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## DRAWING THE LINE: DNA DATABASING AT ARREST AND SAMPLE EXPUNGEMENT

Jesika S. Wehunt\*

*New technologies test the judicial conscience. On the one hand, they hold out the promise of more effective law enforcement, and the hope that we will be delivered from the scourge of crime. On the other hand, they often achieve these ends by intruding, in ways never before imaginable, into the realms protected by the Fourth Amendment.*

—Judge Kozinski, United States Court of Appeals, Ninth Circuit<sup>1</sup>

### INTRODUCTION

In recent years, news headlines across the country have been splashed with stories of cases considered cold for decades until a new sample of DNA revealed who committed the crime.<sup>2</sup> Not only is DNA increasingly used to identify the culprit responsible for a crime; many innocent people have been exonerated thanks to new advances in DNA evidence.<sup>3</sup> As technology advances, it promises to reveal

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1. *United States v. Kincade*, 379 F.3d 813, 871 (9th Cir. 2004) (Kozinski, J., dissenting) (discussing the Ninth Circuit's majority holding that DNA sampling is constitutional).

2. See, e.g., Al Baker, *In Manhattan, District Attorney Sees DNA as Tool to Solve Cold Cases*, N.Y. TIMES (June 14, 2011), <http://www.nytimes.com/2011/06/15/nyregion/district-attorney-vance-sees-dna-as-tool-to-solve-cold-cases.html>; Colin Moynihan, *Cold Case DNA Unit Links Rikers Inmate to '86 Murder*, N.Y. TIMES (July 6, 2011), <http://www.nytimes.com/2011/07/07/nyregion/ny-cold-case-unit-links-dna-to-86-murder.html>; Michael Stetz, *Cold Case Murder Solved After 31 Years*, SAN DIEGO UNION-TRIB. (Feb. 10, 2008), [http://www.signonsandiego.com/uniontrib/20080210/news\\_1m10carrier.html](http://www.signonsandiego.com/uniontrib/20080210/news_1m10carrier.html).

3. To date, in the United States, 306 convictions have been overturned based on DNA evidence. *DNA Exonerations Nationwide*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Facts\\_on\\_PostConviction\\_DNA\\_Exonerations.php](http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php) (last visited Mar. 21, 2013). The 306 exonerees served an average of over thirteen years, and eighteen served on death row. *Id.*

DNA is a powerful component of the forensic science and criminal justice systems; it can link seemingly unrelated crimes, resolve cold cases, track violent offenders both in and out of the penal system, solve crimes which would have been previously unsolvable, and

even more information about individuals from their DNA in the future.<sup>4</sup> Given the growing number of real-world, high-profile cases solved with DNA evidence, fictional television increasingly features shows that depict the use of DNA to solve crimes.<sup>5</sup> Consequently, the public has greater awareness of how DNA works, and juries demand DNA evidence from prosecutors in exchange for a conviction.<sup>6</sup>

In response to this demand for DNA evidence, all fifty states and the federal government allow, by statute, both collection of DNA from select individuals and storage of DNA in databases.<sup>7</sup> Traditionally, those *convicted* of felonies were required to submit DNA samples; however, more recently, the federal statute and some state statutes have been amended so that those who have been

prevent innocent people from going to prison. Currently, DNA is also being used to exonerate the innocent.

*DNA Evidence, Cases of Exoneration*, ENOTES, <http://www.enotes.com/forensic-science/dna-evidence-cases-exoneration> (last visited Mar. 21, 2013).

4. *United States v. Kriesel*, 508 F.3d 941, 948 (9th Cir. 2007). The possible future developments in DNA:

raise[] questions both about the kind of personal and private information that may be derived from the DNA samples in the DOJ's possession, and the uses of that biometric data as scientific developments increase the type and amount of information that can be extracted from it. For example, commentators have discussed the potential for research to identify genetic causes of antisocial behavior that might be used to justify various crime control measures.

*People v. Buza*, 129 Cal. Rptr. 3d 753, 769 (Ct. App.), *cert. granted*, 262 P.3d 854 (Cal. 2011) (note that under California Rule of Courts 8.1105(e)(1), an opinion is no longer considered published if the Supreme Court grants review). *See generally* Dorothy Roberts, *Collateral Consequences, Genetic Surveillance, and the New Biopolitics of Race*, 54 HOW. L.J. 567 (2011) (discussing the fear of using DNA as a new form of Jim Crow racial profiling).

5. Jessica D. Gabel, *Probable Cause from Probable Bonds: A Genetic Tattle Tale Based on Familial DNA*, 21 HASTINGS WOMEN'S L.J. 3, 5 (2010) ("High profile paternity and criminal cases become part of water cooler conversation, and the 'ripped from the headlines' approach of popular television programs (such as NCIS, Criminal Minds, Forensic Files, and, of course, the various incarnations of CSI and Law & Order) continue the soap opera where reality left off.").

6. This demand for DNA evidence has been coined the "CSI effect." *E.g.*, Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1050 (2006). Mr. Tyler defined the term:

The "CSI effect" is a term that legal authorities and the mass media have coined to describe a supposed influence that watching the television show CSI: Crime Scene Investigation has on juror behavior. Some have claimed that jurors who see the high-quality forensic evidence presented on CSI raise their standards in real trials, in which actual evidence is typically more flawed and uncertain.

