

**PLEA BARGAINING FOR DNA: IMPLICATIONS ON THE RIGHT  
TO PRIVACY**

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They who can give up essential liberty to obtain a little temporary safety,  
deserve neither liberty nor safety.

—Benjamin Franklin<sup>1</sup>

I. INTRODUCTION

DNA is a very important and useful tool for solving crimes and convicting criminals. DNA technology is evolving rapidly, and scientists are constantly finding new applications for its use by law enforcement personnel. With all these new technologies come new threats to privacy. DNA is obtained by law enforcement from individuals, but under the Fourth Amendment, individuals have the right to be free from unreasonable searches and seizures of their person absent probable cause. In some situations law enforcement officers clearly have probable cause to seize an individual's DNA. In other situations, despite having apparent probable cause, an individual's constitutional right to be free from unreasonable seizures and a related reasonable expectation of privacy may rightly prevent police from being able to collect or use that person's DNA.

In Orange County, California, the District Attorney offers a plea bargain to arrestees for misdemeanor crimes only: in exchange for a DNA sample, the District Attorney will drop all charges against the arrestee. Police will then retain that person's DNA sample in their database ("Orange County database") indefinitely.

Aside from due process questions about the circumstances surrounding the acquisition of DNA, the use of DNA databases for various purposes implicates significant privacy concerns. The two privacy issues of greatest concern are familial searches and function creep.

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<sup>1</sup> BENJAMIN FRANKLIN & WILLIAM TEMPLE FRANKLIN, MEMOIRS OF THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN 270 (London 1818).

This comment will discuss these and other privacy risks of DNA databases and evaluate how the Orange County database is designed to address these risks. Specifically, Orange County should set a time limit on the inclusion of arrestee profiles in the database to balance the needs of law enforcement with an individual's reasonable expectation of privacy. Additionally, although Orange County's prohibition on familial searches is one very important privacy safeguard, the amount of allowed and encouraged function creep remains a serious problem and needs to be addressed to ensure the privacy interests of the program's participants are protected.

## II. THE DEVELOPMENT OF DNA AS A TOOL FOR LAW ENFORCEMENT

Investigators began using DNA analysis to investigate crimes in 1987.<sup>2</sup> By the mid-1990s, the use of DNA to solve crimes had become mainstream.<sup>3</sup> Any DNA sample stored properly, regardless of age, may be able to produce a viable sample for testing.<sup>4</sup> The procedure for extracting DNA samples that will be included in the federal National DNA Index System (NDIS) is heavily regulated by the DNA Advisory Board (DAB), a division of the FBI.<sup>5</sup> The DAB is responsible for promulgating quality control standards and for doing proficiency testing.<sup>6</sup> DNA testing is the most regulated forensic science in America and is considered to be the most scientifically sound.<sup>7</sup> State and local labs are not required to follow DAB procedures for profiles that will not be included in NDIS. Many such labs, however, either follow these procedures or analogous procedures voluntarily. For example, in California, DNA labs that contribute to the state database are required to be accredited.<sup>8</sup>

Scholars and practitioners actively debate how this developing forensics field should evolve in order to best serve the needs of justice and the courts. One of the major points of dispute is the fact that prosecutors have much greater access to DNA evidence than defen-

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2 See Norah Rudin & Keith Inman, *Forensic Science Timeline*, FORENSIC DNA CONSULTING, <http://www.forensicdna.com/Timeline020702.pdf> (last updated Feb. 7, 2002).

3 See Jessica D. Gabel, *Probable Cause from Probable Bonds: A Genetic Tattle Tale Based on Familial DNA*, 21 HASTINGS WOMEN'S L.J. 3, 12 (2010).

4 *Analyzing DNA Evidence*, DNA INITIATIVE, <http://www.dna.gov/basics/analysis/> (last visited Mar. 27, 2011).

5 See Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 209 (2007).

6 *Id.*

7 *Id.* at 210.

8 CAL. PENAL CODE § 297(d) (West 2008) (requiring accreditation "by ASCLD/LAB or any certifying body approved by" ASCLD/LAB) (quotations omitted)).

dants have.<sup>9</sup> One proposed solution is to require all crime labs to operate independently from police and other investigative departments.<sup>10</sup> Another solution is to provide defendants the same access to DNA evidence that prosecutors have, particularly for defendants who believe they could be exonerated based on DNA testing.<sup>11</sup> A second major point of dispute involves the treatment of evidence once it is admitted in court: what expert testimony is required or allowed to legitimize it before the fact finder?<sup>12</sup>

#### A. Federal DNA Databases

The federal government, through the Federal Bureau of Investigations (FBI), collects and stores DNA in the National DNA Index System (NDIS).<sup>13</sup> This index is a part of the Combined DNA Index System (CODIS).<sup>14</sup> CODIS is a computer system that collects DNA information from local, state, and national sources and allows users to identify serial crimes, match suspects, and discover other patterns.<sup>15</sup> The FBI restricts CODIS access to public crime labs that have been accredited and trained on CODIS procedures and quality standards.<sup>16</sup> There are two main indexes in the CODIS system: the convicted offender index and the forensic index.<sup>17</sup>

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<sup>9</sup> See Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for the Truth*, 38 SETON HALL L. REV. 893, 898–907 (2008) (discussing disparities between defendants and prosecutors in the ability to find and develop forensic evidence).

<sup>10</sup> *Id.* at 906–07.

<sup>11</sup> See *id.* at 915 (describing the unreliability of eye witness accounts and the ability of DNA analysis to exonerate those who have been falsely accused based on mistaken identification).

<sup>12</sup> Compare *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–95 (1993) (listing various factors to consider when determining the reliability of expert scientific testimony under the Federal Rules of Evidence), with *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147, 158 (1999) (holding that all expert testimony, not just testimony based on scientific knowledge, must rest on a reliable foundation and be relevant to the task at hand, and reliability may be determined at the discretion of the trial judge by considering one or more of the factors articulated in *Daubert*).

<sup>13</sup> *Combined DNA Index System (CODIS)*, DNA.GOV, <http://www.dna.gov/dna-databases/codis> (last visited Mar. 27, 2011).

<sup>14</sup> *Id.*

<sup>15</sup> *What Is CODIS?*, DNA.GOV, <http://www.dna.gov/solving-crimes/cold-cases/howdatabasesaid/codis/> (last visited Mar. 27, 2011).

<sup>16</sup> *FBI—CODIS and NDIS Fact Sheet*, FBI.GOV, <http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet> (last visited Mar. 27, 2011).

<sup>17</sup> *How Does CODIS Work?*, DNA.GOV, <http://www.dna.gov/solving-crimes/cold-cases/howdatabasesaid/codis/howcodisworks> (last visited Mar. 27, 2011).

Every state collects DNA from convicted offenders and shares the information with NDIS.<sup>18</sup> As of December 2010, NDIS includes over 9,233,554 offender profiles and 351,951 forensic profiles.<sup>19</sup> Each state sets its own qualifying level of crime that will require a DNA sample to be sent in for inclusion in the database; each state also has some leeway on the type of information it collects for inclusion in the database.<sup>20</sup> Since 2006, NDIS accepts DNA profiles from arrestees for certain offenses where the state requires a DNA sample for that specific offense.<sup>21</sup> Some states also maintain their own databases of suspect DNA samples, but much of this information is ineligible for inclusion in the NDIS.<sup>22</sup> Federal law places strict limits on the requirements a DNA profile must meet before it can be uploaded to NDIS, although states are free to maintain their own databases that are subject to different state legislative restrictions.<sup>23</sup> The NDIS procedures board sets policy, monitors compliance, and ensures quality control at the federal level.<sup>24</sup>

As of December 2010, the CODIS database had provided leads to over 129,500 investigations.<sup>25</sup> The number of leads is expected to grow annually as more DNA profiles are stored in NDIS and the technology for improving DNA recovery from forensic evidence develops. In 2000, Congress passed the DNA Analysis Backlog Elimination Act,<sup>26</sup> which provided funding to local, state, and federal DNA crime labs. One of the Act's purposes was to accelerate the process of testing and indexing backlogged DNA evidence because existing laboratories lacked capacity to meet the growing demand for their services.<sup>27</sup> The Act also gave the United States Attorney General the authority to expand NDIS by requiring collection of a DNA sample from all incarcerated individuals, from anyone convicted of a qualifying offense (most felonies), and from anyone currently serving parole

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18 *Types of Profiles in the Database*, DNA.GOV, <http://www.dna.gov/dna-databases/types/> (last visited Mar. 27, 2011).

