in section 133 no individually identifiable DNA sample shall be analyzed as part of a research project unless an Institutional Review Board has determined that:

(1) use of individually identifiable DNA samples is essential to the research project;

(2) the potential benefit of the research project outweighs the potential risks to the subjects including psychosocial risks and intrusion into the privacy of the subjects that would result from analysis of individually identifiable samples;

(3) the research protocol

(A) contains adequate safeguards to protect against disclosure of private genetic information that is generated by the research;

(B) requires that research subjects will be given the applicable information set forth in section 101 of this Act in addition to the informed consent requirements contained in 45 CFR 46.116 (1992) as such regulation may be amended;

(C) requires the written authorization of research subjects that includes the applicable requirements of section 103 of this Act; and

(D) prohibits inclusion of research records in medical records unless the sample source or the sample source's representative authorizes such inclusion in writing.

(b) SAFEGUARDS AGAINST DISCLOSURES OF PRIVATE GENETIC INFORMATION. — For purposes of subparagraph (3)(A) of subsection (a) of this section, adequate safeguards against disclosure of private genetic information include but are not limited to:

(1) obtaining a certificate of confidentiality from the Secretary of Health and Human Services as provided in 42 U.S.C. § 241(d) as such statute may be amended;

(2) ensuring that research subjects will not be identifiable in any report or publication which results from

the research; and

(3) having procedures to remove or destroy at the earliest opportunity consistent with the purposes of the project, information that would enable a sample source to be identified.

(c) FURTHER LIMITATIONS ON RESEARCH INVOLVING INDIVIDUALS UNDER 18. — No research shall be conducted on individually identifiable DNA samples when the sample source is under 18 years of age unless:

(1) a parent or guardian is given the applicable information set forth in section 101 of this Act;

(2) a parent or guardian executes an authorization that includes the applicable requirements of section 103 of this Act and which specifically states that the parent or guardian understands and agrees that unless the analysis reveals a genetic condition which in reasonable medical judgment can only be effectively ameliorated, prevented or treated while the sample source is under 18 years of age, the results of the analysis will not be disclosed to the parent or guardian of the sample source; and

(3) any provisions for soliciting the assent of minors as contained in 45 CFR § 46.408 as such regulation may be amended which the Institutional Review Board determines to be applicable are met.

(d) DESTRUCTION OF DNA SAMPLES OR IDENTIFIERS.

(1) GENERALLY. -- In the absence of a specific authorization to maintain an individually identifiable DNA sample, individually identifiable DNA samples collected, stored or analyzed in connection with a research project shall be destroyed upon completion of the project or withdrawal of the sample source from the project, whichever occurs first.

(2) EXCEPTION. -- Whenever the authorization for collection, storage or analysis of an individually identifiable DNA sample does not contain a prohibition against research use of the sample when it is no longer linked to any individual identifier, the person in possession of the sample may destroy all individual identifiers linking the sample to the sample source instead of destroying the sample as required by subsection (1)....

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[subpart on pedigree analysis discussed at p.101]

(g) USE OF UNIDENTIFIABLE DNA SAMPLES NOT PROHIBITED. — Except as provided in section 103 (a)(8), nothing in this Act shall be construed as prohibiting or limiting research on a DNA sample that cannot be linked to any individual identifier.

The provisions included in this part are detailed, and modify and adapt the general rules about the collection, storage, and analysis of DNA in the research setting. By setting forth detailed rules that govern use of individually identifiable DNA samples in research, the Act takes some of the burden off researchers who would otherwise have to develop guidelines for individual projects on a case by case basis. Moreover, nothing in the Act prohibits or limits the use of non-identifiable DNA samples in research [see section 131(g)]. Minors are treated differently in the context of research than elsewhere. Parental authority to authorize analysis of a child's DNA, although not absolute in any circumstances (see discussion in regard to section 141), is restricted in the context of research in unique ways.

This section incorporates by reference and builds upon the requirements of the Federal Policy for the Protection of Human Subjects, which apply to 16 federal departments and agencies that conduct or support research involving human subjects.<sup>30</sup> The rules presented here, however, are applicable to research regardless of whether it is conducted under federal support and regulation, or is financed entirely by private sources.

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<sup>30</sup> The Common Rule, based on the regulations of the Department of Health and Human Services (see 45 CFR Part 46) has been adopted in whole or as modified by individual departments and agencies. For a particular agency's version, see 56 Fed. Reg. 28019-28031 (1991).

The section requires as a condition to analysis of an individually identifiable DNA sample in research that an Institutional Review Board (IRB) must make certain determinations. First, use of such samples must be essential to the project. This creates an initial barrier against using genetic analysis unnecessarily. Furthermore, the potential benefit of the project must outweigh the risks to the subjects. Although this requirement is not novel, in weighing these risks, the IRB must consider the psychosocial risks and intrusion into the privacy of the subjects which would result from an analysis. [section 131(a)(2)] This consideration has been specifically included because the risk that might otherwise be focused on is that presented by the relatively non-invasive procedures used to collect specimens that contain DNA, such as taking of blood or extrapolation of hair or tissue samples. In this area of genetic research it is the information that results from the analysis itself, and not a procedure performed on the subjects, which presents the risk to an individual's privacy and well-being.

To guard against needlessly exposing subjects to these risks, the IRB must determine that the research protocol has adequate safeguards to protect against disclosure of private genetic information created as a result of an analysis. Although the statute does not contain an exhaustive list of safeguards, it notes three specifically: obtaining a certificate of confidentiality from the Secretary of Health and Human Services pursuant to 42 U.S.C. § 241(d) (which would protect the identity of the subjects

from any compelled disclosure); ensuring that subjects will not be identified in publications or reports; and limiting the length of time that identifying information is maintained by destroying identifiers at the earliest possible time consistent with the purpose of the project. [section 131(b)]

Samples which no longer exist pose no threat of unauthorized analysis, therefore section 131(d) also requires that individually identifiable samples be destroyed on completion of the project or withdrawal of the sample source from participation, or that all individual identifiers be removed. This requirement can only be modified by the specific authorization of a sample source. As a result, projects which intend or anticipate secondary use of samples must obtain authorization to store samples beyond the initial analysis for use in any follow-up studies.

Use of DNA samples is further restricted when it involves subjects who are under 18 years of age. Section 131(c) requires that prior to authorization for collection and analysis of the DNA of a minor under 18, the parent or guardian must receive the information in section 101 which is applicable to the circumstances. Furthermore, the statute contains a limitation in regard to the information that the parent or guardian who authorized the analysis of the child's DNA can obtain from the person who conducts the research. This limitation is unique, and is one of the few exceptions to the general policy of giving the person who authorizes an analysis access to the all the information that results. Pursuant to this rule, although the parent or

guardian must execute an authorization that is similar to one that is required by the basic rules, the authorization itself must contain one additional limitation. That is, the parent or guardian must agree that the results of the analysis can be withheld from the parent under certain conditions. If the analysis reveals a genetic condition which "in reasonable medical judgment cannot be ameliorated, prevented or treated while the sample source is under 18" [Section 131(c)(2)] the parent or guardian has no right to access that information. (See discussion on children at page 110, *infra*.)

Section 131(c) authorizes both parents and guardians to provide permission for research with minors. There is some question whether guardians should have this authority. The reason for limiting such authority solely to parents is that genetic research may unveil information about other family members and therefore a parent would be in the best position to determine whether or not this ought to be done. Furthermore, as a result of their parental role, it is likely that parents would be best situated to protect the interests of their minor children. It is also not apparent that limiting research to that which could only be performed on children with parental permission would limit genetic research with children. While such a limitation would exclude some particular children from being research subjects, it is not clear that requiring parental permission would eliminate the possibility of conducting an entire research project. There are, therefore, good arguments that guardian permission should not be

sufficient for authorizing genetic research with children. However, we have included guardian authorization for genetic research with children to be consistent with the federal rules and because we were not sure if excluding guardian permission would, in fact, cut off some avenues of important research. However, where a genetic research project can be conducted with children with an available parent we think it would be appropriate for IRBs to exclude as subjects children who have guardians.

**Sec. 131. (e) PEDIGREE ANALYSIS AND FAMILY LINKAGE STUDIES.**  
- When a research project includes analysis of DNA from family members for pedigree analysis or linkage analysis-

(1) the Institutional Review Board, in addition to making the determinations required in subsection (a) of this section, shall also require-

(A) that education and counseling regarding how pedigree analysis is conducted and the kind of information that results from such analysis is provided to research subjects; and

(B) that as far as practicable separate records are maintained on each subject.

(2) Prior to their participation, and in addition to the disclosures required by section 101 of this Act, subjects shall be-

(A) informed that one risk of their participation is that by the end of the project other family members may learn private genetic information about them;

(B) informed of what will be done with records and data generated during the project;

(C) informed that the project may determine that some members of their family are not genetic relatives.

Genetics can be thought of as the study of family information, and this is evident in research involving pedigree analysis.

Historically, this method has been used to search for a particular gene and often begins with the study of gene markers in families with members who have the condition or disease that is under investigation. Through the analysis of DNA of several individuals and across generations, inferences about the presence and transmission of genetic conditions are made. Huntington disease, adult polycystic kidney disease, and familial breast cancer, are examples of diseases that were thought to be caused by a gene, and those genes were eventually discovered through linkage analysis. Because of the design of such studies and the nature of the information that results, maintaining individual privacy and confidentiality of participants is particularly difficult. The rules set forth in section 131(e) are intended to address the peculiarities of these family studies and the preservation of individual privacy in this context. These rules fall into two general categories: those that require specific information be given to participants, and those that govern the manner in which the researcher maintains and discloses information that is developed.

When a research project will include pedigree or linkage analysis, in addition to all the other requirements contained in the previous sections, the IRB must also require that some education and counseling be provided to research subjects. This is intended to ensure that subjects are aware, before they agree to participate, of how pedigree analysis is conducted and the kind of information that it produces. [section 131(e) (1) (A)] Since results

of such studies usually consist of statistical probabilities regarding whether or not the subject carries a gene, such information may result in a greater sense of uncertainty than would have been expected by participants. Counseling provides the opportunity for individuals to identify and deal with such uncertainties.<sup>31</sup>

In addition, they must be told that one risk of participation is that others in the family may learn private genetic information about them. [section 131(e)(2)(A)] During the course of such study it may be impracticable, if not impossible, for information about one individual to be conveyed to that person without information about another being inferred in the process. For example, if individuals are told they have a marker that is linked to a disease causing gene or the probability that they have a disease causing gene, ensuing discussion may educate them on the probable transmission of the gene and by inference, the status of another individual. Before agreeing to participate, subjects also must be made aware that misattributed paternity can be discovered through the results of the DNA analysis of several family members. Consequently section 131(e)(2)(C) requires that they be told that the project may determine that some members of their family may not

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<sup>31</sup> This requirement coincides with the recommendations of the NIH Office for Protection from Research Risks that IRB make sure adequate counseling is provided to pedigree research participants on the meaning of the genetic information they receive so as to minimize the psychological risks of participation. National Institute of Health, *Protecting Human Research Subjects, Institutional Review Board Guidebook*, Washington, D.C.: U.S. Gov. Printing Office, 1993, pp. 5-54.

be genetic relatives.<sup>32</sup>

Despite the fact that participants in pedigree analysis and linkage analysis cannot be given a guarantee that no other family member will find out information about them in the course of the project, this does not mean that researchers are excused from making maximum efforts to maintain the confidential nature of information that is created. To assist with that endeavor section 131(e)(1)(B) instructs the IRB to require that, as far as practicable, individual records be maintained on each subject. Regardless of this rule, since the purpose of the project is to study the transmission of genes among family members, some pooling or compilation of information about several individuals in some records may be necessary. A charted pedigree which contains a shorthand version of information that has been extrapolated from the analyses of individual subjects is the most likely example. Unlike the family tree used in other genealogies, this pedigree may have notations that refer to the genetic condition of particular individuals and not just graphically represent innocuous information known to all members.