*Id.*

7. 42 U.S.C. § 14135a(a)(1)(A) (2006). For examples of state laws, see: ARIZ. REV. STAT. ANN. § 13-610 (West, Westlaw through 1st Reg. Sess. of 51st Legislature (2013)); MINN. STAT. § 299C.155 (West, Westlaw through 2013 Reg. Sess. through ch 10).

*arrested* are also required to submit samples.<sup>8</sup> In the majority of states that take DNA samples upon arrest, DNA samples and profiles of individuals who are not ultimately convicted are not automatically destroyed; rather, the exonerated individuals must go through a lengthy process of requesting an expungement.<sup>9</sup>

While opponents have brought many constitutional challenges to the collection and storage of DNA under the Fourth Amendment, most courts that have reviewed the state statutes requiring DNA samples from convicted persons have found them constitutional.<sup>10</sup> In August 2011, however, the California Court of Appeals reviewed the jurisprudence surrounding the constitutionality of DNA collection at arrest in *People v. Buza* and found the California statute for DNA collection at arrest, Proposition 69, unconstitutional.<sup>11</sup>

This Note addresses the constitutionality of the collection and retention of DNA samples from individuals at arrest and proposes a statutory scheme for utilizing DNA evidence while protecting arrestees' privacy rights by requiring judicial probable cause and placing the burden of expungement on the state. First, Part I provides

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8. Leigh M. Harlan, Note, *When Privacy Fails: Invoking a Property Paradigm to Mandate the Destruction of DNA Samples*, 54 DUKE L.J. 179, 186 (2004). The original DNA Identification Act included mandatory samples from only those persons convicted of a felony. The act was amended in 2005 to include arrestees. H.R. REP. NO. 109-218(I), at 38 (2005); *see also* 42 U.S.C. § 14135a(a)(1)(A) ("The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested, facing charges, or convicted or from non-United States persons who are detained under the authority of the United States."); David H. Kaye, *Two Fallacies About DNA Data Banks for Law Enforcement*, 67 BROOK. L. REV. 179, 180–81 (2001); *State that Have Passed Arrestee DNA Database Laws*, DNARESOURCE.COM (Sept. 2011), <http://www.dnaresource.com/documents/ArresteeDNALaws-2011.pdf> [hereinafter *States with DNA Arrestee Laws*]. Twenty-five states have passed arrestee DNA database laws as of September 2011. *Id.* For example, California's law states:

Each adult person arrested for a felony offense . . . shall provide the buccal swab samples and thumb and palm print impressions and any blood or other specimens required pursuant to this chapter immediately following arrest, or during the booking or intake or prison reception center process or as soon as administratively practicable after arrest, but, in any case, prior to release on bail or pending trial or any physical release from confinement or custody.

CAL. PENAL CODE § 296.1 (West, Westlaw through Ch. 3 of 2013 Reg. Sess.).

9. *States with DNA Arrestee Laws*, *supra* note 8 (diagram with states that require application for expungement); *see also, e.g.*, CAL. PENAL CODE § 299(a) (West, Westlaw through Ch. 3 of 2013 Reg. Sess.); *Buza*, 129 Cal. Rptr. 3d at 758–59 (reviewing expungement procedures in California).

10. *Buza*, 129 Cal. Rptr. 3d at 759–61. For further discussion on the constitutionality of DNA samples, *see generally* D.H. Kaye, *Who Needs Special Needs? On the Constitutionality of Collecting DNA and Other Biometric Data from Arrestees*, 34 J.L. MED. & ETHICS 188 (2006).

11. *See generally Buza*, 129 Cal. Rptr. 3d. 753.

a brief history of the use of DNA and the statutory schemes that mandate the sampling and retention of DNA.<sup>12</sup> Next, Part II analyzes the constitutionality of DNA sampling at arrest—as well as the subsequent retention of DNA samples and profiles of citizens who are not convicted—under the Fourth Amendment and in light of the 2011 California Court of Appeals decision, *People v. Buza*.<sup>13</sup> Finally, based on the analysis used by the California Court of Appeals in *Buza*, Part III proposes that DNA profiles and samples should be collected upon arrest of a suspect only with a judicial finding of probable cause. If collected, the sample should be destroyed upon immediate acquittal—instead of the current popular scheme used by most states and the federal government that requires the individual to request expungement and does not differentiate the type of probable cause required for sample collection.<sup>14</sup>

## I. DNA COLLECTION AND DATABASING

### A. The Foundations Of DNA Use

The fathers of DNA, James Watson and Francis Crick, declared on February 28, 1953, that they “had found the secret of life.”<sup>15</sup> In fact, they had uncovered the double-helix structure of deoxyribonucleic acid (DNA) and subsequently made their research public, continuing to research and publish their findings.<sup>16</sup>

DNA is the foundation on which an individual’s entire genetic makeup stands.<sup>17</sup> A person’s DNA is like a genetic fingerprint; the DNA that is found in a person’s blood is identical to the DNA found

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12. See discussion *infra* Part I.

13. See discussion *infra* Part II.

14. See discussion *infra* Part III.

15. Robert Wright, *Molecular Biologists Watson & Crick*, TIME, Mar. 29, 1999, at 172, available at <http://www.time.com/time/magazine/article/0,9171,990626,00.html> (discussing the lives and scientific discoveries of James Watson and Francis Crick). For more information on the discovery of DNA, see Leslie A. Pray, *Discovery of DNA Structure and Function: Watson and Crick*, NATURE EDUC. (2008), <http://www.nature.com/scitable/topicpage/discovery-of-dna-structure-and-function-watson-397>.