19 *Codis—NDIS Statistics*, FBI.GOV, <http://www.fbi.gov/about-us/lab/codis/ndis-statistics/>.

20 *NDIS Procedures and Administration*, DNA.GOV, <http://www.dna.gov/dna-databases/ndis> (last visited Mar. 27, 2011).

21 *Types of Profiles in the Database*, *supra* note 18.

22 *Id.*

23 Justice for All Act of 2004, Pub. L. No. 108-405, § 203, 118 Stat. 2260 (codified as amended at 42 U.S.C. §§ 14132-14135 (2004)); *see also Levels of the Database*, DNA.GOV, <http://www.dna.gov/dna-databases/levels/> (last visited Mar. 27, 2011) (“States may have their own regulations regarding which profile types can be maintained at SDIS.”).

24 *NDIS Procedures and Administration*, *supra* note 20.

25 *See Codis—NDIS Statistics*, *supra* note 19.

26 Pub. L. No. 106-546, § 2, 114 Stat. 2726 (2000) (codified at 42 U.S.C. § 14135 et seq.).

27 *See* 42 U.S.C.S. § 14135(a) (2000).

for a qualifying offense.<sup>28</sup> Finally, the Act set additional procedures for the collection of DNA samples, including the delegation of authority to state and local agents, and required that all samples collected under this statute be submitted for inclusion in NDIS.<sup>29</sup>

### B. State and Local DNA Databases

State and local databases maintained independently from CODIS are referred to as “rogue” databases.<sup>30</sup> These databases are not subject to the federal laws governing DNA collection; it is up to each state legislature to enact its own laws. While many of these laws resemble the federal equivalents, states have greater discretion in determining what DNA samples will be included and what, if any, limits will be placed on the use of such samples. Local databases, like the one maintained by Orange County, are not subject to any mandatory oversight in California.<sup>31</sup>

In 2004, California voters enacted Proposition 69, which expanded the state DNA database.<sup>32</sup> This law mandates the collection of DNA samples from all convicted state felons, all convicted state sex offenders, and from all parolees from state felony or sex offender sentences.<sup>33</sup> For qualifying offenders, it is a misdemeanor to refuse to provide a DNA sample.<sup>34</sup> In fact, the law authorizes law enforcement personnel to use reasonable force to obtain a sample.<sup>35</sup>

Proposition 69 drastically expanded the scope of DNA collection. Before Proposition 69, California collected an average of 47,878 DNA profiles per year.<sup>36</sup> In the first year after Proposition 69, approximately 600,000 individuals qualified for DNA testing.<sup>37</sup> As of September

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28 42 U.S.C.S. § 14135a (a)(1), (2) (2000).

29 42 U.S.C.S. § 14135a (a)(4), (b) (2000).

30 See Tami Abdollah, *Arrested in O.C.? DNA Sample Could Buy Release*, L.A. TIMES, Sept. 17, 2009, at A1 [hereinafter Abdollah, *Arrested in O.C.?*].

31 See *The California Report: Expanding DNA Databases Raise Questions*, KQED Public Radio (Oct. 8, 2009), <http://www.californiareport.org/archive/R910080850/b> (interview with Kara Dansky, Executive Director of the Stanford Criminal Justice Center) [hereinafter *California Report*, Dansky interview].

32 See Proposition 69, “DNA Fingerprint, Unsolved Crime and Innocence Protection Act of 2004,” available at [http://ag.ca.gov/bfs/pdf/sec\\_state\\_full\\_version\\_prop69.pdf](http://ag.ca.gov/bfs/pdf/sec_state_full_version_prop69.pdf). (codified in scattered sections of the California Penal Code) [hereinafter Proposition 69].

33 See *id.*

34 CAL. PENAL CODE § 298.1(a) (West 2008).

35 CAL. PENAL CODE § 298.1(b), (c) (West 2008).

36 See Tania Simoncelli & Barry Steinhardt, *California’s Proposition 69: A Dangerous Precedent for Criminal DNA Databases*, 34 J.L. MED. & ETHICS 199, 211 n.25 (2006).

37 See *id.* at 201.

2010, the California database included 1,691,511 profiles.<sup>38</sup> These profiles have provided leads in 15,094 investigations.<sup>39</sup> Five years after Proposition 69 was enacted, in January 2009, the law expanded to require any suspect arrested in California on a state felony charge to provide a DNA sample.<sup>40</sup> In addition to California, only Virginia, Texas, and Louisiana collect DNA from arrestees. Unlike California, these three states all limit collection to those arrested for felonies or a few discrete crimes, rather than permitting samples from all arrestees.<sup>41</sup>

These profiles are maintained even if charges are later dropped or if the suspect is found not guilty.<sup>42</sup> Approximately 60% of California suspects arrested on state felony charges are never convicted.<sup>43</sup> Citing privacy concerns, particularly for people acquitted and those on probation or parole, the American Civil Liberties Union (ACLU) has filed a court challenge to the constitutionality of Proposition 69.<sup>44</sup>

### III. DNA AND THE RIGHT TO PRIVACY

The intersections between DNA collection and the right to privacy are numerous and warrant close examination. Most privacy concerns relate to the Fourth Amendment prohibition against unreasonable searches and seizures:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath

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38 See CAL. DEP'T OF JUSTICE, PROPOSITION 69 DNA BANK PROGRAM: REPORT FOR THIRD QUARTER 2010, available at <http://ag.ca.gov/bfs/pdf/quarterlyrpt.pdf>; see also *Codis—NDIS Statistics*, *supra* note 19 (showing that as of December 2010, California had only submitted 1,321,925 offender profiles for inclusion in NDIS).

39 See CAL. DEP'T OF JUSTICE, *supra* note 38.

40 See Proposition 69, *supra* note 32 at 137.

41 See CAL. PENAL CODE § 296 (West 2008); LA. REV. STAT. ANN. § 15:609 (2005); TEX. GOV'T CODE ANN. § 411.1471 (West 2010); VA. CODE ANN. § 19.2-310.2:1 (2008); see also Simoncelli & Steinhardt, *supra* note 36 at 202 (describing the DNA sampling practices of Virginia, Texas, and Louisiana).

42 See Press Release, ACLU, ACLU Files Challenge to Proposition 69 (Dec. 7, 2004) (on file with author), available at <http://www.aclu-sc.org/releases/view/100787> (announcing that the ACLU has filed a suit against Proposition 69 challenging the law as unconstitutional on privacy grounds).