The researcher that creates group records, such as the charted pedigree, will be faced with a dilemma if an individual participant requests inspection of records containing his or her private genetic information and pursuant to section 113. On the one hand, access to such records containing information on the individual is

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<sup>32</sup> Revelation during the authorization process that such information may result from participation is also recommended by OPRR. *Id.*

mandated; on the other hand they also contain someone else's private genetic information. Therefore section 131(f) states that when complying with such a request, no person shall provide an individual member of the pedigree with private genetic information about another person without that person's authorization. Consequently, individuals can be denied access to their charted pedigree on the basis of this rule. This should not, however, prevent the holder from providing the individual with his or her own private genetic information. If the information is contained in other records which may not be examined, the holder can convey the information verbally or rewrite it. Of course, if everyone in the pedigree authorizes the disclosure of the pedigree itself, that too would fulfill the prerequisites to disclosure. On a practical level, however, it could be cumbersome and complicated for a researcher to obtain everyone's authorization. Rather than requiring that a researcher seek and obtain all participants' authorization, the Act permits the researcher to choose between denying inspection of the pedigree to participants or obtaining everyone's authorization.

Lastly, to enable subjects to exercise their rights regarding their private genetic information, they must be informed of what will happen to records and data generated during the project.

[131(e) (2) (B)]

**Sec. 132. DISCLOSURE OF PRIVATE GENETIC INFORMATION FOR RESEARCH PURPOSES**

**(a) IN GENERAL. — Any person who, in the ordinary course of business, practice of a profession, or rendering of a**

service, stores or maintains private genetic information is prohibited from allowing access to such information to researchers unless:

(1) an Institutional Review Board has approved the conduct of the research program or study; and

(2) the sample source or the sample source's representative has specifically consented to the access or disclosure of such information in an authorization that meets the requirements of section 112 of this Act.

(b) LIMITED ACCESS FOR STATISTICAL USE. — Notwithstanding the provisions of subsection (a), a person who stores or maintains private genetic information may grant access to such information solely for the purpose of inspection or review of records containing the information provided that:

(1) the inspection or review is for the purpose of compiling data for statistical or epidemiological studies and private genetic information is not to be copied, removed from the records, or redisclosed in any way; and

(2) the person conducting the inspection or review certifies in writing:

(A) that these limitations will be complied with; and

(B) to an awareness of their liability for violations of this Act.

Researchers' interest in private genetic information is not limited to information they create through DNA analysis, but includes information that already exists. Access to genetic disease information, for example, will be sought much in the same way that medical information has traditionally been accessed by researchers from patient records. In recognition of this interest, laws governing the confidentiality of such patient information instruct medical record keepers as to the conditions under which access to patient information can be granted. In deference to the societal benefits of medical research, such

disclosures can be permissible without the patient's knowledge or authorization.<sup>33</sup> One rationale for not requiring patient consent prior to disclosures to researchers is that lack of consent from some of the targeted patients could seriously bias the results of a research project, and raise questions as to the validity of conclusions drawn from the study.<sup>34</sup> While this concern may have merit, removing control from the patients places the control of private information in the hands of the keeper of the information, who may or may not be capable of appreciating the risks to the subjects of the information and representing their interests. This can be especially problematic when the patients whose information is sought belong to a vulnerable population whose interests are not as well represented as those of the general population. The provisions of this section are, therefore, intended to strike a balance between such competing interests, and to maximize

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<sup>33</sup> Examples include the Uniform Health Care Information Act § 52-104(a)(7), and H.R. 4077, § 128 *supra* note 17. These acts contain similar provisions for access for research use to patient information without the authorization of patients if an IRB has determined that the project's importance outweighs the intrusion into the patient's privacy, and that it would be impracticable to conduct the project without such information. Although 42 U.S.C. §290dd-2(b)(2) is less restrictive and permits disclosures of information regarding substance abuse treatment without patient authorization to "qualified personnel for purposes of conducting research", regulations under the same statute require that an independent panel of three persons determine the welfare of the patients will be adequately protected and that the risks in disclosure of alcohol and substance abuse treatment information are outweighed by the benefits of the research. 42 CFR § 2.51 (1993). None of these models is more specific in regard to what factors must be considered by the reviewer in conducting such balancing tests.

<sup>34</sup> H.R. Rep. No. 601, *supra* note 19, 124-125.

individual control over private genetic information. They also reflect the anticipation that genetic research will, more often than not, involve the analysis of DNA samples rather than the secondary use of information derived from such analysis.

Section 132(a) sets forth the general rule governing holders of private genetic information and states that access to researchers is prohibited unless an IRB has approved the conduct of the research and the sample source (or the sample source's representative) has authorized the access or disclosure. An exception to this general rule nevertheless permits access to records containing private genetic information when records are inspected for compiling data for statistical or epidemiological use only. In the process of compiling such data, however, no records containing identifiable private genetic information may be copied, and new records containing identifiable private genetic information cannot be created. [section 132(b)]

This exception accommodates the legitimate societal interest in such studies without risking unauthorized disclosure of information about an identifiable individual. To ensure that such access is not casually granted, the Act further requires that the person inspecting such records certify in writing that the limitations will be complied with, and that they are aware of liability for violations of these rules. [section 132(b)(2)] Of course, nothing in these provisions obligates a person who, in the ordinary course of business maintains records containing private genetic information, to provide such access to researchers.

Finally, this section does not limit access to records containing genetic information, if those records contain nonidentifiable genetic information only.

**Sec. 133. EXCEPTION FOR DNA SAMPLES PREVIOUSLY COLLECTED FROM DECEASED PERSONS**

(a) ANALYSIS PERMISSIBLE. — Notwithstanding the provisions of section 131, an individually identifiable DNA sample which was collected from a sample source who died prior to the effective date of this Act may be analyzed as part of a research project, but no individually identifiable genetic information may be disclosed without the authorization of the sample source's representative;

(b) DISCLOSURE TO RELATIVES. — If the analysis of a DNA sample permitted by subsection (a) determines that a relative of a deceased sample source is at risk for a genetic disease which in reasonable medical judgment can be effectively ameliorated, prevented, or treated, nothing in this Act shall be construed as prohibiting researchers from contacting such relatives and informing them of such risk provided that private genetic information about the sample source is not disclosed.

This section is needed because research affected by the Act may already be underway. Living sample sources can be contacted prior to analysis of their DNA samples for purposes of complying with this Act, deceased sources, of course, cannot.

Section 133(a) permits analysis of the DNA of an individual who died prior to the effective date of this Act, so long as no identifiable genetic information is disclosed by the researcher without the authorization of the sample source's representative, i.e., the executor or administrator of the decedent's estate. The executor of an estate has been recognized elsewhere as the person who can waive privilege when discovery of confidential

communications of a decedent are sought.<sup>35</sup>

This section additionally permits a researcher who analyzes the deceased person's DNA and in so doing determines that a relative of that person is at risk, to contact such individuals to tell them of that finding. The researcher may not, however, disclose private genetic information about the decedent. [section 133 (b)]

## PART E

### MINORS AND INCOMPETENT PERSONS

#### Sec. 141. AUTHORIZATION FOR COLLECTION AND ANALYSIS OF DNA FROM MINORS

(a) INDIVIDUALS UNDER 16. — Except as provided in sections 131(c) and 151, the individually identifiable DNA sample of a sample source who is under 16 years of age shall not be collected or analyzed to determine the existence of a gene that does not in reasonable medical judgment produce signs or symptoms of disease before the age of 16, unless:

- (1) there is an effective intervention that will prevent or delay the onset or ameliorate the severity of the disease; and
- (2) the intervention must be initiated before the age of 16 to be effective, and
- (3) the sample source's representative has received the disclosures required by section 101 of this Act and has executed a written authorization which meets the requirements of section 103 of this Act and which

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<sup>35</sup> Courts have held that an administrator of an estate can waive the attorney client privilege on behalf of the deceased in some instances. In the Matter of John Doe Grand Jury Investigation, 562 N.E.2d (Mass. 1990) Statutes can also vest authority in a decedent's personal representative to exercise the decisional right to waive psychiatrist-patient privilege. See, for example, Mont. Code Ann. 50-16-222 (1993) granting such authority in the personal representative, or if none available, in a surviving spouse, parent or adult child.

also limits the uses of such analysis to those permitted by this section.

(b) INDIVIDUALS AGE 16 OR 17. - Except as otherwise provided in sections 131(c) and 143, the individually identifiable DNA sample of a sample source who is 16 or 17 years of age may be collected and analyzed provided that-

(1) the sample source receives the information required by section 101 of this Act while accompanied by a parent or other adult family member; and

(2) the sample source executes a written authorization which meets the requirements of section 103 of this Act.

(c) DESTRUCTION OF DNA SAMPLES OF INDIVIDUALS UNDER 16. - A sample source's representative may, on behalf of a sample source who is under 16 years of age, order the destruction of a DNA sample collected pursuant to subsection (a) of this section.

#### Sec. 142. AUTHORIZATION FOR DISCLOSURE OF PRIVATE GENETIC INFORMATION ABOUT MINORS

(a) AUTHORIZATION REGARDING INDIVIDUALS AGE 16 OR 17. - Except as provided by section 144, private genetic information about an individual who is age 16 or 17 shall not be disclosed unless the sample source has executed a written authorization which meets the requirements of section 112.

(b) AUTHORIZATION REGARDING INDIVIDUALS UNDER 16. - Except as provided in section 152, private genetic information about a minor who is under 16 years of age shall not be disclosed unless a parent or other sample source's representative has executed a written authorization that meets the requirements of section 112.