16. J.D. Watson & F.H.C. Crick, *Molecular Structure of Nucleic Acids: A Structure of Deoxyribose Nucleic Acid*, 171 NATURE 737, 737 (1953).

17. See generally A. JAMIE CUTICCHIA, GENETICS: A HANDBOOK FOR LAWYERS, 8–16 (2009).

in his skin cells.<sup>18</sup> In fact, DNA is identical in every cell of a person's body and is unique to each individual.<sup>19</sup> The four "bases" of DNA are Cytosine (C), Guanine (G), Thymine (T), and Adenine (A), and the sequencing and order of these "bases" are what make a person's unique DNA pattern.<sup>20</sup> "More than ninety-seven percent of DNA is identical between all people," but the remaining base sequences, called polymorphic loci or "junk DNA," are what make each individual unique.<sup>21</sup> These junk DNA are analyzed to identify suspects in DNA sampling.<sup>22</sup>

DNA sampling for forensic identification purposes first occurred in Great Britain in the 1980s, more than thirty years after the discovery of DNA.<sup>23</sup> Soon after this discovery of "DNA fingerprinting,"<sup>24</sup> the United States had its first conviction based on DNA technology in 1987.<sup>25</sup> DNA provided an immediate way to identify offenders and quickly link them to a crime more efficiently than other typical methods, such as fingerprinting and mugshots.<sup>26</sup> DNA technology became the method of choice for forensic examination for many reasons: it has "high discrimination power";<sup>27</sup>

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18. *See generally id.* at 8–11.

19. *Id.*

20. *Id.* at 7.

21. ANDREI SEMIKHODSKII, DEALING WITH DNA EVIDENCE: A LEGAL GUIDE 12 (2007). "It is these individually varying regions, known as polymorphic loci, that are used in DNA profiling and identification techniques." Harlan, *supra* note 8, at 185; *see also* Gabel, *supra* note 5, at 9 (referring to the regions of DNA that house individual identity as "junk DNA").

22. *Cf.* SEMIKHODSKII, *supra* note 21, at 12.

23. *Id.* at 21–22. British scientist Dr. Alec Jeffreys first used DNA to identify a rapist in a police investigation in 1986. Debra A. Herlica, Note, *DNA Databanks: When Has a Good Thing Gone Too Far?*, 52 SYRACUSE L. REV. 951, 952 n.8 (2002) (describing the first use of DNA in a criminal investigation); Heidi C. Schmitt, Note, *Post-Conviction Remedies Involving the Use of DNA Evidence to Exonerate Wrongfully Convicted Prisoners: Various Approaches Under Federal and State Law*, 70 UMKC L. REV. 1001, 1002 (2002) (discussing Alec Jeffreys's discovery).

24. Gabel, *supra* note 5, at 11 ("The process of collecting and analyzing a DNA profile is often referred to as DNA 'typing,' 'fingerprinting,' or 'profiling.'"); *see also* SEMIKHODSKII, *supra* note 21, at 12 (arguing that the use of the term "DNA fingerprinting" may be widely accepted but is "somewhat confusing" and that "the analogy between conventional and DNA fingerprinting is not helpful").

25. *Andrews v. State*, 533 So. 2d 841, 843 (Fla. Dist. Ct. App. 1988). In 1987, Tommie Lee Andrews was convicted of rape after a DNA match was made between his blood sample and semen recovered from the victim. *Id.*; *see also* Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 WAKE FOREST L. REV. 767, 773 (1999); *supra* note 24.

26. RON C. MICHAELIS, ROBERT G. FLANDERS & PAULA H. WULFF, A LITIGATOR'S GUIDE TO DNA xiii (2008); Gabel, *supra* note 5, at 12.

27. SEMIKHODSKII, *supra* note 21, at 2. "No two people, with the single exception of identical twins,

the DNA of an individual remains the same for his entire lifetime;<sup>28</sup> it is inherited from his parents;<sup>29</sup> DNA samples remain stable over time;<sup>30</sup> and it is easily obtained from the smallest of samples of biological materials.<sup>31</sup> Today, DNA fingerprinting has become the “gold standard” of forensic analysis and is widely accepted by courts.<sup>32</sup>

## B. The DNA Sampling And Matching Process

### 1. Collecting the DNA Samples

In an investigation, DNA must first be collected at the crime scene.<sup>33</sup> “Blood, semen, saliva and other types of bodily fluid or tissue are the most common types of biological evidence collected at crime scenes.”<sup>34</sup> The unique DNA sequences from the collected

have identical DNA.” *Id.* Therefore, “every DNA profile obtained is virtually unique” to an individual. *Id.*

28. *Id.* DNA’s “biometrical parameters” for an individual do not change as that individual grows older, and the DNA profile remains the same regardless of what kind of biological sample is obtained. *See id.*

29. *Id.* Family members have similar DNA profiles, which has led to controversial “familial DNA searches” of databased DNA. Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 294–301 (2010) (discussing the mechanics of DNA databasing and familial searches). Familial DNA searches, which cross-reference two persons to see if they are related based on their DNA, is beyond the scope of this Note. For more information on familial DNA searches, see generally Gabel, *supra* note 5, at 19.