43 See Simoncelli & Steinhardt, *supra* note 36 at 201.

44 See Press Release, ACLU, *supra* note 42. The case is currently awaiting a decision from the Ninth Circuit for the ACLU's appeal from the denial of their motion for a preliminary injunction of the law. ACLU of Northern California, *Haskell v. Brown*, ACLU OF NORTHERN CALIFORNIA (Jul. 10, 2010), [http://www.aclunc.org/cases/active\\_cases/haskell\\_v\\_brown.shtml](http://www.aclunc.org/cases/active_cases/haskell_v_brown.shtml) (discussing the case and including links to the complaint, ACLU and amicus briefs, and a recording of oral argument).

or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>45</sup>

“A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.”<sup>46</sup> By its very nature, DNA collection<sup>47</sup> and use involves the identification of a suspect without any individualized suspicion whatsoever. DNA collection also implicates the right to privacy for medical records and genetic materials.<sup>48</sup> The maintenance of a DNA database calls both of those rights into question.<sup>49</sup> Individual privacy rights are extended to protection from the states through the Fourteenth Amendment, for example to be secure in the privacy of one’s body from invasion by the state.<sup>50</sup> California is one of a handful of states that gives its citizens a state constitutional right to privacy.<sup>51</sup>

#### A. *Why DNA Deserves Enhanced Privacy Protections*

While some analogize DNA profiling as just another form of identification, such as an advanced method of fingerprinting, in fact they

<sup>45</sup> U.S. CONST. amend. IV.

<sup>46</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (quoting *Chandler v. Miller*, 520 U.S. 305, 308 (1997)).

<sup>47</sup> Taking a DNA sample is recognized by courts as a search under the Fourth Amendment. See *Friedman v. Boucher*, 580 F.3d 847, 852–53 (9th Cir. 2009) (listing Supreme Court and Circuit Court decisions supporting this assertion).

<sup>48</sup> See Health Insurance Portability and Accountability Act, 45 C.F.R. § 162.502, 164.306 (2009); U.S. DEPT. OF HEALTH AND HUMAN SERVICES, SUMMARY OF THE HIPAA PRIVACY RULE 2–4 (2003), available at <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf> (describing the privacy protections provided to health information by HIPAA); see also *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001) (“The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent.”); *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (acknowledging “the individual interest in avoiding disclosure of personal matters”).

<sup>49</sup> See Press Release, ACLU, *supra* note 42 (“Collecting DNA through Prop. 69 is a direct violation of a person’s Fourth Amendment and due process and privacy rights.” (quoting ACLU Staff Attorney Ricardo Garcia)).

<sup>50</sup> U.S. CONST. amend. XIV; see also *Roe v. Wade*, 410 U.S. 113, 155 (1973) (noting that while the right to privacy is not absolute, when “certain ‘fundamental rights’ are involved, the Court has held that regulations limiting these rights may be justified only by a ‘compelling state interest’” (quoting *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969))).

<sup>51</sup> See CAL. CONST., art. I, § 1 (“All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”); see also *Privacy Protections in State Constitutions*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=13467> (showing other states that expressly provide for a constitutional right to privacy, including Alaska, Arizona, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington).

are very different. In the forensic context, fingerprints and palm prints serve as identification tools only. While DNA permits identification, it also carries information about a person's race, family history, predisposition to various diseases, appearance, and behavioral traits,<sup>52</sup> as well as their legitimacy of birth.<sup>53</sup> Scientists claim that DNA may also be able to shed light on a person's aggression, substance addiction, criminal tendency, and sexual orientation.<sup>54</sup> As DNA profiling technology improves, it is possible that scientists will be able to mine even greater or more specific information about a person from that person's DNA.

### B. *Legitimate Expectation of Privacy*

For prisoners, there is no legitimate expectation of privacy.<sup>55</sup> Due to this diminished expectation of privacy among prisoners, courts have held there is no Fourth Amendment violation when states require DNA samples from convicted felons. The rationale for this holding is that the collection is both minimally invasive and is justified by a legitimate government interest. Specifically, the government has a strong interest in solving crimes, which may be advanced by linking currently incarcerated prisoners to unsolved or other crimes.<sup>56</sup> Additionally, courts have held that no individualized suspicion is required to obtain DNA samples from prisoners.<sup>57</sup> In fact, federal statute mandates that a DNA sample be collected from every person serving qualifying federal sentences.<sup>58</sup>

Although qualifying convicts are required to provide a sample of their DNA, they have no legal right to access their own DNA sample,

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52 See Simoncelli & Steinhardt, *supra* note 36, at 208 (noting that DNA profiling may be used for identification purposes, but that the "DNA itself represents more than a fingerprint").

53 See *DNA Forensics*, [http://www.ornl.gov/sci/techresources/Human\\_Genome/elsi/forensics.shtml](http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml) ("DNA profiles are different from fingerprints . . . . DNA can provide insights into many intimate aspects of people and their families including . . . legitimacy of birth . . . .") (last visited Mar. 27, 2011).

54 See Simoncelli & Steinhardt, *supra* note 36, at 208.

55 *Hudson v. Palmer*, 468 U.S. 517, 525–26 (1984).

56 See *Banks v. Gonzales*, 415 F. Supp. 2d 1248, 1266 (N.D. Okla. 2006) (noting that building a DNA database to gain "accurate identification for purposes of solving past and future crimes" satisfies the special needs exception to government searches); see also *United States v. Amerson*, 483 F.3d 73, 86 (2d Cir. 2007) (holding that police already possess so much information about defendants by the time they are convicted that the additional intrusion obtained through a DNA sample is small in comparison to the legitimate state interest in recording it).

57 See *Johnson v. Quander*, 440 F.3d 489, 494 (D.C. Cir. 2006) (noting that, in some circumstances, the government's interests outweigh the need for individualized suspicion).

58 42 U.S.C. § 14132(a).



or to test and compare their DNA to other untested DNA evidence in post-conviction proceedings.<sup>59</sup> Individual states, however, can grant state prisoners this right through legislation.<sup>60</sup>

Unlike prisoners, normal citizens have a legitimate expectation of privacy,<sup>61</sup> so the rationale for collecting DNA from prisoners does not apply to citizens.<sup>62</sup> Courts apply a totality of the circumstances test in determining whether a DNA sample may be obtained from non-prisoners without violating the Fourth Amendment.<sup>63</sup>

The only method by which law enforcement can obtain a normal citizen's DNA without going through the totality of the circumstances test is through covert involuntary DNA sampling. An example of covert involuntary DNA sampling would be when a citizen uses a tissue or licks an envelope and the police surreptitiously seize the item. Critics of such covert involuntary sampling assert that the Fourth Amendment's reasonable expectation of privacy<sup>64</sup> protects citizens from the threat that the police would employ such tactics to sample their genetic material.<sup>65</sup> That assertion, however, is in tension with the recognition that there is no Fourth Amendment reasonable expectation of privacy for an abandoned item because that person's volitional act of relinquishing the item forfeits that person's reasonable expectation of privacy with regard to that item.<sup>66</sup>

Sampling the DNA of arrested persons prompts additional privacy concerns. Although arrestees have a decreased expectation of priva-

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59 Dist. Attorney's Office for the Third Judicial Circuit v. Osbourne, 129 S. Ct. 2308 (2009) (declining to recognize a prisoner's right to DNA evidence).

60 *Id.* at 2316.

61 *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (noting that the Fourth Amendment requires that the police respect a citizen's minimal, reasonable expectation of privacy).

62 See Lina Alexandra Hogan, *Fourth Amendment—Guilt by Relation: If Your Brother is Convicted of a Crime, You Too May do Time*, 30 W. NEW ENG. L. REV. 543, 583–84 (2008) (discussing court decisions that discussed prisoners' reduced expectation of privacy in the context of familial searches and declaring that those holdings do "not apply to a family member who is a free and law-abiding citizen with an undiminished expectation of privacy").

63 See *United States v. Weikert*, 504 F.3d 1, 9 (1st Cir. 2007) ("[T]he totality of circumstances analysis is . . . the appropriate framework to apply" for a search of an individual on conditional release).

64 *Kyllo*, 533 U.S. at 34.