The collection and genetic analysis of DNA from minors is governed by different standards depending on the circumstances, which fall into these general categories and are summarized in Table 1:

1. Rules that govern genetic analysis in the context of research and which apply to all minors (previously discussed and set forth in section 131);

2. Rules that govern genetic analysis in a non-research context and which apply to minors under the age of 16 [section 141(a)];

3. Rules that govern genetic analysis in a non-research context and which apply to minors age 16 and 17 [section 141(b)]; and

4. Rules that govern genetic analysis of DNA of pregnant minors (sections 151, 152).

**[Intentionally left blank]**

TABLE 1

COLLECTION AND ANALYSIS OF DNA FROM MINORS  
UNDER THE GENETIC PRIVACY ACT

	Research	Diagnosis and Treatment	
Sample source	Under 18	Under 16	Age 16 or 17
Whose authorization required prior to collection or analysis	parent or guardian	parent or guardian*	sample source
Limits on analysis that can be conducted	as in written authorization and general research rules	analysis prohibited for late onset diseases unless effective intervention	as in written authorization
Can parent inspect records containing results?	no, unless results indicate a condition that must be treated while person is under 18	yes *	no, unless sample source authorizes disclosure to parent
Whose authorization required for disclosure of PGI?	parent or guardian	parent or guardian	sample source
Who can order destruction of sample?	parent or guardian	parent or guardian*	sample source

\* unless sample source is pregnant and exercising rights of an adult sample source under the Act, sections 151 and 152.

The Act forbids the genetic testing of children for conditions that will not be manifested until after the child becomes an adult. This accords with the positions of others who have commented upon this topic. For example, the Institute of Medicine's report on Assessing Genetic Risks states:

Children should generally be tested only for genetic disorders for which there exists an effective curative or preventive treatment that must be instituted early in life to achieve maximum benefit. Childhood testing is not appropriate for carrier status, untreatable childhood diseases, and late onset diseases that cannot be prevented or forestalled by early treatment.<sup>36</sup>

Similarly, other commentators have said, "The only justification for doing predictive testing in childhood is if an advantage can clearly be demonstrated for the child.<sup>37</sup> These statements and the prohibition of such childhood testing are controversial because they remove authority from parents who may wish to have their offspring tested.

There are two reasons for this prohibition on the exercise of parental discretion. First, if someone learns that the child is a carrier of a gene that disposes the child to some condition later in life, this finding may subject the child to discrimination and stigmatization by both the parents and others who may learn of this fact. Second, a child's genetic status is the child's private genetic information and should not be determined or disclosed

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<sup>36</sup> Assessing Genetic Risks, *supra* note 7, at 10.

<sup>37</sup> Bloch M & Hayden MR, Opinion: Predictive Testing for Huntington Disease in Childhood: Challenges and Implications, 46 Am. J. Hum. Genet. 1-4 (1990).

unless there is some compelling reason to do so.

Parents have an enormous amount of discretion and authority when it comes to making child rearing decisions. Indeed, such authority has constitutional dimensions.<sup>38</sup> Parents are given this authority because it is assumed that they will act in the best interests of their children. However, there are social policies that deprive parents of discretion in a number of areas. For example, child labor laws and mandatory education laws forbid parents from sending their young children to work or from withholding basic educational opportunities from their children. Even in circumstances in which parents have a religious objection to mandatory education, the state may require that children receive enough instruction so that children learn basic reading, writing and math skills.<sup>39</sup>

Parents have broad discretion, but not absolute discretion, in making health care decisions for their children. For example, the state may require that children receive certain services, such as vaccination, even over parental objections. When a child is ill parents can choose between alternative suggested remedies and can choose to use no remedies in most cases. However, parents may not refuse to provide children with care that is necessary to sustain the child's life, because in such an instance there can be no argument that the parent is acting in the child's best interest.

Parents also have access to their children's medical records

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<sup>38</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>39</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

and other medical information as a general rule. This is because parents need to have such access to make informed medical decisions about their children's care. But when parents are not in the position to make health care decisions for their children there is no justification for parents to have access to these records. Thus, when minor children are authorized to make treatment decisions for themselves as a result of emancipation or maturity, their medical records are confidential and their parents are not authorized to obtain access to this private medical information.<sup>40</sup>

It is increasingly recognized that children have rights independent of parent's rights. Thus minor women have a constitutional right to obtain abortions without their parents' consent or knowledge because minors have a constitutional right to privacy.<sup>41</sup> Likewise, minors have a constitutional right to obtain contraceptives without parental involvement.<sup>42</sup> The exercise of these rights by minors is dependent upon their maturity to make the decisions necessary to use these services.

The Act's limitation of parental authorization for genetic testing does not provide minors with decisional rights, but rather provides them with protection from potential harm. In this regard it is similar to the prohibition on parents from consenting to research for their children in which the research presents a risk

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<sup>40</sup> See, e.g., Mass. Gen. Laws Ch. 112 § 12F.

<sup>41</sup> Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 443 U.S. 622 (1979).

<sup>42</sup> Carey v. Population Services International, 431 U.S. 678 (1977).

of harm to the child with no benefit. Not only is such research strictly regulated, there are those who argue that it should be absolutely banned.<sup>43</sup> The further purpose of the limitation of parental authority to authorize collection and analysis is to protect the child's privacy interest in his or her own genetic information. This information will not only exist during the child's minority but will continue to exist when the child becomes an adult. As a result, a parent's curiosity about a child's genetic information should not be sufficient to breach the child's (and later the adult's) privacy interest in this genetic information.

If, however, there is sufficient justification, a parent may authorize the collection and analysis of DNA samples. It is for this reason that the Act makes an exception for the collection and analysis of genetic material where it is necessary in order to ameliorate, prevent or treat a condition that will manifest itself prior to the time when the child is authorized to consent to such DNA collection and analysis. This exception enables parents to play their traditional protective role, and provides them with the authority to obtain necessary information when needed for them to act in their child's best interest.<sup>44</sup>

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<sup>43</sup> Ramsey P, "Children in Medical Investigation" in *The Patient as Person*, New Haven, Conn., Yale University Press, 1970, pp.11-17; and Ramsey P, Children as Research Subjects: A Reply, 7(2) Hastings Center Report 40 (April, 1977).

<sup>44</sup> Bloch & Hayden, *supra* note 37 at 1-3. The authors acknowledge that most parents who request such tests are seeking a way to allay their own anxieties about the child's future. However, they caution that the results could have negative impact on the child's upbringing and relationship to siblings with a different risk. They recommend that predictive testing in

Under the Act 16 and 17 year olds have the same rights as adults in nonresearch settings to authorize genetic analysis [section 141 (b)]. This accords with the increasing recognition that mature minors are entitled to make medical decisions for themselves. Consequently, if a 16 or 17 year old wanted information about carrier status, such screening could be conducted under his or her sole authorization. This information would mostly be relevant to decisions relating to reproduction. Although unlikely, a 16 or 17 year old could seek genetic analysis either prior to becoming pregnant, or in relation to the decision to continue with a pregnancy. Where the young woman is already pregnant, under the Act, no restrictions are placed on her pursuit of such analysis and genetic information regarding herself or her fetus. (sections 151, 152)

In all other nonresearch circumstances, however, the Act requires that the 16 or 17 year old be accompanied by an adult family member at the time that the information required by section 101 (b) is given to him or her. [section 141 (b) (1)] The decision to include an adult family member in this process is not up to the young person, as some state statutes provide regarding abortion counseling.<sup>45</sup> The Act requires an adult's involvement. Although

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childhood only be done when an advantage can be clearly demonstrated for the child.

<sup>45</sup> See, e.g., Me. Rev. Stat., tit.22, § 1597-A4, requiring that the physician or counselor who provides information to the pregnant minor explore with her whether or not involvement of a parent, guardian or adult family member in the decision making process would be in her best interests.

the decision to undergo genetic analysis is a highly personal and private one, it is unlike the decision to continue a pregnancy in that requiring the involvement of a family member does not expose the minor to the same familial repercussions. The goal of this requirement is to provide family support for the minor who is faced with a novel situation which involves obtaining and processing complex information. Since the collector of the sample is likely a stranger, regardless of how skilled this person is in communicating information, he or she may not be aware of, or sensitive to, the burden that such information can place on even a mature minor. A family member will also have a shared interest in protecting family privacy and will be aligned with the minor if issues of disclosure to other family members arise or are anticipated.

The Act does not require the authorization of the adult family member prior to the collection of a sample for analysis. The role of the adult family member in the authorization process is limited to providing support and guidance. The decision not to require dual consent of parent and minor when the minor is 16 or 17 years old is intentional. We want to avoid giving greater deference to the interests of a parent or family member than to the autonomy of the mature minor who seeks genetic analysis. Actual exercise of this authority by a 16 or 17 year old will undoubtedly be rare. In general, those likely to seek such genetic analysis will do so out of a need to know if they are at risk for a specific genetic disease that is known to be present in the family. Unlike adults,

16 and 17 year olds do not generally seek genetic analysis and information in the context of reproductive planning, since few teenage pregnancies are the result of conscious and careful planning.

**Sec. 143. AUTHORIZATION FOR COLLECTION AND ANALYSIS OF DNA SAMPLES FROM INCOMPETENT PERSONS**

(a) **LIMITATIONS ON COLLECTION AND ANALYSIS.** — The individually identifiable DNA sample of a sample source who lacks the ability to understand the information disclosed pursuant to section 101 and the information contained in an authorization under section 103 shall not be collected or analyzed unless—

(1) the analysis is necessary:

(A) to diagnose the cause of incompetence; or

(B) to diagnose a genetic condition which in reasonable medical judgment can only be effectively ameliorated, prevented or treated while the sample source is incompetent; or

(C) to diagnose a genetic disease of a parent, sibling, child or grandchild of the sample source provided that the disease in reasonable medical judgment can be effectively ameliorated, prevented, or treated;

(2) the analysis is limited to that which is necessary for such diagnosis; and

(3) the sample source's representative has executed an authorization which meets the requirements of section 103 of this Act.

(b) **DESTRUCTION OF SAMPLES COLLECTED PRIOR TO INCOMPETENCY.** — Whenever a sample source while competent has, either in an authorization under section 103 of this Act, or in an exercise of the sample source's rights under section 104(b) of this Act, ordered the destruction of a DNA sample, and the sample source becomes incompetent before the occurrence of the date or event which was designated by the sample source to cause the destruction of such sample, the sample source's representative may order the earlier destruction of such sample, but is not empowered to cancel or override any such destruction unless the postponement of the

destruction is to enable an analysis of the DNA sample for a purpose provided for in subsection (a) of this section.

The question of what tests or procedures can be authorized by a guardian or other legally authorized representative of an incompetent person is not unique to genetics. In the past courts have been asked to determine when consent of a guardian is legally effective in varying circumstances. Several courts have determined that the doctrine of substituted judgment should be applied to effectuate the intentions and preferences of the incompetent individual whenever possible. When such intentions are not known, a decision to authorize or refuse treatment is based on a determination of the best interests of the ward. The rules in this section are consistent with this approach and are intended to prevent exploitation of incompetency to obtain private genetic information about a person.