30. *See* SEMIKHODSKII, *supra* note 21, at 2. DNA is resilient, “can be produced from very old and decayed biological samples,” and “withstand[s] both natural and man-made environmental injury.” *Id.*

31. *Id.* (“[A] single hair, skin flake or small droplet of sweat left at the crime scene is often sufficient to obtain a full DNA profile . . . .”); Gabel, *supra* note 5, at 13 (“As DNA harvesting went beyond the bounds of blood, evidence took the form of semen, saliva, hair, tissue, bones, teeth, and sweat found on or in clothes, soda cans, hairbrushes, toothbrushes, stamps, envelopes, Kleenex, chewing gum, cigarette butts—anything a person would come in contact with.”).

32. Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 171 (2007) (noting DNA profiling as “the current gold standard in forensic science”); *see also* 8 AM. JUR. 3D *Proof of Facts* § 749 (1990) (“[T]he validity of the underlying principles of DNA identification testing is perhaps the easiest hurdle to overcome for the proponent of that evidence.”); William C. Thompson & Simon Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 VA. L. REV. 45, 60 (1989) (“There is nothing controversial about the theory underlying DNA typing. Indeed, this theory is so well accepted that its accuracy is unlikely even to be raised as an issue in hearings on the admissibility of the new tests.”).

33. Paul E. Tracy & Vincent Morgan, *Big Brother and His Science Kit: DNA Databases for 21st Century Crime Control?*, 90 J. CRIM. L. & CRIMINOLOGY 635, 649 (2000).

34. SEMIKHODSKII, *supra* note 21, at 23. Other type of DNA samples analyzed include “semen, saliva, hair, tissue, bones, teeth, and sweat found on or in clothes, soda cans, hairbrushes, toothbrushes,

evidence samples are isolated and prepared to be cross-referenced with the DNA of potential suspects by lab technicians.<sup>35</sup>

Potential suspects may voluntarily provide a comparison sample, or the collection of a comparison sample may be mandated by statute.<sup>36</sup> Samples can be taken voluntarily from a mass population of potential suspects in a process that is referred to as “DNA dragnets.”<sup>37</sup> State or federal statutes can also require the submission of a DNA sample under certain conditions.<sup>38</sup> When DNA collection was in its earliest stages, “only people . . . convicted of serious sexual crimes” were required to submit DNA samples.<sup>39</sup> As the popularity of DNA testing grew, “many states began collecting DNA from murderers, then other violent felons, and, most recently, all felons and even some misdemeanants.”<sup>40</sup> Since a 2006 amendment to the DNA Analysis Backlog Elimination Act, the federal government has allowed collection of arrestee DNA samples merely upon arrest, prior to any conviction.<sup>41</sup> Statutes in twenty-five states also require suspects to provide DNA samples upon arrest.<sup>42</sup>

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stamps, envelopes, Kleenex, chewing gum, cigarette butts—anything a person would come in contact with.” Gabel, *supra* note 5, at 13. For deeper analysis on how various biological samples are analyzed, see generally SEMIKHODSKII, *supra* note 21, at 21–26.

35. Robert Berlet, Comment, *A Step Too Far: Due Process and DNA Collection in California After Proposition 69*, 40 U.C. DAVIS L. REV. 1481, 1486 (2007).

36. Harlan, *supra* note 8, at 186–87.

37. *Id.* DNA dragnets collect samples from a large group of people who may have had the ability to perpetrate the crime. *Id.* Dragnets do not require warrants since the samples are typically voluntarily given; however, some scholars have argued against their constitutionality. *Id.* For more on DNA dragnets and challenges to their constitutionality, see generally Fred W. Drobner, Comment, *DNA Dragnets: Constitutional Aspects of Mass DNA Identification Testing*, 28 CAP. U. L. REV. 479 (2000).

38. Harlan, *supra* note 8, at 186–87.

39. Kaye, *supra* note 8, at 180.

40. *Id.* at 180–81; see also, e.g., MINN. STAT. § 609.117 (West, Westlaw through 2013 Reg. Sess. through Ch. 25) (requiring that a person who has been convicted of a misdemeanor submit a DNA sample when that misdemeanor “aris[es] out of the same set of circumstances” as a felony that the person was also charged with); H.B. 483, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011) (proposing expanding list of felonies required to submit DNA samples at arrest to include “assault on handicapped persons” and child abandonment). Minnesota’s statute was upheld as constitutional in *State v. Johnson*. *State v. Johnson*, 813 N.W.2d 1, 11 (Minn. 2012) (“[W]e conclude that when a person is convicted of a misdemeanor offense that arises out of the same set of circumstances as a felony charge and that person’s sentence includes probation with conditions such as random urinalyses, there is a significant reduction in that person’s expectation of privacy in his or her identity.”).

41. 42 U.S.C. § 14135a(a)(1)(A) (2006) (“The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested, facing charges, or convicted or from non-United States persons who are detained under the authority of the United



The sampling, whether voluntary or mandated by statute, is usually a non-invasive procedure, such as buccal swabbing.<sup>43</sup> Once the DNA sample is taken, a unique DNA “fingerprint” or “profile” of the individual is created and used only for identification purposes.<sup>44</sup> A DNA profile is not the sample, which is the actual physical specimen originally taken from the individual, but rather a simple series of numbers that represent the DNA sequence and do not share any information about a person’s individual traits.<sup>45</sup>

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States.”); Kaye, *supra* note 8, at 180; *States with DNA Arrestee Laws*, *supra* note 8; see also CAL. PENAL CODE § 296.1 (West, Westlaw through Ch. 3 of 2013 Reg. Sess.). The statute reads:

Each adult person arrested for a felony offense . . . shall provide the buccal swab samples and thumb and palm print impressions and any blood or other specimens required pursuant to this chapter immediately following arrest, or during the booking or intake or prison reception center process or as soon as administratively practicable after arrest, but, in any case, prior to release on bail or pending trial or any physical release from confinement or custody.