65 See Laura A. Matejick, *DNA Sampling: Privacy and Police Investigation in a Suspect Society*, 61 ARK. L. REV. 53, 56–57 (2008) (noting that, under the Fourth Amendment reasonable expectation of privacy analysis, there is a "delicate balance" between an individual's freedom and society's interest in resolving crimes).

66 See *California v. Hodari*, 499 U.S. 621, 629 (1991) (holding that that there was no unlawful seizure where the contents examined had been abandoned); see also Matejick, *supra* note 65, at 72 ("The Fourth Amendment does not protect abandoned items because the act of abandonment relinquishes a person's reasonable expectation of privacy in abandoned items.").

cy, that status may be temporary, depending on whether the arrestees are convicted. Not all arrestees are convicted: the charges could be dropped, the suspect could be acquitted, or the arrestee could be the victim of a case of mistaken identity. Unfortunately, the DNA databases do not remove the DNA profiles for arrestees who are not later convicted.

The government's practice of retaining the DNA profiles for arrestees could and does perpetuate improper law enforcement practices and procedures. The most common example derives from the demographics of the DNA collection. Since a disproportionate number of minorities are arrested, DNA databases that include arrestee data include a disproportionate number of minorities' DNA.<sup>67</sup> It is possible that this bias results in some minorities being unfairly searched during the daily searches run in these databases, and that unfair familial partial matches are being made as well.

### C. How Law Enforcement Obtains DNA

Law enforcement may acquire DNA directly or indirectly, or voluntarily or involuntarily, and either with or without the suspect's knowledge. An example of direct collection of DNA is from the suspect himself; an example of indirect collection of DNA is forensic investigation of a crime scene. If a suspect abandoned an item, law enforcement may collect the suspect's DNA "involuntarily," or without that suspect's knowledge or consent.<sup>68</sup> Significant privacy concerns are implicated, however, when law enforcement deliberately sends items directly to the suspect for the sole purpose of surreptitiously collecting the DNA afterwards.<sup>69</sup> Law enforcement typically invokes a special needs exception to obtain abandoned DNA based on hunches

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<sup>67</sup> See Solomon Moore, *F.B.I. and States Vastly Expand DNA Databases*, N.Y. TIMES, April 19, 2009, at A1 ("[E]xpanding genetic sampling in the United States could exacerbate racial disparities in the criminal justice system"); *California Report*, Dansky interview, *supra* note 31.

<sup>68</sup> For example, if a suspect throws a cigarette butt on the ground or throws away an envelope he licked, police can pick it up and send it to a lab for analysis. See, e.g., *State v. Athan*, 158 P.3d 27, 31–32 (Wash. 2007) (holding that police could obtain a DNA sample from an envelope defendant licked and then threw away); *United States v. Flynn*, 309 F.3d 736, 737–38 (10th Cir. 2002) (holding a defendant voluntarily abandoned drugs when he left them at the top of an exit ramp even though police were pursuing him).

<sup>69</sup> See Matejik, *supra* note 65, at 55–56 (describing an example where police sent a suspect a fake class action notice with the intent that he would lick the envelope and send it back to them).

and absent a warrant or other judicial oversight.<sup>70</sup> This exception is broad.

Another quasi-voluntary method police use is the DNA dragnet. Typically, a DNA dragnet is used after police obtain a DNA sample from the crime scene but find no matching profile in the existing databases.<sup>71</sup> Based on physical characteristics<sup>72</sup> that can be determined from analyzing a DNA sample found at the crime scene, police will request all persons in a geographic area who meet those physical descriptions to “voluntarily” provide a DNA sample.<sup>73</sup> While it is legal to refuse to provide a sample, many individuals feel compelled to provide a sample in order to avoid appearing guilty. This feeling of compulsion is particularly prevalent when the dragnet is based on a partial match that suggests a familial connection and there are only a handful of possible matches, despite the lack of individualized suspicion for those individuals.<sup>74</sup> Of all the states that engage in DNA dragnets, only Nebraska has a law regulating this practice.<sup>75</sup>

#### IV. PRIVACY ISSUES SPECIFIC TO DNA DATABASES

##### A. *Time Horizons for Profile Storage*

A significant privacy concern is the duration of time that DNA profiles are retained by the government. The Privacy Act of 1974 has been interpreted to prevent federal law enforcement agencies from maintaining dossiers of information on individuals not suspected of wrongdoing.<sup>76</sup> In contrast, the DNA of convicted criminals can be

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<sup>70</sup> The special needs test is typically applied in situations where a warrant would be impracticable due to the need to act quickly to preserve evidence. *See, e.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (holding teachers do not need to obtain a warrant to search students for drugs because swift and certain action is necessary in maintaining school discipline); *Schmerber v. California*, 384 U.S. 757, 770 (1966) (holding blood alcohol testing does not need a warrant because alcohol dissipates quickly in the blood).

<sup>71</sup> *See generally* Sepideh Esmaili, Note, *Searching for a Needle in a Haystack: The Constitutionality of Police DNA Dragnets*, 82 CHI.-KENT L. REV. 495 (2007) (discussing the constitutionality of the use of “DNA Dragnets”).

<sup>72</sup> Such characteristics include race, gender, familial connections, or appearance.

<sup>73</sup> *See generally* Esmaili, *supra* note 71.

<sup>74</sup> Gabel, *supra* note 3, at 3–4.

<sup>75</sup> NEB. REV. STAT. § 29–4126 (2008). *See* Matejik, *supra* note 65, at 62 (“Nebraska is the only state that has enacted a statute addressing the collection of voluntary DNA samples.”).

<sup>76</sup> *See The “Open Government Act”: Hearing on S. 394 Before the Subcomm. on Terrorism, Tech., and Homeland Sec. Comm. of the S. Comm. on the Judiciary*, 109th Cong. 4 (2005) (statement of Lisa Graves, Senior Counsel for Legislative Strategy, American Civil Liberties Union) available at <http://www.fas.org/sgp/congress/2005/031505graves.pdf>; *see also* Privacy Act of 1974, 5 U.S.C. § 552a(e), (j) (2006) (providing limitations on collecting information).

kept in CODIS indefinitely, even after a prison sentence or parole term has concluded.<sup>77</sup> As a result, these profiles will continue to be searched in every crime run through CODIS. The information can also be used indefinitely to make familial matches against those whom the government has no individualized suspicion of wrongdoing.

While an individual not suspected of wrongdoing may petition to remove his DNA from NDIS, the process is legally complex and involves a very onerous standard.<sup>78</sup> Further, that person may not petition for removal until at least two years from the date of arrest.<sup>79</sup> During that time, or indefinitely if a person is unable or unwilling to go through these burdensome procedures, his DNA will be included in all searches run on the database.

An ordinary citizen with no convictions has a reasonable expectation of privacy.<sup>80</sup> Once this person's DNA is included in a DNA database, however, it will be subject to all future database searches without individualized suspicion. Given the onerous standards and lengthy period of time required to remove a DNA profile from the databases, an argument could be made that the profile will be subjected to an indefinite license for unlimited searches absent new reasonable suspicion. Where the DNA profile came from an arrestee who was never convicted, these searches continue despite the restoration of his reasonable expectation of privacy.

### B. *The Practice of Familial Searching*

The use of DNA profiling raises significant privacy concerns when used in familial searching. Familial searching permits investigators who find a partial DNA match to use that person as a "pivot," or a person who is likely related to the true offender.<sup>81</sup> Once police iden-

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77 See *Johnson v. Quander*, 440 F.3d 489, 499 (D.C. Cir. 2006) (holding that a DNA profile is like a snapshot so neither storage nor use of the profile gives rise to independent Fourth Amendment claims).