A person is incompetent for purposes of the Act if the person lacks the ability to understand the information that must be provided under section 101 and the information contained in the authorization [section 143(a)]. The DNA of any individual who is incompetent cannot be collected or analyzed unless the conditions in this section have been met. Such conditions are similar to the restrictions placed on the collection and analysis of the DNA of children because there are similar privacy concerns involved in determining both the best interests of children and incompetent adults whose intentions are unknown.

Consequently, the analysis of the DNA of an incompetent person can only be conducted if it is for one of three permissible

purposes. Two are related to the person: for the diagnosis of the cause of incompetence, or the diagnosis of a genetic condition that can be effectively ameliorated, prevented, or treated during the period of incompetency. [section 143(a)(1)(A)] This prevents testing for untreatable genetic conditions (which would have no benefit for the incompetent person), and testing for conditions that do not require intervention during a period of temporary incompetency (which could be postponed until the person can act for themselves).

The third permissible purpose for analysis conducted is for the diagnosis of a particular relative (parent, sibling, child or grandchild) for a disease that can be ameliorated, prevented or treated. [section 143(a)(1)(B)] This purpose was included after examination of instances where courts have applied the best interests standard but nevertheless permitted a guardian to consent to procedures which had no therapeutic benefit for the ward, but significant benefit to another individual. Although reluctant to use substituted judgment as a basis for permitting invasive procedures with no direct benefit to the incompetent person, a few courts have nonetheless done so when an indirect psychosocial benefit to the individual has been demonstrated. Such benefit is typically derived from the continuation of a relationship with an individual who has a significant role in the ward's life and when that individual needs something from the ward in order to

survive.<sup>46</sup> This benefit has been identified in cases involving kidney transplants and donation of bone marrow from an incompetent person to a close relative.<sup>47</sup>

In contrast to the procedures involved in such situations, the collection of DNA from an incompetent person itself presents little physical risk and is relatively non-invasive. The risks involved the harm that can come from disclosure of highly personal information, and not risk to the physical well-being of the individual. Balanced against this low risk is the indirect benefit that the person may gain when a relative with whom they have a significant relationship needs the information contained in the DNA of the incompetent person and it can be effectively used to help them. To limit creation of private genetic information about the incompetent person to those circumstances where actual benefit will result, the rule specifies that the information must be needed for the diagnosis of a disease which in "reasonable medical judgment can be effectively ameliorated, prevented, or treated." [section 143(a)(1)(B)] Because this purpose is also only permissible when the individual who will benefit is a parent, sibling, child or grandchild of the incompetent person, the Act reflects a

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<sup>46</sup> See, e.g., *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1969) in which the court exercised its equitable power to permit transplantation of a kidney from an incompetent man to his brother who was dying.

<sup>47</sup> *Id.* See also, *Curran v. Bosze*, 566 N.E.2d 1319 (Ill. 1990). Although the principal issue in this case was whether or not it was in a child's best interests for a parent to withhold consent for a donation to a half-sibling, the court specifically held that a parent could consent to such donation only when it would be in the minor's best interests. *Id.* at 1331.

presumption that the person would, if competent, choose to help such individuals.

The Act does not take the more stringent approach of requiring a demonstration that no other alternative is available for the diagnosis of the relative.<sup>48</sup> Instead, the determination of the appropriateness of the use of genetic analysis for such diagnosis is left first to the standard of medical care for the relative, and secondly, to the discretion of the sample source's representative whose authorization is required before the analysis can proceed. Until the whole human genome is mapped, there may be no other alternative than linkage analysis which involves the analysis of several family members' DNA to develop reliable information on the inheritance of some genetic diseases. Rather than prohibit the participation of an incompetent person in such a process, this rule accommodates a legitimate need for such participation. The Act does not, however, obligate a sample source's representative to authorize any analysis which would not be appropriate under the doctrine of substituted judgment, either because it would be inconsistent with the prior wishes of the incompetent person, or because it presents a risk to their privacy which is not outweighed by other factors.

Although the incompetent person's representative generally has

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<sup>48</sup> In *In re Richardson*, 284 So. 2d 185, 188 (La. App. 1973) the court concluded that before application of the best interests standard was considered to determine if consent could be given for transplantation of a kidney from a brother to a sister, it must first be established that the surgical intrusion was urgent, there were no reasonable alternatives, and that the contingencies were minimal.

the same authority in regard to authorizing the collection and analysis of DNA that the sample source would have if competent, there is one additional restriction on what the representative of such a sample source can do. The representative cannot in most circumstances override an order of the sample source made during a period of competency which directs the destruction of a previously collected DNA sample. If postponement of the destruction would, however, avoid collection of an additional sample for an analysis that is currently necessary and permissible, the sample source's representative can authorize such postponement. [section 143(b)] The representative of an incompetent person is obligated to first act in a manner consistent with the person's expressed wishes, and therefore is unlikely to rescind an order made by the person while competent. Nonetheless, this rule gives clear deference to decisions made while the person was competent and prevents a representative from taking advantage of the person's incompetency so as to discover private genetic information.

## **PART F**

### **PREGNANT WOMEN, FETUSES, AND EXTRACORPOREAL EMBRYOS**

#### **Sec. 151. AUTHORIZATION FOR COLLECTION AND ANALYSIS OF DNA FROM PREGNANT WOMEN AND FETUSES**

Regardless of her age, a pregnant woman shall have all the rights and authority of an adult sample source in regard to her DNA sample and the DNA sample of her fetus unless she is otherwise incompetent under the provisions of section 143.

#### **Sec. 152. AUTHORIZATION FOR DISCLOSURE OF PRIVATE GENETIC INFORMATION ABOUT PREGNANT WOMEN AND FETUSES**

Regardless of her age, a pregnant woman shall have all the rights of an adult sample source in regard to records containing private genetic information as provided in section 113, 114, and 115 of this Act, and in regard to disclosure of genetic information resulting from an analysis of her DNA sample or the DNA sample of her fetus, unless she lacks the ability to understand the information contained in an authorization under section 112.

These rules apply regardless of the age of the pregnant woman, and thus avoid a situation where a pregnant mature minor's independent decision regarding the continuation of her pregnancy would have legal effect, but she would be unable to independently obtain genetic information about herself or her fetus. It is also the woman alone who can consent to any intervention that might be available for a fetus who may have a particular genetic condition, and therefore she has a direct interest in the information that could be derived from the analysis.

**Sec. 153. AUTHORIZATION FOR COLLECTION AND ANALYSIS OF DNA FROM EXTRACORPOREAL EMBRYOS**

(a) **RELINQUISHMENT OF DONOR'S RIGHTS.** — Whoever donates a gamete for the reproductive purposes of a person or persons other than the gamete donor relinquishes all rights regarding the collection and analysis of a DNA sample of an embryo subsequently created using the donated gamete.

(b) **CONDITIONS FOR COLLECTION AND ANALYSIS.** — Prior to the collection and analysis of a DNA sample from an extracorporeal embryo created for reproductive purposes, the person collecting or causing to be collected the DNA sample of such embryo shall:

(1) make the disclosures required by section 101 of this Act to the person or persons who intend to use the embryo for reproduction; and

(2) shall obtain the written authorization of such person or persons that meets the requirements of section 103 of this Act.

(c) DISCLOSURE OF RESULTS. - The results of a genetic analysis of a DNA sample of an extracorporeal embryo shall be disclosed to the person or persons who intend to use the embryo for reproductive purposes.

In vitro fertilization may take place with gametes from individuals other than the woman in whom the embryo may be implanted, or the male who is the prospective father. Whose authorization is necessary for collecting and analyzing DNA from the embryo? There are several possibilities. The rules could require authorization of the gamete sources, regardless of whether or not such individuals have any connection to use of the gamete for reproductive purposes. The argument could be made that the individuals who are the source of the gametes are genetically linked to the embryo and therefore have the greatest interest in the information contained in the DNA of the embryo. However, it is not necessarily those individuals who will ultimately be responsible for decisions regarding the fetus that the embryo develops into, or the child that is eventually born. Compared to a gamete donor, it is the prospective parents who have a need for genetic information about the embryo so that they can plan for its future development and the care which will be their responsibility. Consequently, the Act reflects the diminishing interests of a gamete donor once a donation is made, and the increasing interests of the persons who use the resultant embryo for reproduction. Section 153(a) provides that the gamete donor who donates a gamete for reproductive purposes relinquishes all rights regarding the collection and analysis of the DNA of an embryo that is subsequently created with that gamete.

This allocation of authority does not deprive gamete donors of any genetic information about themselves since they are free to have their own DNA tested. Nor does it deny them any information they would need in regard to the possible future development of the resultant embryo, since they would not otherwise have any authority or responsibility in regard to its future. Giving them rights to such information would create the only instance under the Act where an individual could know private genetic information of another simply for the sake of knowing, and without serving any beneficial purpose.

If the embryo is subsequently implanted and develops into a fetus, then any further collection or analysis of DNA is governed by the rules in section 151 and the authorization of the pregnant woman is required.

## PART G

### MISCELLANEOUS PROVISIONS

#### Sec. 162. TRANSFER OF OWNERSHIP, DISCONTINUANCE OF SERVICES

(a) ACTIVITIES INVOLVING DNA SAMPLES. — Any person in possession of individually identifiable DNA samples who intends to discontinue a program, business, enterprise, or service in which such DNA samples were collected, stored, or analyzed or who intends to transfer control of such program, business, enterprise, or service to a person who intends to use such DNA samples for a substantially different purpose than was authorized at the time of collection, storage, or analysis of such DNA samples must:

(1) no less than 45 days prior to the effective date of the discontinuance or transfer of control, mail a notice to the last known address of each sample source or the sample source's representative informing such individuals of the

intended change, and

(A) in the case of an intended discontinuance of activities, give the individual the opportunity to direct that the DNA sample be returned to the individual prior to the date on which the discontinuance is effective and informing them of the date on which such direction must be received to effectuate such request; or

(B) in the case of an intended transfer of control, give the individual the option of agreeing to the transfer, or requiring the destruction or return of the DNA sample prior to the effective date of the transfer, and informing the individual of the date on which such a requirement must be received to be effectuated;

(2) In the event that no response is received from the individual by the date specified in the notice, the person in possession of such DNA sample:

(A) in the case of a discontinuance shall destroy such DNA samples; and

(B) in the case of transfer of control shall either;

- (i) destroy such DNA samples, or
- (ii) remove all individual identifiers from such DNA samples...