*Id.*

42. See *States with DNA Arrestee Laws*, *supra* note 8. The twenty-five states that have passed arrestee DNA database laws are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Illinois, Kansas, Louisiana, Maryland, Michigan, Missouri, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, and Virginia. *Id.* See also, e.g., KAN. STAT. ANN. § 21-2511(e)(2) (West, Westlaw through 2012 Reg. Sess.) (“[A]ny adult arrested or charged or juvenile placed in custody for or charged with the commission or attempted commission of any felony . . . shall be required to submit such specimen or sample at the same time such person is fingerprinted pursuant to the booking procedure.”); N.C. GEN. STAT. § 15A-266.3A(b) (West, Westlaw through S.L. 2013-36 of 2013 Reg. Sess.) (“The arresting law enforcement officer shall obtain, or cause to be obtained, a DNA sample from an arrested person at the time of arrest, or when fingerprinted. However, if the person is arrested without a warrant, then the DNA sample shall not be taken until a probable cause determination has been made pursuant to [the statute].”); N.D. CENT. CODE § 31-13-03(1) (West, Westlaw through 2011 Reg. and Spec. Sess.) (“An individual eighteen years of age or over who is arrested . . . for the commission of a felony shall provide to a law enforcement officer . . . at the time of the individual’s arrest . . . a sample of blood or other body fluids for DNA law enforcement identification purposes and inclusion in the law enforcement identification databases.”).

43. The most common form of DNA collection is buccal swabbing, where the “inside of a suspect’s cheek is briefly and painlessly brushed with cotton.” Harlan, *supra* note 8, at 187.

44. *Id.*; see also *People v. Buza*, 129 Cal. Rptr. 3d 753, 757 (Ct. App.) cert. granted, 262 P.3d 854 (Cal. 2011). The court held:

Analysis of the DNA may be “only for identification purposes.” A genetic profile is created from the sample based on 13 genetic loci known as “noncoding” or “junk” DNA, because “they are thought not to reveal anything about trait coding”; the resulting profiles are so highly individuated that the chance of two randomly selected individuals sharing the same profile are “infinitesimal.”

*Id.* (citations omitted).

45. *Buza*, 129 Cal. Rptr. 3d at 757; Harlan, *supra* note 8, at 186–88. See also *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet> (last visited Mar. 14, 2013) [hereinafter *CODIS FAQs*]. The Federal Bureau of Investigation explains:

No names or other personal identifiers of the offenders, arrestees, or detainees are stored

## 2. *Storage and Maintenance of DNA Profiles*

Once the DNA profile is created from a collected sample, it is of little value unless it can be catalogued and compared with other profiles from crime scenes. As the amount of DNA used in criminal cases has grown, the “need to house, maintain, and recall the DNA profiles of offenders for use in solving other crimes” on a larger scale has also grown exponentially.<sup>46</sup> “All fifty states have passed legislative provisions authorizing the use of DNA databases to store the genetic profiles of convicted criminals.”<sup>47</sup> Additionally, recognizing the need for an overarching profile organization system, the Federal Bureau of Investigation (FBI) created the Combined DNA Index System (CODIS).<sup>48</sup>

CODIS “coordinate[s] the various national, state, and local DNA databases in a centralized system” that allows for the exchange of DNA information nationwide.<sup>49</sup> Following the creation of CODIS in 1994, “the DNA Identification Act (‘DNA Act’) authorized the FBI

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using the CODIS software. Only the following information is stored and can be searched at the national level:

- (1) The DNA profile—the set of identification characteristics or numerical representation at each of the various loci analyzed;
- (2) The Agency Identifier of the agency submitting the DNA profile;
- (3) The Specimen Identification Number—generally a number assigned sequentially at the time of sample collection. This number does *not* correspond to the individual’s social security number, criminal history identifier, or correctional facility identifier; and
- (4) The DNA laboratory personnel associated with a DNA profile analysis.

*Id.* (footnote omitted).

46. Gabel, *supra* note 5, at 13.

47. Harlan, *supra* note 8, at 188. However, the states vary on what kinds of crimes require DNA samples and if arrestees will be included in the database. *See supra* Part I.B.1.

48. *See* Gabel, *supra* note 5, at 13. “State [and] local law enforcement agencies are rapidly developing their own DNA testing laboratories and looking to the Federal Government for potential financial support.” 138 CONG. REC. H11737-01 (daily ed. Oct. 5, 1992), 1992 WL 280161 (Westlaw).

49. Gabel, *supra* note 5, at 13. The FBI’s website provides the CODIS mission statement:

The CODIS Unit manages the Combined DNA Index System (CODIS) and the National DNA Index System (NDIS) and is responsible for developing, providing, and supporting the CODIS Program to federal, state, and local crime laboratories in the United States and selected international law enforcement crime laboratories to foster the exchange and comparison of forensic DNA evidence from violent crime investigations. The CODIS Unit also provides administrative management and support to the FBI for various advisory boards, Department of Justice (DOJ) grant programs, and legislation regarding DNA.