78 See *CODIS—Expungement Policy*, FBI.GOV, [http://www.fbi.gov/about-us/lab/codis/codis\\_expungement](http://www.fbi.gov/about-us/lab/codis/codis_expungement) (listing the requisite procedures for the expungement of DNA records) (last visited Mar. 27, 2011); see also Simoncelli & Steinhardt, *supra* note 36, at 204–05 (noting that an individual who seeks to get their DNA back must send a formal request to three different offices).

79 Simoncelli & Steinhardt, *supra* note 36, at 205 (“[A]nyone swept up in a DNA dragnet in California should expect that they will not be able to get their DNA back for at least two years . . .”); see *CODIS—Expungement Policy*, *supra* note 78.

80 *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

81 Gabel, *supra* note 3, at 18.

tify a pivot, they can investigate that person's relatives with greater scrutiny, despite the absence of any individualized suspicion.

Unlike prisoners, normal citizens have a higher reasonable expectation of privacy,<sup>82</sup> so the rationale for sampling the DNA of prisoners does not apply to citizens.<sup>83</sup> The reasonableness test suggests that while familial searching may enable law enforcement to identify a new suspect, they must still develop an individualized suspicion against that new suspect before they can obtain a new DNA sample.<sup>84</sup> In the case of familial searching, an involuntary DNA sample from one suspect can be used to cast suspicion on a sibling, cousin, or other relative against whom police have no other basis for suspicion.<sup>85</sup> This violates the relative's reasonable expectation of privacy because law enforcement is now able to identify him using a criminal DNA database, despite the fact that the relative did not choose to voluntarily abandon a DNA sample, nor did the government have a legitimate reason to obtain one from the relative.<sup>86</sup> As a result of the suspected criminal behavior of the pivot, the relative can now be tagged from a DNA database without any individualized suspicion. The risk to the right to privacy is even greater if the pivot's DNA was obtained through an abandoned sample that police collected without a warrant.

Familial search results, however, sometimes lead to the successful apprehension of the perpetrator of a crime.<sup>87</sup> That success has led to an increase in attempts to collect abandoned DNA, so that police may search the database and identify potential relatives of the perpetrator without alerting the suspect.<sup>88</sup> At this time, no law prevents police from obtaining abandoned DNA from a suspect's family member

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82 *Kyllo*, 533 U.S. at 34.

83 Hogan, *supra* note 62, at 553–60 (discussing how a convict's Fourth Amendment right to privacy has been curtailed based on the "special need" of the government to protect the broader interests of the public); *see also* Matejik, *supra* note 65, at 85 (discussing the differences in analyzing privacy claims of private citizens and convicted criminals).

84 Hogan, *supra* note 62, at 559–60 (noting that individualized suspicion is usually required to justify a search conducted without a warrant).

85 Matejik, *supra* note 65, at 59–60.

86 *Id.* at 60.

87 Gabel, *supra* note 3, at 26 ("One study estimates that familial searching could give a forty percent boost to the number of investigative leads generated from a DNA database search." (citing David Lazer, *Searching the Family Tree for Suspects: Ethical and Implementation Issues in the Familial Searching of DNA Databases*, TAUBMAN CENTER POLICY BRIEFS, Mar. 2008, at 1, available at [http://www.hks.harvard.edu/var/ezp\\_site/storage/fckeditor/file/pdfs/centers-programs/centers/taubman/policybriefs/lazer\\_final.pdf](http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/taubman/policybriefs/lazer_final.pdf))).

88 *See* Maura Dolan & Jason Felch, *State Offers Police Extra DNA Tool*, L.A. TIMES, Apr. 26, 2008, at A1 (discussing the controversies surrounding California's use of familial searches).

when the police are unable to obtain abandoned DNA from a suspect and want to determine if that lead is worth pursuing. Thus, the police may investigate a pivot's relatives absent any individualized suspicion and without a warrant because they are related to, for example, a person who was arrested for a misdemeanor and who accepted a deal from prosecutors. Often, the relative is unaware that the pivot was arrested because, perhaps, no charges were filed or the state agreed to conditionally drop the charges and the pivot went on with his life. The common conception of a reasonable expectation of privacy conflicts with these investigative techniques.

Another privacy concern implicated by familial searching is the confidentiality of a person's medical records, including his or her genetic relationships. The results of familial searching could result in police revealing genetic relationships to unknown relatives, including illegitimate children, half siblings, and other previously secret relationships.<sup>89</sup>

California leads the nation in conducting familial searches and has articulated a specific policy to use this investigative tool whenever applicable.<sup>90</sup> Concerns about familial searching are exacerbated in jurisdictions that include arrestee samples in their database. Unless jurisdictions curb their use of this leading-edge investigative technique, any time the DNA of a person arrested for a misdemeanor but never charged is included in a DNA database, it may be used by police to identify relatives as future suspects.

### C. *The Temptation of Function Creep*

The final major privacy concern for individuals who have had their DNA entered into databases results from function creep.<sup>91</sup> Function creep refers to a situation where the use of a database expands beyond the original contemplated purpose of that database. For example, a database originally created to track sex offenders has already been expanded to track perpetrators of other qualifying crimes, then arrestees and parolees, abandoned samples, and finally, to run familial searches. Future expansion creates additional risk of

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<sup>89</sup> *Id.*

<sup>90</sup> See Memorandum from Lance Gima, Chief of Bureau of Forensic Services to All Cal. Law Enforcement Agencies and Dist. Att'y's Offices, (Apr. 25, 2008) (on file with *The University of Pennsylvania Journal of Constitutional Law*); see also Dolan & Felch, *supra* note 88 (observing that California is the national leader in familial DNA searching); Gabel, *supra* note 3, at 22 (observing that California is the national leader in familial DNA searching).

<sup>91</sup> Jeffrey Rosen, *Genetic Surveillance for All*, SLATE, (Mar. 17, 2009, 4:52 PM), <http://www.slate.com/id/2213958/pagenum/all/>.

function creep. Part of the problem is that individual states are allowed to set their own policies regarding who is included and what information is retained in state databases.<sup>92</sup> Law enforcement can already use the information contained in CODIS databases to determine a person's ethnicity, appearance, and certain medical conditions.

Function creep goes beyond the mere inclusion of more types of DNA profiles. When the existing and ever-evolving capabilities of DNA testing technology are combined with the government's ongoing attempts to create databases that follow medical records, credit history, travel patterns, document requests, and other activities, the threat to traditional concepts of privacy becomes even more real.<sup>93</sup> In addition to the function creep occurring within government-maintained DNA databases, the Patriot Act of 2001 permitted the government greater access to datasets maintained by private entities.<sup>94</sup> These private databases could allow the government or other parties with access to both databases to tie different types of commercial information to DNA records.

## V. THE ORANGE COUNTY DNA COLLECTION PROGRAM

In 2009, the District Attorney of Orange County, California, introduced a program that would allow any person arrested for a misdemeanor to voluntarily provide the District Attorney's office with a DNA sample.<sup>95</sup> In exchange for the DNA sample, the District Attorney would drop the misdemeanor charge.<sup>96</sup> At the time of the exchange, the defendant is required to "sign a waiver explaining the rights . . . giv[en] up and the fact that [the DNA] will be put in the

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<sup>92</sup> *Id.*

<sup>93</sup> See Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317, 333–35 (2008) (describing the results of a survey measuring ratings of intrusiveness of various investigatory actions); see generally JAY STANLEY, ACLU, THE SURVEILLANCE—INDUSTRIAL COMPLEX: HOW THE AMERICAN GOVERNMENT IS CONSCRIPTING BUSINESSES AND INDIVIDUALS IN THE CONSTRUCTION OF A SURVEILLANCE SOCIETY (2004), available at [http://www.aclu.org/files/FilesPDFs/surveillance\\_report.pdf](http://www.aclu.org/files/FilesPDFs/surveillance_report.pdf) (discussing how current privacy laws and information-age technology are implicating privacy rights and leave citizens with very little control over their own information).