This section contains detailed provisions for facilities that discontinue services or transfer control of such services to someone who will use individually identifiable DNA samples or private genetic information for a substantially different purpose than that authorized by the sample source or sample source's representative. Therefore, a sale of a business or practice in which DNA samples have been collected or stored to an individual or facility that will engage in different activities would require compliance with these provisions. However, sales of clinical practices in which DNA samples are collected or records containing private genetic information are maintained to practitioners who will provide similar services would not be affected by these rules.

Neither would mergers between entities such as hospitals or laboratories that result in management or personnel changes but not in changes in the business or services provided. However, if individually identifiable DNA samples were, for instance, collected and stored in a research program on a genetic disease, a commercial enterprise such as a pharmaceutical company could not acquire the DNA samples or data bank that contains private genetic information, without meeting these provisions.

In regard to discontinuation of services or activities in which records containing private genetic information have been maintained, the holder of such records who does not receive a response from the subject of the information has the option of sealing and storing records for up to 3 years. [section 162(b) (2) (A) (ii)] This provision is intended to satisfy the concerns of those who fear that mandatory destruction of such records would hinder the defense of subsequent claims such as malpractice brought against the keeper of such records.

These rules will accommodate the commercial interests of individuals or entities that collect, store or analyze DNA samples or private genetic information, and who want to profit from the sale or transfer of their endeavors, without compromising the rights and interests created under this Act of persons who are affected by such changes.

**PART H**  
**ENFORCEMENT**

**Sec. 171. CIVIL REMEDIES**

(a) **PRIVATE RIGHT OF ACTION.** — Any person whose rights under this Act have been violated may maintain a civil action for damages or equitable relief as provided for in this section...

(c) **RELIEF.** — In any action brought under this section, a court may order a person to comply with the provisions of this Act and may order any other appropriate equitable relief.

(d) **LIABILITY FOR NEGLIGENT VIOLATIONS.** — Any person who through negligence collects a DNA sample in violation of this Act, analyzes a DNA sample in violation of this Act, or discloses private genetic information in violation of this act, shall be liable to the sample source and any other person injured by each such violation in an amount equal to:

(1) any actual damages sustained as a result of the collection, analysis, or disclosure, or \$25,000, whichever is greater; and

(2) in any case where such violation has resulted in profit or monetary gain, treble damages; and

(3) in the case of a successful action to enforce any liability under this section, the costs of the action together with reasonable attorneys' fees as determined by the court.

(e) **LIABILITY FOR WILLFUL VIOLATIONS.** — Any person who-

(1) through a request, the use of persuasion, under threat, or with a promise of reward, willfully induces a person to collect a DNA sample in violation of this Act, analyze a DNA sample in violation of this Act, or discloses private genetic information in violation of this Act, or

(2) willfully collects a DNA sample in violation of this Act, willfully analyzes a DNA sample in violation of this Act, or willfully discloses private genetic information in violation of this Act, shall be liable to the sample source and any other person injured by each such violation in an amount equal to:

(A) any actual damages sustained as a result

of the collection, analysis, or disclosure, or \$50,000, whichever is greater;

(B) punitive damages as the court may allow; and

(C) in the case of a successful action to enforce any liability under this section, the costs of the action together with reasonable attorneys' fees as determined by the court...

Under this section an aggrieved individual may maintain a cause of action for negligent or willful acts in violation of these rules. Where a person has acted negligently in the collection or analysis of a DNA sample, or in regard to disclosures of private genetic information, they will be liable for a minimum amount of \$25,000. Although the individual who is harmed does not have to suffer actual damages in order to recover, if they do sustain actual damages which exceed \$25,000, they can recover the greater amount. [section 171(d)(1)] The amount of actual monetary damages as a result of violations of these provisions may not be sufficient to motivate individuals to assert their rights. These liquidated damages have been made available so that injuries to personal privacy and dignity that result from violations can be prosecuted.

The availability of treble damages in cases where the negligent person has profited from such unlawful actions is included to deter profiting from the invasion of another's privacy and as an incentive for individuals and entities governed by these rules to monitor their compliance and performance. Whether the person facing liability is an individual practitioner, an independent laboratory or a multi-service corporation, a \$75,000 minimum potential liability for each violation that results in their benefit should be incentive to invest in effective risk

management measures.

Under section 171(e), individuals can also recover for willful violations of these rules by individuals who induce another to collect or analyze a DNA sample in violation of these provisions, or who induce another to wrongfully disclose private genetic information. Consequently, anyone who exerts influence over those who actually collect or analyze DNA samples to obtain or analyze a sample without authorization, is exposed to liability for actual damages, or a liquidated damage amount of \$50,000, whichever is greater. [sections 171(e)(1) and (2)]. Anyone who willfully collects or analyzes a DNA sample without proper authorization, or who willfully discloses private genetic information without authorization, is similarly liable.

Both the person who induces such action, and the person who engages in the unauthorized act, are liable for such punitive damages as the court may allow. [section 171(e)(2)(B)] As in negligence cases, if the individual who is harmed prevails, costs of the action and reasonable attorneys' fees shall also be awarded.

Besides awarding monetary damages, courts are empowered to fashion equitable relief and remedies as necessary in particular circumstances. [section 171(c)] For example, a court can order destruction or return of DNA samples, purging of records, reinstatement of benefits or privileges denied through violations, and order a person or entity to comply with the provisions of the statute.

## SEC. 172. CIVIL PENALTIES AND INJUNCTIVE RELIEF

Whenever the attorney general has reason to believe that any person is using or is about to use any method, act or practice in violation of the provisions of this Act, and that proceedings would be in the public interest, the attorney general may bring an action against such person to restrain by temporary restraining order or preliminary or permanent injunction the use of such method, act or practice. The action may be brought in the district court of the jurisdiction in which the person resides or has a principal place of business. The court may issue temporary restraining orders or preliminary or permanent injunctions and make such other orders of judgments as may be necessary to prevent harm or to remedy harm suffered by any person as a result of the use or employment of such method, act or practice in violation in the Act. If the court finds that a person has employed any method, act or practice which he knew or should have known to be in violation of this Act, the court may require such person to pay a civil penalty of not more than \$50,000 for each such violation and may also require the said person to pay reasonable costs of investigation and litigation of such violation, including reasonable attorneys fees.

One problem which faces individuals whose privacy rights have been violated is that pursuit of remedial actions may contribute to further publication of genetic information and erosion of privacy. It may be possible to sue for wrongful collection or analysis of DNA and present necessary evidence without revealing private genetic information. Nonetheless, it is more likely that this information will be revealed since an essential proof in the case is that the information falls within the statutory definition of private genetic information. It will be up to individuals to assess the relative risks and benefits of asserting their rights and pursuing legal action. If the risks of pursuing such remedies inhibit individual enforcement, thereby diminishing the effectiveness of the Act, inclusion of additional methods of

enforcement must be considered. The two remaining possibilities are: criminal actions and/or civil penalties.

Criminal penalties through fines and imprisonment for violations of this Act are not included or recommended. Despite a desire to draft a law that gives protection to the privacy interests of individuals and that would adequately deter unauthorized collection of DNA samples and unauthorized disclosures of private genetic information, we decided that creation of a new federal crime would not necessarily serve such goals. Criminal sanctions are appropriate when other methods of inducing compliance are ineffective or when the interests served by the law are best promoted through pursuit of criminal actions.

There is no reason to assume that there will not be voluntary compliance with the Act. Granting broad powers of law enforcement investigation and prosecution in areas that contain highly sensitive and personal information, and the risks to privacy that such power presents, must be balanced against this assumed low rate of noncompliance. Unless or until it is demonstrated that violations of the privacy rights created under the Act are sufficient in number or in degree of harm so as to warrant creation of a new federal crime, we do not recommend the inclusion of criminal sanctions. Additionally, it is our belief that such prosecutions could not realistically be given priority over the myriad federal crimes that now exist; nor would there be a likelihood that the severity of sentences that are likely to be imposed or arrived at through plea arrangements would have a

deterrent effect greater than is presented by the threat of civil liability.

In addition to providing private civil actions and criminal sanctions, other statutes containing fair information practices either look to an administrative agency for enforcement, or authorize the attorney general to pursue civil penalties for violations of fair practices. For instance, the Fair Credit Reporting Act (FCRA) [15 USC § 1681 (a)] authorizes the Federal Trade Commission to use powers granted by the Federal Trade Commission Act to enforce the provisions of the FCRA, and to bring actions to redress consumer complaints.

In regard to oversight of compliance with the Act, it might be useful to give enforcement powers to an independent board or agency. Although no privacy protection board currently exists, the concept of a data protection board has been introduced and recommended to Congress repeatedly over the last 20 years. Since the introduction of the Privacy Act of 1974, the need for an independent board which would, among other things, monitor and evaluate laws designed to protect personal privacy has been identified. In recent years, the proliferation of computer generated personal information systems has led to a renewed interest in a board charged with developing model standards, proposing legislation, and investigating complaints about violation of privacy or data protection rights.<sup>49</sup>

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<sup>49</sup> S. 1735, 103d Cong., 1st Sess. (1993). The Privacy Protection Act of 1993 was introduced by Sen. Paul Simon to establish a Privacy Protection Commission. Like previous

Even if such proposals were heeded, and a board created, its effectiveness in protecting individual privacy interests would be negligible unless it was granted enforcement powers in addition to investigative and advisory functions.<sup>50</sup> If a board with such inclusive powers is established in the future, we recommend that it be given jurisdiction over the investigation and enforcement of violations of this Act. To effectuate such a mandate, the Genetic Privacy Act could be amended to include a provision for the reporting of violations to the Board which could impose civil penalties on persons found to be in violation. Given that establishment of such a board is unlikely in the near future, this leaves one additional alternative for enforcement of civil penalties on violators of the Act. That is to authorize the Attorney General to bring civil actions against violators and to enforce the rights created by the Act.

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proposals, although granting investigative powers to the Commission, this bill contained no similar grant of enforcement powers to the Commission itself but charged it with reporting violations of the Privacy Act for which criminal but not civil penalties are available, to the president, Attorney General and Congress. It also leaves activities of the private sector outside the Commission's jurisdiction.

<sup>50</sup> Rotenberg M, In Support of a Data Protection Board in the United States, 8 Gov. Info. Q. 79, 88 (1991).

## PART I

### EFFECTIVE DATES; APPLICABILITY; AND RELATIONSHIP TO OTHER LAWS

#### Sec. 183. RELATIONSHIP TO OTHER LAWS

- (a) No state may establish or enforce any law or regulation concerning the collection, storage, or analysis of DNA samples except to the extent that such law or regulation:
  - (1) prohibits or further restricts the collection, storage, or analysis of DNA samples; or
  - (2) provides additional protection to the privacy interests of the individual who is a sample source.
- (b) Effective as of the effective date of this Act, no State may establish or enforce any law or regulation concerning the disclosure of private genetic information except to the extent that such law or regulation:
  - (1) prohibits or further restricts the disclosure of such information;
  - (2) prohibits or further restricts the use of such information; or
  - (3) provides additional protection to the privacy interests of the individual who is a sample source or the subject of the genetic information.
- (c) Nothing in this Act shall be construed as limiting or prohibiting the pursuit of any other remedies available under common or statutory law in regard to the collection, storage, analysis of DNA samples, and the disclosure of private genetic information.