*Combined DNA Index System (CODIS)*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/about-us/lab/biometric-analysis/codis> (last visited Mar. 31, 2013).

to create the National DNA Index System (“NDIS”),” which allows sharing profile information between federal and state DNA databases, and provides states with financial support to create or improve their existing state DNA databases.<sup>50</sup> As of March 2013, this multi-tiered system of local, state, and national databases contains more than ten million offender profiles, more than 1.3 million arrestee profiles, and almost half a million forensic profiles.<sup>51</sup>

“As soon as a DNA profile is uploaded, it is compared to crime scene samples in CODIS; new crime scene samples are searched against the uploaded profile, and a search of the entire system is performed once each week.”<sup>52</sup> If there is a match, known as a “hit,” between a suspect profile in the database and a sample from a crime scene, “it is confirmed with a new analysis of the profile,” and the “submitting laboratory is notified and can notify the appropriate law enforcement agency.”<sup>53</sup> The number of crimes assisted by CODIS is

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50. Gabel, *supra* note 5, at 13. The Debbie Smith DNA Backlog Grant Program lays out the eligibility requirements for a state to receive federal funding for its DNA sampling and database system, which includes quality controls and inclusion of the samples into CODIS. 42 U.S.C. § 14135 (2006); Jonathan Kimmelman, *Risking Ethical Insolvency: A Survey of Trends in Criminal DNA Databanking*, 28 J.L. MED. & ETHICS 209, 210 (2000); *see also* Buza, 129 Cal. Rptr. 3d at 759 (“In 2004, Congress expanded the definition of ‘qualifying federal offenses’ to include all felonies. In 2006, Congress further expanded the reach of the 2000 act by allowing the Attorney General to ‘collect DNA samples from individuals who are *arrested*, facing charges, or convicted . . . .’” (alteration in original) (citations omitted)).

51. *CODIS—NDIS Statistics*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics> (last visited Apr. 6, 2013). Professor Gabel describes the CODIS architecture:

This three-tier structure functions as a food chain, where information at the lowest level is fed into larger mouths (databases). It begins at the local level (“LDIS”—Local DNA Index System) where local laboratories take samples from both crime scenes and offenders and generate them into CODIS profiles. At the second level (“SDIS”—State DNA Index System), state law enforcement agencies input this information into their statewide databases. At the top of the database food chain—the national level—state profiles are uploaded into NDIS.

Gabel, *supra* note 5, at 14 (citations omitted); *see also* *CODIS Brochure*, FED. BUREAU INVESTIGATION, [http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis\\_brochure](http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis_brochure) (last visited Mar. 31, 2013) (detailing the CODIS hierarchy).

52. Buza, 129 Cal. Rptr. 3d at 758; *see also* Haskell v. Brown, 677 F. Supp. 2d 1187, 1190–91 (N.D. Cal. 2009).

53. Buza, 129 Cal. Rptr. 3d at 758; *see also* Gabel, *supra* note 5, at 16 (“A ‘hit’ occurs when an offender profile matches a crime scene sample at all thirteen CODIS markers. A ‘cold hit’ occurs when an offender profile is linked to a cold case years after the crime was committed.” (citations omitted)).

staggering—“[a]s of March 2013, CODIS has produced over 205,700 hits assisting in more than 197,400 investigations.”<sup>54</sup>

### *3. Expungement and Removal of DNA Profiles from Databases*

Once a profile is in CODIS, it is permanently housed in the system unless the individual seeks expungement by obtaining a court order expunging the profile from either the state or federal government.<sup>55</sup> State laws governing expungement of a DNA profile and sample from the state and federal system differ, with eighteen states expunging upon request<sup>56</sup> and only seven states expunging the profile and sample automatically upon non-conviction.<sup>57</sup> For example, under California’s DNA Act, an individual may have his sample and DNA profile destroyed if he has “no past or present offense or pending charge which qualifies that person for inclusion within the state’s DNA and Forensic Identification Database and Data Bank Program and there otherwise is no legal basis for retaining the specimen or sample or searchable profile.”<sup>58</sup> In other words, the arrestee may not have any crimes that qualify for inclusion in the database, but it is ultimately up to the court to decide if there is a legal basis for retaining the sample and profile.

The expungement process in California is also drawn out: an arrestee has to show that “no accusatory pleading has been filed within the applicable period allowed by law charging the person with

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54. *CODIS—NDIS Statistics*, *supra* note 51.

55. The FBI provides information regarding the expungement requirements: Laboratories participating in the National DNA Index are required to expunge qualifying profiles from the National Index under the following circumstances:

1. For convicted offenders, if the participating laboratory receives a certified copy of a final court order documenting the conviction has been overturned; and
2. For arrestees, if the participating laboratory receives a certified copy of a final court order documenting the charge has been dismissed, resulted in an acquittal or no charges have been brought within the applicable time period.

*CODIS FAQs*, *supra* note 45.

56. Alabama, Arizona, Arkansas, California, Colorado, Florida, Illinois, Kansas, Louisiana, Michigan, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Dakota, Texas, and Utah require a request for expungement. *States with DNA Arrestee Laws*, *supra* note 8.