<sup>94</sup> USA Patriot Act, Pub. L. No. 107–56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 18 & 50 U.S.C.).

<sup>95</sup> Abdollah, *Arrested in O.C.?*, *supra* note 30.

<sup>96</sup> See e.g., *id.*; Ashby Jones, *An OC Offer: Give Us Your DNA and We'll Drop Your Charges*, WALL ST. J. L. BLOG (Sept. 24, 2009, 11:03 AM), <http://blogs.wsj.com/law/2009/09/24/an-offer-in-oc-give-us-your-dna-and-well-drop-your-charges/> [hereinafter Jones, *O.C. Offer*] (stating how Orange County has been "quietly" offering such a deal "to those arrested for misdemeanors"); *California Report*, Dansky interview, *supra* note 31.

[local] Orange County . . . database,” which is operated and maintained independently from any state or federal CODIS DNA databases.<sup>97</sup> The DNA profiles from the Orange County program are not processed by an accredited crime lab.<sup>98</sup> The lack of accreditation could lead defendants to challenge the validity of evidence or leads obtained against them on the basis of quality. DNA is not failsafe; it is subject to human error just like any other form of forensic evidence.<sup>99</sup>

This program became public knowledge in 2009 when the District Attorney, in response to a budget crisis, successfully petitioned the Orange County Board of Supervisors to impose a \$75 administrative fee on those who accepted the plea bargain.<sup>100</sup> Although the Board of Supervisors’ passage of this administrative fee could be considered an implicit local legislative approval of the program, there is currently no state statute authorizing this program.<sup>101</sup>

The program’s appeal to prosecutors is self-evident: a greater number of cases may be processed using vastly fewer resources than traditional law enforcement methods.<sup>102</sup> Since charges are dropped, the program also reduces the number of people imprisoned for non-violent misdemeanor offenses. California’s well-known struggles with prison overcrowding and budgetary woes make this especially attractive.<sup>103</sup> Other supporters believe the program will lead to decreased

97 ORANGE COUNTY GRAND JURY REP., DNA: WHOSE IS IT, ORANGE COUNTY CRIME LAB’S OR THE DISTRICT ATTORNEY’S?, 3–4 (2010), available at <http://www.ocgrandjury.org/pdfs/DNA/DNA-Report.pdf>; see also Tami Abdollah, D.A.’s DNA Database Growing in O.C., L.A. TIMES, Oct. 5, 2009, at A3 [hereinafter Abdollah, O.C. DNA Database]; Abdollah, *Arrested in O.C.?*, *supra* note 30.

98 Abdollah, *Arrested in O.C.?*, *supra* note 30 (stating that the Orange County database is “unusual” for not being run by an accredited crime lab).

99 *California Report*, Dansky interview, *supra* note 31.

100 Abdollah, *Arrested in O.C.?*, *supra* note 30. Although the misdemeanor program was not widely known to the public until 2009, the Orange County Board of Supervisors provided funding for the creation of this database in 2007. ORANGE COUNTY GRAND JURY REP., *supra* note 97, at 3 (noting that the Orange County Board of Supervisors provided \$875,000 worth of financial support to the DNA collection program).

101 E-mail from Erwin Chemerinsky, Professor of Constitutional Law, U.C. Irvine School of Law, to author (Jan. 18, 2010, 20:01 EST) (on file with author) (stating that there is no statutory basis or authority that renders the DNA collection program legal).

102 Abdollah, *Arrested in O.C.?*, *supra* note 30 (quoting Orange County District Attorney, Tony Rackauckas, who said the DNA collection program is advantageous “because we’re able to handle more cases with fewer resources”).

103 See Randal C. Archibald, *Driven to a Fiscal Brink, a State Throws Open the Doors to Its Prisons*, N.Y. TIMES, Mar. 24, 2010, at A14 (reporting that California’s prison population has long exceeded capacity); Ashby Jones, *Ruling on Prison Overcrowding: Cut 57,000 Prisoners*, WALL ST. J. L. BLOG (Feb. 10, 2009, 9:49 AM), <http://blogs.wsj.com/law/2009/02/10/ruling-on-california-prison-overcrowding-cut-57000-prisoners/> (discussing a ruling by a three judge panel requiring California to “reduce its prison population by as many as 57,000”).



crime, based on the theory that if a person knows police have his DNA record on file, that person will be less likely to commit crimes in the future.<sup>104</sup> Even if recidivism is not reduced, police have an additional law enforcement tool to catch the perpetrators.<sup>105</sup> This program led to a quadrupling of Orange County's DNA database in 2009 alone.<sup>106</sup> Lastly, the program allows arrestees to avoid having criminal records, which can otherwise make them ineligible for certain jobs, child custody agreements, aid programs, and other government benefits.<sup>107</sup>

This program also has its critics. In addition to criticisms about privacy, there is concern about the demoralizing effect on the police officers who make arrests only to see them disappear, particularly in narcotics arrests which often involve lengthy background work.<sup>108</sup> Others are concerned by the absence of empirical evidence establishing the deterrent effect of DNA possession by law enforcement.<sup>109</sup> In rogue, non-legislative enacted programs such as this Orange County program, the absence of the legislative process often means an absence of accountability and oversight and the inherent safeguards associated with the legislative process, such as public debate and deliberation. Unlike programs enacted by the legislature, the only oversight comes from the rules decided upon by the attorney general, district attorney, or other founding executive branch actor. If prosecutors had evidence sufficient for conviction, the program may adversely affect community morale by advancing the perception that those who commit misdemeanors will escape punishment.<sup>110</sup>

There is also a serious concern that this program seeks to punish those who have done nothing wrong. Given the ease of providing a DNA sample in exchange for dropping charges, some lawyers have stated that it would be irresponsible not to advise a client to eliminate

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104 See Abdollah, *Arrested in O.C.?*, *supra* note 30 ("The DNA sample could act as a deterrent for potential criminals . . .").

105 See Jones, *O.C. Offer*, *supra* note 96 (describing the DNA collection program as a "useful investigative tool for law enforcement"). The Orange County District Attorney's office has stated that "8% of previously convicted criminals commit 80% of all crimes." ORANGE COUNTY GRAND JURY REP., *supra* note 97, at 3.

106 *California Report*, Dansky interview, *supra* note 31. "By March 2010, over 25,000 buccal swabs had been collected and analyzed, and over 22,000 samples uploaded into the District Attorney's DNA database, resulting in three hits (identification of the suspect)." ORANGE COUNTY GRAND JURY REP., *supra* note 97, at 3.

107 *California Report*, Dansky interview, *supra* note 31.

108 See Abdollah, *Arrested in O.C.?*, *supra* note 30 ("[L]aw enforcement will be demoralized, especially on narcotics cases . . .").

109 *Id.*

110 *California Report*, Dansky interview, *supra* note 31.

the uncertainties and expenses of defending against misdemeanor charges, even if that client knew he could prove he was innocent.<sup>111</sup> The appeal of this plea bargain calls into question the “voluntary” nature of the exchange. If a prosecutor has insufficient evidence to secure a conviction, the ethical action is to drop the charges, not to collect the defendant’s DNA.<sup>112</sup>

Since the Orange County database is a local database, it sets its own rules and procedures. County ordinances include a general provision against disclosing any confidential data the database holds, except to authorized entities.<sup>113</sup> The Orange County municipal code also provides for sanctions against those who disclose confidential information illegally.<sup>114</sup> Orange County permits investigators to release confidential information to the public when investigators deem it necessary to aid an ongoing investigation. Further, disclosure is permitted in court documents and transcripts, which are usually public documents.<sup>115</sup> Orange County allows disclosure of data that has been anonymized for research or statistical analysis of populations.<sup>116</sup>

There is no statutory authorization for mandatory collection of DNA from misdemeanor arrestees in California. Therefore, in order to be legal, this program must be considered a purely voluntary exchange. Plea bargains are considered contracts between the defendant and the prosecutor.<sup>117</sup> If these exchange contracts are entered into voluntarily, courts would likely conclude this program is the equivalent of a plea bargain. “The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but [the Supreme Court has] repeatedly held that the government ‘may encourage a guilty plea by offering

111 Abdollah, *Arrested in O.C.?*, *supra* note 30.

112 *California Report*, Dansky interview, *supra* note 31.