This Act does not supersede or preempt any federal or state law that provides additional privacy protection to sample sources. Consequently, states that pass legislation restricting the use of genetic analysis for particular purposes may do so. For example, nothing in the Act would limit a state's authority to

prohibit genetic testing by employers or insurance companies. States, however, may not take actions that conflict with the protection provided by this Act. State statutes, for example, that would mandate genetic screening or testing of identifiable newborns would be preempted by these provisions if they analyzed DNA analysis and did not require the prior authorization of the parent.

The actions available under the Act to address wrongful violations are limited to civil actions and civil penalties; nonetheless, the Act does not prevent states from providing additional remedies, such as making unauthorized collection or analysis of DNA samples a crime, or criminalizing unauthorized disclosures of private genetic information.

The provision of the right to bring a civil action for damages does not prevent pursuit of other tort claims where the facts would support such causes of action and when available under state common or statutory law. For example, an action for publication of private facts would not be precluded by the remedy available here. Information covered by this Act may also be covered by other confidentiality statutes. Such concurrent coverage is intended so as to maximize the protection of private information. State laws which prohibit obtaining genetic information in particular circumstances, or the use of such information for particular purposes, would not be superseded by the Act. Therefore, states which prohibit employers or insurers from requiring individuals to

submit to genetic analysis<sup>51</sup> could continue to enforce such prohibitions. States could also mandate requirements in regard to the consent process for genetic analysis in all or particular circumstances which go beyond those required by the Act.<sup>52</sup>

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<sup>51</sup> See, e.g., Iowa Code Ann. § 729.6 (1992) (prohibiting employers from requiring or administering genetic tests as a condition of employment); Wis. Stat. Ann. § 631.89 (1994) (restricting the use of genetic tests and results of such tests by insurers), Cal. Ins. Code § 10146 (1994) (establishing standards for underwriting life and disability insurance on the basis of tests for genetic characteristics) and Cal. Health & Safety Code § 1374.7 (1994) (prohibiting health insurance plans from rejecting applicants, or setting higher rates for applicants, on the basis of genetic characteristics).

<sup>52</sup> For instance, in regard to genetic testing that is permissible by life and disability insurers, California requires that written informed consent for such test include, in addition to information that would also be required by this Act, the limitations of the test and procedures for notifying the applicant of the results. Cal. Ins. Code § 10148 (1994).



## **Appendix**

# **GENETIC INFORMATION AND THE DUTY TO WARN**



The Genetic Privacy Act prohibits the determination or disclosure of a person's private genetic information without the person's explicit consent. But are there circumstances in which a health care provider should be able to disclose a person's private genetic information to a genetic relative because that information might be of value to the relative? This issue is important because one of the aspects of genetic testing that makes it different from most other types of medical testing is that genetic testing results will always disclose information about an individual's genetic relatives. For example, if it is determined that a woman has one of the genes for breast cancer, BRCA 1, her sisters are at substantially increased risk for also having this gene, and might benefit from having this information.

This issue is not solely a result of our increasing ability to perform genetic testing. For example, the 1983 President's Commission report on genetic screening and counseling discusses this issue in the context of the clinical diagnosis of multiple polyposis of the colon, which is a precursor to cancer.<sup>1</sup> Since this is a genetic condition, it is advisable to tell other family members that they should be regularly screened for the existence of polyps. However, the increasing availability of genetic tests resulting from the Human Genome Project is certain to exacerbate the issue.

The President's Commission concluded that there are

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<sup>1</sup> President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Screening and Counseling for Genetic Conditions*, Washington, D.C.: Gov. Printing Office, 1983, p.43.

circumstances when "a professional's ethical duty of confidentiality can be overridden" in the context of genetic testing. This occurs when (1) efforts to obtain consent to disclosure have failed; (2) there is a high probability that the person to whom the information is disclosed would actually use it to avert a serious harm; and (3) appropriate precautions are taken to ensure that only the genetic information needed for diagnosis and/or treatment is disclosed.<sup>2</sup> The President's Commission did not conclude that there was a duty of disclosure, only that health professionals could ethically disclose such information.

There has been much concern and speculation about the authority or obligations of health care providers to disclose genetic information to relatives.<sup>3</sup> Much of this concern comes from the perception that courts have required disclosures by health care providers in an increasing number of circumstances. This concern is misplaced, however, since when courts have required disclosures to relatives, they have done so when there was no breach of confidentiality involved.

#### **Physician Obligations to Third Parties**

The general rule of law is that one person is not obligated to take action to protect the well-being of another

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<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., Andrews LB, Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks, 29 Houston L. Rev. 149 (1992).

person. This rule is stated in Section 314 of the Restatement of Torts, Second as follows:

The fact that the actor realizes or should realize that the action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

An example used to explain this rule in the Restatement involves a case in which A sees B, a blind man, about to step in front of an approaching automobile. A could prevent this from happening simply by either reaching out his hand or verbally warning B of the danger. A does nothing, and B is run over and injured. A was under no duty to B to protect him from harm and therefore is not liable for his injuries. The commentators to the Restatement note, "Such decisions have been condemned by legal writers as revolting to any moral sense, but thus far they remain the law."<sup>4</sup> Thus the rule is that even when we have moral obligations to others, the law will not enforce such moral obligations.

There are, however, a number of situations in which a person does have a legal obligation to take actions to protect others. For example, the driver of the automobile in the hypothetical case presented has a obligation to B, the blind man, and all other pedestrians, to drive with reasonable care, because he creates the possibility of danger through forces and circumstances he creates and controls by driving the automobile. There is also an important exception to the general rule based on the existence of "special relationships"

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<sup>4</sup> Restatement (Second) of Torts, Sec. 314, Illustration 1, p.117.

which create a duty to aid or protect others. Examples of such special relationships provided in Section 314A of the Restatement include a common carrier's (i.e., railroad and airline) duty to protect its passengers, a hotel's duty to protect its guests, and the duty of a person who takes custody of another under circumstances such as to deprive the other of his normal opportunities for protection. These special relationships involve a relation of dependence or mutual dependence. The duty applies only where a special relationship exists and the risk of harm occurs during the course of the relationship.

These rules applied to medicine mean that a health care provider is under no obligation to protect a person who is not his or her patient unless a special relationship exists. There are a number of cases involving the obligation of a health care provider to protect others from contagious diseases that, on first glance, might appear to obligate the provider to protect others from the effects of genetic diseases. Closer examination of these cases, however, shows that they do not support the existence of such an obligation.

There are a variety of circumstances in which a physicians' failure to act appropriately could lead to the spread of infectious diseases to a family member or other person with whom the infected patient is in close contact.<sup>5</sup> The doctor can fail to diagnose the contagious disease, can

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<sup>5</sup> Bateman TA, Anno., Liability of Doctor or Other Health Practitioner to Third Party Contracting Contagious Disease from Doctor's Patient, 3 ALR 5th 370.

diagnose it but fail to disclose the existence of the disease to the patient or the family members, or the doctor can provide incorrect information about the precautions to be taken to prevent the transmission of the disease. An example of the first type of case is Wojcik v. Aluminum Co. of America<sup>6</sup>, in which physicians working for the patient's employer diagnosed him as having tuberculosis but failed to notify him of this fact. The patient's wife alleged that she contracted the disease as a result of not being informed by the doctor that her husband suffered from this contagious disease. She alleged that had she been warned of the existence of the disease she could have taken steps to avoid contracting it, and could have sought early medical treatment when she developed symptoms. The court held that the doctors, who were agents of the employer, had a obligation to notify her of the existence of her husband's contagious disease. The court quoted with approval the statement that,

It is the duty of a physician who is attending a patient afflicted with a contagious or infectious disease to exercise care in advising and warning members of the family and others who are liable to exposure of the existence and nature of the danger from the disease, to avoid doing any act which would tend to spread the infection, and to take all precautionary measures to prevent the spread to other patients attended.<sup>7</sup>

While there is certainly language directed at the physician's duty to the wife, the central basis for the

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<sup>6</sup> 18 Misc.2d 740, 183 N.Y.S.2d 351 (1959).

<sup>7</sup> *Id.*, 18 Misc. 2d at 747-8, 183 N.Y.S.2d at 358, quoting 41 Am. Jur., Physicians and Surgeons, sec. 101, p. 216.

negligence suit was that the physicians did not inform the husband himself of his own contagious condition. Thus the court states,

The risk of the plaintiff contracting tuberculosis from her husband, when unaware that he was so inflicted, was reasonably foreseeable by the defendant. Such a risk was within the range of probability and apprehension of an ordinarily prudent person. The defendant's negligent conduct toward the plaintiff husband under the circumstances was negligence to the plaintiff wife.<sup>8</sup> (emphasis added)

Elsewhere the court also states,

[T]he defendant could have reasonably anticipated that the plaintiff husband, without knowledge of his contagious disease, would not have taken the precautionary measures necessary to prevent infecting others, including his wife, with the germs of the disease.<sup>9</sup>

The underlying basis for this case is thus not the failure of the physicians to inform the patient's wife, but the failure to inform the patient himself. This failure to inform the patient placed other people at foreseeable risk for which the physician would be responsible absent any sort of special relationship.

Other courts have also confused the existence of a special relationship (giving rise to otherwise nonexistent duties) with responsibility for the foreseeable injuries caused by negligent conduct. Thus, in a case in which a hospital failed to diagnose a mother's infectious meningitis, which the plaintiff's son contracted and later died from, a

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<sup>8</sup> *Id.*, 18 Misc.2d at 745, 183 N.Y.S.2d at 357-8.

<sup>9</sup> *Id.*, 18 Misc.2d at 746, 183 N.Y.S.2d at 358.

court found that the hospital could be liable for the son's death.<sup>10</sup> The hospital argued that it owed no duty of care to the son who was not its patient. The court stated,

[D]efendant had a physician-patient relationship with plaintiff [mother]. This was a special relationship with the one who allegedly infected Eric, leading to his death. Accordingly a duty of reasonable care may arise.

Because the defendant had a special relationship with plaintiff, we conclude that defendant owed a duty of reasonable care to Eric. As plaintiff's son and a member of her household, Eric was a foreseeable potential victim of defendant's conduct.<sup>11</sup> (emphasis added)

The court never says why the physician-patient relationship is "special" for purposes of creating obligations to third parties, like the son, but rather seems to assume that all physician-patient relationships are special, an untenable assumption not found in other court opinions. Liability to the foreseeable victims of one's negligence does not depend on the existence of a special relationship. This is particularly evident in this case in which no one could seriously argue that the hospital's obligation could be satisfied by notifying five-year-old Eric of anything. Rather, by not appropriately diagnosing his mother, she was unaware of the need to take precautions to prevent the spread of the disease to her son, or to spot the symptoms of the

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<sup>10</sup> Shepard v. Redford Community Hospital, 151 Mich. App. 242, 390 N.W.2d 239 (1986).