57. Alaska, Maryland, Missouri, South Carolina, Tennessee, Vermont, and Virginia expunge DNA samples and profiles upon non-conviction. *Id.*

58. CAL. PENAL CODE § 299(a) (West, Westlaw through Ch. 3 of 2013 Reg. Sess.); *see also* *Buza*, 129 Cal. Rptr. 3d at 758–59 (reviewing expungement procedures in California).

a qualifying offense” or that the charges of the qualifying offense that led to the arrest “have been dismissed prior to adjudication,”<sup>59</sup> and “the court must then wait 180 days before it can grant the request.”<sup>60</sup> Even after the statute of limitations has passed, a prosecutor can object to the individual’s request, and the court’s order allowing or preventing expungement is “not reviewable by appeal or by writ.”<sup>61</sup> Furthermore, if a person had the right to have his DNA records expunged but failed to do so—either by his own delay or that of the state—and is subsequently convicted using that DNA evidence, he cannot appeal the arrest or conviction based on the delay.<sup>62</sup>

## II. DNA COLLECTION UNDER THE FOURTH AMENDMENT

DNA collection and databasing have most frequently been challenged under the Fourth Amendment’s “judicially created doctrine of privacy.”<sup>63</sup> The Fourth Amendment’s Search and Seizure clause provides that “[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.”<sup>64</sup> It is clear under the Fourth Amendment that collection of samples for DNA databasing constitutes a search.<sup>65</sup> Yet, courts have concluded that the collection of the DNA sample is merely the first search in

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59. CAL. PENAL CODE §§ 299(b)(1), (c)(2)(B).

60. *Buza*, 129 Cal. Rptr. 3d at 758.

61. *Id.*; see CAL. PENAL CODE § 299(c)(1).

62. CAL. PENAL CODE § 299(d) (“Any identification, warrant, probable cause to arrest, or arrest based upon a data bank or database match is not invalidated due to a failure to expunge or a delay in expunging records.”).

63. Harlan, *supra* note 8, at 191; Drobner, *supra* note 37, at 510 (explaining that the collection of DNA samples requires Fourth Amendment analyses because it implicates privacy interests). Defendants have also used the First Amendment, Eighth Amendment, Fifth Amendment, Due Process Clause, and the Equal Protection Clause to raise constitutional challenges to DNA sampling and databasing. Aaron P. Stevens, Note, *Arresting Crime: Expanding the Scope of DNA Databases in America*, 79 TEX. L. REV. 921, 937–38 (2001).

64. U.S. CONST. amend. IV.

65. *Buza*, 129 Cal. Rptr. 3d at 759. “Searches” include the collection of blood and urine, performing a breathalyzer test, fingernail scrapings, and buccal swabbing for the collection of saliva. *Id.* The test for what falls under constitutional scrutiny has been defined as the searches of parts of the body that are “beyond mere physical characteristics . . . constantly exposed to the public.” *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (alteration in original) (internal quotation marks omitted).

DNA collection; the actual creation of the DNA profile from the sample and cross-referencing of that profile in the database constitutes a second search.<sup>66</sup> While probable cause is required to justify the first search (the sample collection), in evaluating the second search (the cross-referencing of that sample in a DNA database), the measure of the constitutionality is “reasonableness.”<sup>67</sup> The reasonable standard requires an analysis of the individual’s “subjective privacy interest” and the public’s consideration of what is reasonable, and it is a lower standard than probable cause.<sup>68</sup>

#### *A. Constitutionality Of DNA Sampling From Convicted Individuals*

Before the 2006 amendment to the DNA Fingerprinting Act to include sampling of arrestees, courts had settled the debate over the constitutionality of DNA sampling and databasing of convicts under the Fourth Amendment.<sup>69</sup> To uphold convict sampling statutes, the circuits use one of two Fourth Amendment analyses: (1) the “special needs test” or (2) the “totality of the circumstances” test.<sup>70</sup>

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66. *United States v. Mitchell*, 652 F.3d 387, 406 (3d Cir. 2011) (holding that “[t]he collection of DNA under § 14135a entails two separate ‘searches’”), *cert. denied*, 132 S. Ct. 1741 (2012) (mem.). Some scholars have asserted that there are actually three searches in the DNA databasing process: collection of the sample, initial entrance into the database, and the “multiple, recurrent searches” of the DNA against new entries into the database. Ashley Eiler, Note, *Arrested Development: Reforming the Federal All-Arrestee DNA Collection Statute to Comply with the Fourth Amendment*, 79 GEO. WASH. L. REV. 1201, 1209 (2011).

67. Eiler, *supra* note 66, at 1209.

68. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (“My understanding of the [reasonableness] rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”).

69. *Buza*, 129 Cal. Rptr. 3d at 760 (“Prior to expansion of the scope of the Federal DNA Act in 2006 to include the taking of DNA samples from arrestees, the constitutionality of that act was upheld by every federal circuit presented with the issue.” (citations omitted)); *id.* at 760 n.7 (“Comparable state statutes authorizing collection of DNA samples from persons convicted of qualifying offenses were also universally upheld by federal circuit courts.” (citations omitted)). For further discussion of the constitutionality of DNA samples, see generally Kaye, *supra* note 10.