113 ORANGE COUNTY, CAL., CODE OF ORDINANCES tit. 3, div. 17, art. 1, § 3-17-2 (2010).

114 *Id.* at § 3-17-3. Additionally, any actor who contributed to the unauthorized disclosure of DNA information could face liability under California’s public-disclosure-of-private-facts tort. *See Taus v. Loftus*, 151 P.3d 1185, 1207 (Cal. 2007) (listing the elements of the tort as: “(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person, and (4) which is not of legitimate public concern.” (citation omitted)).

115 *See* ORANGE COUNTY, CAL., CODE OF ORDINANCES title 3, div. 17, art. 1, § 3-7-4(c) (2010) (“It is not a violation . . . to include Database Information in a transcript or record of a judicial proceeding, or in any other public record when the inclusion of the information in the public record is authorized by a court, statute, or decisional law.”).

116 *See id.* at § 3-7-4(d) (authorizing the use of anonymous DNA records “for training, research, [and] statistical analysis of populations”).

117 *Puckett v. United States*, 129 S. Ct. 1423, 1430 (2009).

substantial benefits in return for the plea.”<sup>118</sup> Plea bargains, therefore, do not have to result in a fair or balanced exchange of benefits. Parties may take advantage of the differences in bargaining power to achieve the best possible benefits. As long as both parties agree to the terms, a plea bargain will be upheld. “[A]lthough some waiver agreements may not be the product of an informed and voluntary decision, this possibility does not justify invalidating *all* such agreements.”<sup>119</sup> The Orange County program could be considered the equivalent of a plea bargain.

Excluding a strictly legal definition of “voluntary” and applying a more common sense definition of the word “voluntary” calls into question this program’s “voluntariness.” *Black’s Law Dictionary* defines voluntary as: (1) voluntary act, one done by design or intention; (2) voluntary statement, one unconstrained by interference; not impelled by outside influence; (3) voluntary gift, one without valuable consideration or legal obligation; gratuitous; (4) voluntary deed, one having merely nominal consideration.<sup>120</sup> Especially when considering the second and third definitions, the voluntary nature of this program is questionable. The outside influence here is the threat of prosecution for a crime, and the valuable consideration exchanged is having all charges against the defendant dropped. Particularly for defendants who have no prior criminal record or defendants for whom another conviction would implicate some sort of increased sentence, the opportunity to avoid criminal charges is a significant inducement.

## VI. PRIVACY EVALUATION OF THE ORANGE COUNTY PROGRAM

The Orange County program implicates many of the concerns about arrestee DNA sampling. Since California grants its citizens the constitutional right to privacy,<sup>121</sup> borderline cases should be resolved in favor of giving extra protections to the privacy of citizens. In 2007, 66,665 people were arrested on misdemeanor charges in Orange County.<sup>122</sup> Of those arrested, 55,102 (82.7%) were eventually

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118 *United States v. Mezzanatto*, 513 U.S. 196, 209–10 (1995) (quoting *Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978)).

119 *Mezzanatto*, 513 U.S. at 210 (internal quotations omitted) (emphasis in original).

120 BLACK’S LAW DICTIONARY 1710–11 (9th ed. 2009).

121 CAL. CONST. art. I, § 1 (1972) (granting “[a]ll people” inalienable rights, including the right to privacy).

122 *Total Misdemeanor Arrests by Gender, Offense, and Arrest Rate, Orange County*, in CAL. DEP’T OF JUSTICE, CRIMINAL JUSTICE PROFILE, tbl.4A (2007), available at [http://stats.doj.ca.gov/cjsc\\_stats/prof07/30/4A.htm](http://stats.doj.ca.gov/cjsc_stats/prof07/30/4A.htm).

charged.<sup>123</sup> For misdemeanor arrests, prosecutors can offer this bargain, reducing the burden on limited government resources, and achieving alternate goals where there may be less than compelling evidence for a conviction. Given the challenges an innocent person faces when defending against criminal accusations, the relative ease of dropping misdemeanor charges in exchange for a DNA sample results in a database containing the DNA of presumptively innocent people.<sup>124</sup> The Orange County database unfairly burdens that innocent person's constitutional right to privacy. An innocent person should not have to speculate whether the government is using his DNA sample to facilitate investigations or prosecutions.

As discussed, this program may be considered "voluntary" under some interpretations of the word, but not under others. These contravening theories of voluntariness underscore society's expectation that legislatures set the boundaries of criminal law and practice through public debate and deliberations. The privacy concerns raised by this program deserve thorough consideration by the legislature or by the citizens through a ballot initiative. If a court found the Orange County system involuntary, then not only would it violate state law and the first article of the California Constitution, the program could also violate the Fourth Amendment guarantee to the right to be free from searches and seizures absent probable cause. Since this program was created by the Orange County District Attorney without input from the legislature, absent the legislature's imprimatur, the voluntariness of this program remains an open question.

No other known local or state jurisdiction has shown a willingness to follow Orange County's lead in offering DNA plea bargains to misdemeanor offenders. This is likely an implicit recognition that the challenges facing such a program have not yet been resolved and therefore exposes jurisdictions to unknown but real potential liabilities. The ACLU has already filed a challenge to the Orange County program in the California courts.

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<sup>123</sup> *Id.*

<sup>124</sup> *Coffin v. United States*, 156 U.S. 432, 453-54 (1895) (solidifying the concept of innocent until proven guilty that would become pervasive in American jurisprudence).

A. *The Indefinite Duration of Time Is Inappropriate Given the Large Number of Presumptively Innocent People Whose Profiles Are Stored in This Database*

One area of concern is the length of time the Orange County database keeps DNA samples. In the federal NDIS database, DNA profiles are kept indefinitely.<sup>125</sup> Those DNA profiles, however, are more limited in scope than the DNA profiles in the Orange County database and are held to more rigorous quality control standards. Based on the Privacy Act of 1974, federal law enforcement is not allowed to maintain dossiers of information on individuals who are not suspected of wrongdoing.<sup>126</sup>

In addition to its constitutional guarantee to privacy, California enacted a similar law to the federal Privacy Act, the Information Practices Act, in 1977.<sup>127</sup> Unlike the federal NDIS database, given the previously discussed asymmetric dynamics involved in offering this plea bargain to arrestees, it is likely that the Orange County database includes many profiles of people who never did anything wrong. By including the DNA of individuals who were arrested but never charged, arguably officials in Orange County are violating both California's own constitutional guarantee to privacy and the Information Practices Act, which is analogous to the federal Privacy Act.

Unlike California, other states, such as New York, have procedures in place so that a person can petition a court to expunge his DNA profile from the database if no criminal charges are filed.<sup>128</sup> Orange County, however, has no such procedures for removing DNA profiles from the database.

Arguably, Orange County's admitted desire to expand its database by including profiles of people it does not intend to charge with crimes conflicts with enacting procedures to remove DNA profiles. For example, if arrestees knew as soon as the charges were dropped they could have their DNA profiles removed from the Orange County

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125 See *Biology Unit—CODIS Program*, MESAAZ.GOV, [http://www.mesaaaz.gov/police/ForensicServices/Biology\\_Unit\\_CODIS\\_Program.aspx](http://www.mesaaaz.gov/police/ForensicServices/Biology_Unit_CODIS_Program.aspx) (last visited Mar. 27, 2011) (official website of the City of Mesa, Arizona).