<sup>11</sup> *Id.*, 151 Mich. App. At 245, 390 N.W.2d at 241.

disease as soon as they were manifested.<sup>12</sup>

There are also infectious disease cases in which a physician provides incorrect information to a person who comes in contact with a patient afflicted with a contagious disease, thereby causing that person to become infected. In Skillings v. Allen,<sup>13</sup> a physician negligently advised a father of a minor daughter afflicted with scarlet fever that there was no danger in taking her home from the hospital. The father contracted the disease after his daughter was taken home. The father sued the physician for negligence. The physician claimed he owed the father no duty because there was no contractual relationship between him and the father. However the court noted that the physician had given advice to the father knowing that the father would rely on it, and therefore owed a duty of reasonable care to the father.

Similarly, in Jones v. Stanko,<sup>14</sup> the widow of Stephen Stanko brought suit against Dr. Washington Jones for the wrongful death of her husband. In this case, Alexander Thompson, a neighbor of Stanko's, was afflicted with smallpox and was attended by Dr. Jones. Mr. Stanko asked Dr. Jones if

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<sup>12</sup> A similar case is Hofman v. Blackmon, 241 So.2d 752 (1970), in which a physician negligently failed to diagnose tuberculosis in a father which allegedly led to the infection of a two year old girl. The court held "that a physician owes a duty to a minor child who is a member of the immediate family and living with a patient suffering from a contagious disease to inform those charged with a minor's well-being of the nature of the contagious disease and the precautionary steps to be taken to prevent the child from contracting the disease...."

<sup>13</sup> 143 Minn. 323, 173 N.W. 663 (1919).

<sup>14</sup> 118 Ohio St. 147, 160 N.E. 456 (1928).

Mr. Thompson suffered from a contagious disease. Dr. Jones assured him that Thompson was not suffering from an infectious disease and that Mr. Stanko "took no risk of contagion by waiting upon Mr. Thompson." The court sustained the cause of action. As a result of the physician's incorrect advice, Mr. Stanko contracted a fatal disease which he would have avoided had he not relied on this physician's negligent advice.

#### **Physician Obligations to Genetic Relatives**

These cases are starkly dissimilar from the circumstance in which a physician accurately determines that a person has a genetic condition, accurately informs the person of his or her genetic status, and then wants to know if there is an obligation to notify genetic relatives of their risk. Unlike the cases discussed, the physician would not have been negligent in making the "diagnosis" or notifying his patient of the diagnosis. Also, unlike these cases, failure to notify the genetic relatives does not cause them to contract a disease they would otherwise avoid - they already have the genetic condition.

Finally, and perhaps most importantly, none of the contagious disease cases discuss the issue of breaching patient confidentiality. In most of these cases the patient's illness was obvious to others. In the cases of the missed diagnosis or lack of disclosure of the existence of tuberculosis, it was assumed by the courts that if the patient was properly diagnosed or informed, the patient would have

taken proper precautions to prevent the spread of the disease to other family members. We were able to find no case of infectious disease in which the disease was properly diagnosed, and the patient was properly informed of the existence of the disease and the measures to be taken to avoid its spread, in which a third party claimed that they should have been informed of the existence of the disease.

The case that comes closest to being relevant to the issue of the disclosure of genetic conditions to relatives is Tarasoff v. Regents of the University of California,<sup>15</sup> a landmark case involving the duty of psychotherapists to protect identifiable individuals from harm by their patients. In this case, Prosenjit Poddar told his therapist, Dr. Lawrence Moore, that he intended to kill Tatiana Tarasoff. Dr. Moore consulted several of his colleagues who all concluded that Poddar presented a significant danger of harm to Ms. Tarasoff. As a result, Dr. Moore commenced commitment proceedings and sent a letter to the campus police (where Moore worked and Poddar went to school), asking them to take custody of Mr. Poddar. The campus police did take custody of Mr. Poddar, but released him with a warning to stay away from Ms. Tarasoff after they decided he was rational. Upon learning of these events Dr. Moore's superior ordered him to cease all commitment proceedings. Nothing else was done to protect Ms. Tarasoff. Ms. Tarasoff was out of the country during these events, but upon her return Poddar killed her. Ms. Tarasoff's

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<sup>15</sup> 131 Cal. Rptr 14, 551 P.2d 334 (1976).

parents brought a lawsuit against the physicians and the university that employed them, alleging that the physicians had a duty to protect Ms. Tarasoff from their dangerous patient, and that they were therefore liable for failing either to institutionalize Poddar or failing to warn Ms. Tarasoff of the danger Poddar presented to her.

The therapists' primary defense was that they owed no duty of care to Ms. Tarasoff because she was not their patient, and they had no relationship to her. In essence they were arguing they were not responsible for Ms. Tarasoff based on Section 314 of the Restatement of Torts. This case provided an additional legal issue, since under general legal principles, a person is under no obligation to control the conduct of another person.

The exception to this rule is found in section 315 of the Restatement of Torts, Second which states,

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection. (emphasis added)

In Tarasoff, the "actor" is the therapist and the "third person" is Poddar. Since there was no relationship between the therapists and Ms. Tarasoff, subsection (b) does not apply. The question then was, is there a "special relation" between the therapist and Poddar that created a duty that would require the therapist to control Poddar's behavior and

protect identifiable persons who he planned to harm? The court found, without analysis, that the relationship between a patient and his therapist was sufficient to establish a "special relation." There are certainly elements of a therapist-patient relationship that would make it "special" for the purpose of including it under section 315 of the Restatement of Torts. First, it could be argued that the therapist-patient relation is one of far greater dependence than the ordinary doctor-patient relationship. Second, the commentary to section 314A of the Restatement of Torts describes a relevant circumstance in which a person becomes responsible for the acts of another. It states,

(4) One who is required by law to take or who voluntary takes custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

Psychiatrists, unlike other physicians, are legally empowered to take custody of patients, and, indeed, this was the goal of Poddar's therapists at the outset. Further, the larger society has given this authority to psychiatrists for the purpose of protecting the members of society from dangerous mentally ill people.

Ultimately the court concluded that,

[O]nce a therapist does in fact determine, or under applicable professional standards should have determined, that a patient poses a serious threat of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger. While the discharge of this duty of due care will necessarily vary with the facts of each case, in each instance the adequacy of the therapist's conduct must be measured against the traditional negligence standard of the rendition of

reasonable care under the circumstances.<sup>16</sup>  
(emphasis added)

Unlike the previously discussed infectious disease cases, Tarasoff explicitly discusses the fact that therapists are in a confidential relationship with their patients, and that at times the rule the court adopts might cause a breach in confidentiality. The court recognizes that confidentiality is a very important value, but it is not an absolute value. If the trade-off is between saving a life or protecting a confidential communication, saving a life takes precedence. It must be noted that Tarasoff is not a duty to warn case, it is a duty to protect case. Thus one way the therapists could have protected Ms. Tarasoff would have been to institutionalize Mr. Poddar, a much greater intrusion on his liberty and privacy than warning his potential victim of his threat. It is the very fact that the therapists had this power to control his behavior by committing him to a mental institution that puts them in the "special relation" that creates a duty to act at all.

A more recent California case demonstrates that having knowledge of a genetic condition does not create a duty to disclose such information to genetic relatives who might have an interest in it. In this case, Barbara Olson relinquished her parental rights and agreed to have Children's Home Society of California (CHS), an adoption agency, arrange for her son's adoption. Thirteen years later, Ms. Olson, then married, gave

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<sup>16</sup> 131 Cal. Rptr. at 25, 551 P.2d at 345.

birth to another child. At six months of age this child died from combined severe immune deficiency (CSID), a genetically-transmitted X-linked disease, which is carried by females and is manifested in half of their male offspring. After the death of her son, Ms. Olson contacted CHS to inquire about the health of the son she had put up for adoption. A social worker at the agency contacted the adoptive family, learned that the boy was afflicted with CSID and was alive, and wrote Ms. Olson informing her of these facts. Ms. Olson also discovered that the adoptive parents had notified CHS in 1967, soon after the child was adopted, that at the age of 5 months he was hospitalized with viral pneumonia. By 1971, CHS was aware that the boy was afflicted with a genetic disease.

Ms. Olson and her husband filed suit against CHS for the wrongful death of their son, the intentional infliction of emotional distress and fraud. They alleged that CHS had a duty to warn them that Ms. Olson's child had a genetic disease, and that if they had been made aware of this fact they would not have conceived a child or they would have received timely medical treatment which would have saved his life. The trial court dismissed the complaint on the ground that it "failed to allege any legal duty between appellants and respondent." The court of appeal affirmed the trial court's action, saying:

The general rule is that a person who has not created a peril is ordinarily not liable in tort for failing to take affirmative action to assist or protect another, no matter how great the danger or how easily a rescue could be effected. [Citations omitted] An exception to the general rule occurs if there is some special relationship between the

parties which gives rise to a duty to act. (Rest.2d Torts, Sections 314, 314A)<sup>17</sup>

Olson argued that there was a special relationship between her and CHS which imposed a duty on CHS to notify her of the 50% risk of having another affected male child when CHS learned of this in 1971. The court rejected the argument that there was a special relationship in this case, stating that "special relationship situations generally involve some kind of dependency or reliance." Olson could not show that CHS engaged in any conduct at the time of her first son's adoption which would create a condition of dependency or reliance in regard to Olson's future health, or the health of any children she might have in the future. The court distinguished Tarasoff by noting that in that case there was a "nexus between the impending peril and the specific duties undertaken by the defendants in those special relationships." In concluding its opinion the court noted,

CHS did not create the situation in which Barbara Olson found herself; it took no affirmative action which contributed to, increased, or changed the risk which would have otherwise existed; there is no indication that it voluntarily assumed any responsibility to protect Mrs. Olson's future health or that of her later children; and there is no allegation of any justifiable detrimental reliance on any conduct or failure to act by CHS.<sup>18</sup>

For the same reasons, a health care professional who knows that one family member has a genetic condition is not obligated to inform another family member that they might also

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<sup>17</sup> Olson v. Children's Home Society of California, 252 Cal. Rptr. 11, 13 (Cal. App 2 Dist. 1988).

<sup>18</sup> *Id.*

be at risk for a similar condition. However, as the cases discussed above require, when a person seeks professional services to determine the existence of a genetic condition, it is the legal obligation of the professional to exercise reasonable care to determine the existence of such a condition and to accurately inform the person of the findings. It is then up to the person who receives this information to decide whether or not to share this information with family members.

A 1995 California case is in accord with this conclusion. In Reisner v. Regents of the University of California,<sup>19</sup> a 12-year-old girl, Jennifer Lawson, received a blood transfusion. The next day her physician discovered that the blood she received was contaminated with HIV antibodies, but he never told Jennifer or her parents of this fact. Three years later Jennifer started dating Daniel Reisner, and two years after that Jennifer was diagnosed with AIDS. She immediately disclosed her condition to Daniel, who was then tested and determined to be HIV positive. Daniel sued Jennifer's doctor for negligence, claiming that the doctor's failure to inform Jennifer of the transfusion with the tainted blood led to Daniel's becoming infected with the AIDS virus. The doctor argued that he owed no duty of care to Daniel since, unlike Tarasoff, he was an unknown and unidentifiable third party. Accepting this argument, the trial court dismissed the claim.

The appeals court reversed, finding the fact that the

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<sup>19</sup> 1995 Cal. App. LEXIS 54 (Cal.Ct.App., 2d Dist., Div.1, Jan. 26, 1995)

plaintiff was unknown and unidentifiable was not the issue in this case. Rather, the issue was whether a physician had an obligation to inform his patient that she had a communicable disease so that she could take proper steps not to infect others. The court found that there was such a duty, since failure to do so would foreseeably put others at risk. As the court said, "Once the physician warns the patient of the risk to others and advises the patient how to prevent the spread of the disease, the physician has fulfilled his duty -- and no more (but no less) is required."<sup>20</sup> It is also notable that in this case there was no need to address the issue of breaching Jennifer's confidentiality regarding her HIV status. This is because Daniel did not allege that he should have been told of Jennifer's HIV status, he alleged only that she should have been told her HIV status so that she could have informed him.

As part of reasonable professional care we believe that the health care professional has an obligation to tell his or her patient that important genetic information should be shared with family members, and why this is the case. This is why we included a provision in the Genetic Privacy Act that every written authorization signed prior to collecting DNA samples for DNA analysis must include the statement that,

the genetic analysis may result in information about the sample source's genetic relatives which may not be known to such relatives but could be important, and therefore the sample source will have to decide whether or not to share that

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<sup>20</sup> *Id.* at \*9.

information with relatives.<sup>21</sup>

The question of whether there is or should be an obligation to notify family members of the results of genetic analysis of one of its members also involves a factual scenario that is substantially different from the Tarasoff scenario. In that case, if the therapists did not warn Ms. Tarasoff of the danger, there was no other way she could learn of the danger. Certainly, Poddar, for example, would not inform her of his intentions. In the case of genetic counseling, the family member who has been counseled could well discuss the findings with other family members who are at risk. We believe that it is good social policy to assume that family members will act benevolently toward each other in these circumstances even if there will be instances where this is not the case. Moreover, family members can themselves seek genetic testing or counseling, just as the one who actually received the genetic analysis did. Finally, Tarasoff presented a protection circumstance that occurs occasionally in the practice of psychiatry - how to deal with a mentally ill homicidal patient who identifies his potential victim. In genetic counseling this issue would occur much more frequently since many, if not most, genetic analyses will have meaning for other family members. Therefore, unlike psychiatry, a requirement that genetic counselors must inform other family members of their potential genetic risks would severely undermine the principle of genetic privacy.

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<sup>21</sup> Genetic Privacy Act, Sec. 101(b) (8).

A final reason for not imposing such an obligation on health care providers is that it would be difficult if not impossible to set logical boundaries on such an obligation. For example, it would seem artificial to restrict this duty just to genetic conditions, and not include those involving age, environmental factors, diet, life-style, or simply conditions that "run in families". Such an expansion would of course, eliminate both privacy and confidentiality, and be impossible to implement as a practical matter. For example, a 40 year old woman may have a sister of about the same age who would also be at risk for having a child with Down syndrome were she to become pregnant. We think positing any obligation on the part of the physician to inform the sister of the patient about this risk to her potential future child is untenable.<sup>22</sup>

The conclusion that there is no obligation for a professional to disclose private genetic information that might be useful to others does not answer the question as to whether a professional has the discretion to disclose such information to a family member. The common law answer to this question is not clear. In one case that establishes the confidential nature of the physician-patient relationship, the

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<sup>22</sup> Lori Andrews goes even further. If the practitioner has a duty to tell a relative with whom she or he does not have a professional relationship about the enhanced risk to that relative, a practitioner should also have an obligation to tell any other stranger about the enhanced risk that stranger faces. The logic might similarly require [any person who] knows of the increased risk of Down syndrome to women over thirty-five, to warn the forty year-old-pregnant woman sitting next to him or her on an airplane about the risks and existence of amniocentesis. Andrews, *supra* note 3 at 181.

court, in dicta, states that the requirement to keep patient disclosures confidential is subject to "exceptions prompted by the supervening interests to society..."<sup>23</sup> The court elsewhere states that a physician could argue that he had a "legitimate reason" for making a disclosure of confidential information as a defense.<sup>24</sup> A different court states that a physician may not disclose medical information without the patient's consent, "except to meet a serious danger to the patient or others."<sup>25</sup> But again, it is difficult to ascertain the boundaries of this exception, since the applicability of this defense was not an issue in the case.

Whatever the precise nature of the common law exceptions to the rule that forbids physician disclosure of a patient's confidential medical information without the patient's consent, the Genetic Privacy Act does not give professionals the authority to make such discretionary disclosures. The Act is clear: private genetic information may not be disclosed without the individual's consent. The arguments for not obligating such disclosures are the same as the arguments for not permitting such disclosures. If, on the other hand, a professional believes that there is good reason for warning a third person that the person is at risk of having some genetic condition, nothing in the Act would forbid such a warning so long as the recipient of the information does not learn of a

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<sup>23</sup> Horne v. Patton, 287 So.2d 824, 291 Ala. 701 (1973).

<sup>24</sup> 287 So.2d at 830, 291 Ala. at 709.

<sup>25</sup> Alberts v. Devine, 395 Mass. 59, 67, 479 N.E.2d 113, 119 (1985).

sample source's private genetic information. Such a warning may be awkward since the person notifying a stranger that they are at some genetic risk cannot disclose how they have obtained such information, but the Act would not foreclose this type of warning.

Although there is no obligation of genetic practitioners to disclose to relatives of their patients that the relatives may be at risk for a genetic condition, the question of whose genetic information the practitioner has is a separate issue. For example, if a practitioner determines that a woman (sister A) has the breast cancer gene then that practitioner also knows that the patient's sister (sister B) is at a much higher risk for having the gene than other women in the general population. Is knowledge of sister B's increased risk her information such that she has a right to it? This is a close and difficult question.

If the practitioner actually identifies sister B in sister A's medical records, and notes that she is at higher risk for the breast cancer gene, this would be "private genetic information" as that term is defined in the Genetic Privacy Act.<sup>26</sup> This means that under the Act the practitioner would be forbidden from disclosing this information to third parties without sister B's permission. Furthermore, if sister B was aware that there were such records that identified her and documented her risk for a

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<sup>26</sup> Genetic Privacy Act, Sec. 3(M)(2). Private genetic information means any information about an identifiable individual "from an analysis of the DNA of a person to whom the individual is related."

genetic condition, she would have the right to access those portions of the record that discuss her. She could not, however, have access to sister A's genetic information. This problem is entirely avoidable so long as practitioners do not identify the patient's relatives in their records or make observations about their risks. However, the fact that the practitioner may possess information that may be of use to sister B does not mean that there is an obligation to disclose such information to her, any more than the adoption agency in Olson had an obligation to disclose information about the mother to her.

### Conclusion

For all these reasons, we conclude that there is no obligation, and should be no obligation, on practitioners to disclose genetic information to persons who are not their patients. This rule maximizes the privacy between persons who receive services that result in private genetic information and their providers. It also places the responsibility for informing relatives of their potential genetic risks on the family member who has knowledge of such risks, which is where we believe it morally belongs. Further, we think it is reasonable to assume that with proper counseling and guidance from supportive and informed practitioners, family members will act in a protective manner toward other family members.

Our position is also consistent with recommendations of

the Committee on Genetic Risks of the Institute of Medicine which seeks to foster confidentiality and to encourage sharing of information between relatives.<sup>27</sup> Unlike our position, however, the committee seems to recommend imposing a duty of disclosure to relatives in certain narrowly defined circumstances. It states,

The committee recommends that confidentiality be breached and relatives informed about genetic risks only when attempts to elicit voluntary disclosure fail, there is a high probability of irreversible or fatal harm to the relative, the disclosure of the information will prevent harm, the disclosure is limited to the information necessary for diagnosis or treatment of the relative, and there is no other reasonable way to avert the harm.<sup>28</sup>

We agree with the benevolent notion that undergirds this recommendation. Nonetheless, we did not include such a provision in the Genetic Privacy Act because we could not think of a circumstance that would meet these provisions, and we did not want to force genetic practitioners into a situation in which they needed to make difficult judgments as a result of feeling at legal risk for not disclosing. Even the example used in the report to justify its recommendation does not appear to meet its requirements. It says, "Malignant hypothermia is an autosomal dominant genetic condition causing a fatal reaction to common anesthesia. Prompt warning of families can literally save lives, especially from death due

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<sup>27</sup> Andrews LB, Fullarton JE, Holtzman NA, & Motulsky AG, eds., *Assessing Genetic Risks, Implications for Health and Social Policy*, Washington, D.C.: National Academy Press, 1994, p.278.

<sup>28</sup> *Id.*

to minor surgeries such as setting broken bones in children."<sup>29</sup> Apparently the committee believes that this is the type of genetic condition that, once diagnosed, must be disclosed to other family members.

The standards set out for disclosure require "a high probability of irreversible or fatal harm to the relative..." Thus, in the case of malignant hypothermia there would be no obligation to disclose unless we thought that everyone had a "high probability" of undergoing surgery, and that surgery itself presented a high probability of death from malignant hypothermia. But this probability is much less than 10% even for children, and when this is multiplied by the risk of having surgery, the result is not a "high probability" risk.<sup>30</sup> This example also illustrates that the practitioner who diagnoses the malignant hypothermia condition would also have to try to determine which relatives are at risk, and how to contact them. It is just this complexity and the limited utility of such an exception that led us to rely on the willingness of well informed and appropriately counseled relatives to care for each other rather than on statutory requirements for warnings by health care providers.

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<sup>29</sup> *Id.* at 267.

<sup>30</sup> See Kaus SJ & Rockoff MA, Malignant Hyperthermia, 41 Pediatric Clinics of N. Am. 221 (1994); Moore JL & Rice EL, Malignant Hyperthermia, 45 Am. Family Physician 2245 (1992); and Strazis KP & Fox AW, Malignant Hyperthermia: A Review of Published Cases, 77 Anesth. Analg. 297 (1993).