126 See *supra* note 76.

127 Information Practices Act, CAL. CIV. CODE § 1798.24 (West 2009) (prohibiting the disclosure of personal information "in a manner that would link the information disclosed to the individual to whom it pertains" unless it meets a certain exception).

128 N.Y. EXEC. LAW § 995-c (McKinney 1996); Seth Axelrad, *Survey of State DNA Database Statutes*, THE AMERICAN SOCIETY OF LAW, MEDICINE, AND ETHICS, [http://aslme.org/dna\\_04/grid/guide.pdf](http://aslme.org/dna_04/grid/guide.pdf). (discussing how under New York state law, individuals may "petition for expungement of his DNA sample and records when no criminal action is taken against him.").

database, the prosecutors would have little incentive to offer the plea bargain in good faith. Ideally, then, to balance privacy and law enforcement interests, a time limitation on the inclusion of arrestee profiles in the database should be imposed. Orange County could still maintain the arrestee records for some period of time, but by eventually removing DNA samples, the citizen's reasonable expectation of privacy based on the Fourth Amendment and the California Constitution is eventually restored.<sup>129</sup>

*B. The Stated Prohibition Against Familial Searching Is a Necessary Privacy Protection but Should Be Made Official Through Legislative Action*

In response to privacy advocates, the Orange County District Attorney's office declared they will not use their database to do familial searches.<sup>130</sup> As previously discussed, familial searching is one of the most hotly-contested privacy frontiers in the evolution of the use of DNA evidence.<sup>131</sup> The District Attorney's declaration concedes to those interested parties who feared an unregulated local database had great leeway to erode privacy protections. By forgoing familial searches, Orange County is protecting citizens who have no criminal history and have a fully intact reasonable expectation of privacy.<sup>132</sup>

*C. The Allowed and Encouraged Degree of Function Creep in This Database Poses the Greatest Risk to Privacy and Should Be Curtailed*

The Orange County database can legally be mined for research or statistical purposes;<sup>133</sup> therefore, the program carries an extra risk of function creep. Permitting research and statistical analysis potentially allows the database to be combined with other public and private databases, including credit histories, medical or educational records, and other social databases. Currently, the Orange County DNA database is only known to be combined with criminal records databases. California's Information Practices Act, however, explicitly allows agencies to share confidential data with the University of California or other programs approved by the Committee for the Protection of

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129 *Kyllo v. United States*, 533 U.S. 27, 34 (2000) ("To withdraw protection of [a] minimum [and reasonable] expectation [of privacy] would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment.").

130 Abdollah, *O.C. DNA Database*, *supra* note 97.

131 *See, e.g.*, Hogan, *supra* note 62, at 545.

132 *Kyllo*, 533 U.S. at 34 (noting that the Fourth Amendment requires that the police respect minimal, reasonable expectations of privacy).

133 ORANGE COUNTY, CAL., CODE OF ORDINANCES tit. 3, div. 17, art. 1, § 3-17-4(d) (2010).

Human Subjects based on certain criteria.<sup>134</sup> In other words, although the legislature never approved the Orange County program, the legislature expressly contemplated that this DNA database will be subject to function creep. If the University of California or other programs publicly release the results of their studies, they could be used by health insurers, employers, or other private companies to learn more about the private characteristics of the California “criminal” population.<sup>135</sup>

Even if the data would be released anonymously and in the aggregate does not necessarily protect the privacy of individuals. From 2006 through 2009, Netflix sponsored a contest to improve movie recommendations for its customers and released a putatively anonymous, aggregated dataset of thousands of its customers’ rental histories.<sup>136</sup> Researchers from the University of Texas, however, deciphered rental patterns and actually identified individual customers within this allegedly “anonymous” data.<sup>137</sup> The resulting uproar led Netflix to cancel plans for a second contest after private parties and the Federal Trade Commission filed legal challenges.<sup>138</sup> It is easily conceivable that similar breaches of privacy could occur with a DNA database, particularly the Orange County database that is shared for research and statistical purposes. Arguably, disclosing a person’s medical information or DNA profile is far more serious than disclosing a person’s movie rental history and could expose Orange County to legal action. Over time, as data mining technology improves, the risk of inadvertent or deliberate disclosure of individuals from an allegedly anonymous aggregated database will increase. Combined with the fact that a majority of this database will consist of profiles of misdemeanor arrestees, the database raises a profound risk of being used for inappropriate data mining of a large sample of the Califor-

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134 Information Practices Act, CAL. CIV. CODE § 1798.24(t)(1) (West 2009).

135 Gabel, *supra* note 3, at 30–31 (noting that for now, privacy laws dictate that “neither insurers nor employers can require a prospective insured or employee to submit to DNA testing as a prerequisite to being insured or employed[, but] such laws include exceptions for law enforcement purposes, along with provisions for paternity testing and fetal and newborn screening”). These prohibitions would not, however, prevent those institutions from drawing statistical conclusions about this population from the results of publicly available studies.

136 Steve Lohr, *Netflix Cancels Contest After Concerns Are Raised About Privacy*, N.Y. TIMES, Mar. 12, 2010, at B3.

137 Arvind Narayanan & Vitaly Shmatikov, *Robust De-anomization of Large Datasets (How to Break Anonymity of the Netflix Prize Dataset)* 11–12 (February 5, 2008) (unpublished article available online), available at [http://arxiv.org/PS\\_cache/cs/pdf/0610/0610105v2.pdf](http://arxiv.org/PS_cache/cs/pdf/0610/0610105v2.pdf).

138 Lohr, *supra* note 136.

nia population. This goes far beyond the originally contemplated purposes of tracking convicted criminals or other law enforcement purposes.<sup>139</sup>

Function creep is also a serious concern from the perspective of police access. Although local police are not allowed to maintain their own databases with credit history, travel records, and other personal information, they are allowed to purchase this information from data aggregating companies.<sup>140</sup> They could then use this information to identify suspects' behavioral patterns or otherwise aid their investigations. Since the data collected by private companies is not subject to the Privacy Act or the Freedom of Information Act, there is no federally mandated standard regarding the preparation and collection of this data.<sup>141</sup> Given that there are no statutes addressing Orange County's program, and therefore no statutory limitations on what type of data can be aggregated with the County's DNA collection, function creep remains one of the greatest privacy concerns associated with this program.

#### VII. CONCLUSION: EVALUATION OF THE ORANGE COUNTY PROGRAM

Orange County's program to offer plea bargains for DNA in exchange for dropped charges is provocative and may be an important tool in helping law enforcement to solve crimes. Although the privacy implications of this policy are unclear and there are many issues the legislative and judicial branches have not decisively answered, there are some outstanding concerns.

Orange County should establish formal procedures permitting individuals to remove their DNA from the database if certain conditions are met. The legislature should also amend the statutes to formalize and permanently enact the District Attorney's prohibition on familial searching. Finally, Orange County should enact or revise statutes and policies to prohibit disclosure of the DNA database for research and statistical purposes to preclude function creep and limit database use to police investigations only. Orange County should also prohibit police from obtaining commercially available information to combine with its DNA database. As the project evolves it is vitally

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139 *O.C. DNA Database*, *supra* note 97, at A3 (listing the purpose of the database as "to identify criminal suspects").

140 STANLEY, *supra* note 93, at 26 (noting that "local police departments subscribe to private sector information services" in order to obtain information about a person).

141 Privacy Act of 1974, 5 U.S.C. § 552a(e) (1974); Freedom of Information Act of 1986, 5 U.S.C. § 552 (amended 2007).



important to closely safeguard the privacy of the people whose information is stored in the database from the demands of instant and complete access to information that the modern world expects.