70. See Eiler, *supra* note 66, at 1213–16. “[T]he majority of circuits—the First, Fourth, Fifth, Sixth, Eighth, Ninth, Eleventh, and District of Columbia—[use the] totality of the circumstances approach.” *Mitchell*, 652 F.3d at 403. “Only the Second and Seventh Circuits have consistently held otherwise, employing the special needs exception in every case concerning the constitutionality of a DNA indexing statute.” *Id.* at 403 n.15. The Tenth Circuit has used both tests but, most recently, has used the totality of the circumstances analysis. *Id.*

### 1. *The Special Needs Test*

Generally, “a warrant supported by probable cause is required” before a search.<sup>71</sup> The special needs test allows exceptions to this rule, permitting suspicionless searches if they are conducted for non-law enforcement purposes when the situation makes “the warrant and probable-cause requirement impractical . . . .”<sup>72</sup> Courts that have upheld DNA collection and databasing under the special needs test have focused on the purpose of DNA collection: “to obtain a reliable record of an offender’s identity that can then be used to help solve crimes.”<sup>73</sup> The Second Circuit explained in *Nicholas v. Goord*:

Although the DNA samples may eventually help law enforcement identify the perpetrator of a crime, at the time of collection, the samples “in fact provide no evidence in and of themselves of criminal wrongdoing,” and are not sought “for the investigation of a specific crime.” Because the state’s purpose in conducting DNA indexing is distinct from the ordinary “crime detection” activities associated with normal law-enforcement concerns, it meets the special-needs threshold.<sup>74</sup>

### 2. *The Totality of the Circumstances Test*

The “totality of the circumstances” test balances the individual’s privacy interests and the “government’s interest in conducting a search without a warrant supported by probable cause.”<sup>75</sup> Therefore,

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71. Tania Simoncelli, *Dangerous Excursions: The Case Against Expanding Forensic DNA Databases to Innocent Persons*, 34 J.L. MED. & ETHICS 390, 391 (2006); Eiler, *supra* note 66, at 1212.

72. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). For examples of courts upholding certain regimes of suspicionless searches where the program was designed to serve special needs beyond the normal need for law enforcement, see *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) (upholding random drug testing of student athletes) and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (upholding drug tests for United States Customs Service employees seeking transfer or promotion to certain positions).

73. *United States v. Amerson*, 483 F.3d 73, 81 (2d Cir. 2007). For more examples of courts upholding DNA databasing under the special needs test, see *United States v. Hook*, 471 F.3d 766, 771–72 (7th Cir. 2006) and *Nicholas v. Goord*, 430 F.3d 652, 667 (2d Cir. 2005).

74. *Nicholas*, 430 F.3d at 669 (citations omitted).

75. *People v. Buza*, 129 Cal. Rptr. 3d 753, 760–61 (Ct. App.), *cert. granted*, 262 P.3d 854 (Cal. 2011).

in a DNA sampling challenge, a court applying this test weighs the governmental interest in maintaining DNA databases against an individual's right to the privacy of his DNA.<sup>76</sup> In circuits that have upheld DNA databasing of convicts, the courts have taken the individual's conviction into consideration of both the individual's interest and the government's interest.<sup>77</sup> In *Samson v. California*, the Supreme Court recognized a "continuum of liberty interests."<sup>78</sup> The court examined punishments for probationers, parolees, and convicts and concluded that probationers have more freedom than parolees, who have more freedom than convicts.<sup>79</sup> Convicted offenders are subject to a broad range of restrictions that are "severely constricted expectations of privacy relative to the general citizenry."<sup>80</sup> This diminished expectation of privacy of convicted individuals is weighed against the governmental interest in solving crimes, reducing recidivism, and exonerating the innocent.<sup>81</sup> Weighing the privacy interests of the convicted individual and the government's interests, courts have consistently upheld DNA statutes requiring samples from convicted individuals without a warrant, even when there is no suspicion that they may have committed additional crimes.<sup>82</sup>

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76. "In evaluating the totality of the circumstances, we must balance the degree to which DNA profiling interferes with the privacy interests of qualified federal offenders against the significance of the public interests served by such profiling." *United States v. Kincade*, 379 F.3d 813, 836 (9th Cir. 2004) (challenging a DNA collection statute).

77. *Buza*, 129 Cal. Rptr. 3d at 761.

78. Eiler, *supra* note 66, at 1226; *see Samson v. California*, 547 U.S. 843, 846, 848–49 (2006) (upholding a statute that requires every prisoner eligible for release on state parole to agree in writing to be subject to search or seizure by a parole officer or other peace officer with or without a search warrant and with or without cause).

79. *Samson*, 547 U.S. at 846, 848–49.

80. *Kincade*, 379 F.3d at 834. "[C]onvicted offenders have been held to have no reasonable expectation of privacy in their identity." *Buza*, 129 Cal. Rptr. 3d at 761 (citations omitted).

81. *See, e.g., Samson*, 547 U.S. at 853 (finding that the state's combined interest in the supervision of its parolees, the reduction of recidivism, and the effective reintegration of parolees into society justified the suspicionless search at issue); *United States v. Knights*, 534 U.S. 112, 120–21 (2001) (holding that the state had dual interests in reintegrating the probationer into society and in preventing recidivism).

82. *See United States v. Kriesel*, 508 F.3d 941, 947 (9th Cir. 2007) ("As a direct consequence of [Defendant's] status as a supervised releasee, he has a diminished expectation of privacy in his own identity specifically, and tracking his identity is the primary consequence of DNA collection."); *Kincade*, 379 F.3d at 837.



## B. Constitutionality Of DNA Sampling From Arrestees

### 1. Arrestees with Grand Jury or Judicial Probable Cause

While the constitutionality of DNA sampling from convicted individuals appears to be settled among the circuits, the constitutionality of sampling from *arrested* individuals under the 2005 amendment to the DNA Act is less clear.<sup>83</sup> In 2010, the Ninth Circuit affirmed the Eastern District of California's decision upholding the statutory requirement<sup>84</sup> that certain arrestees are required to provide a DNA sample as part of their release conditions before trial.<sup>85</sup> Using the totality of the circumstances test, the Eastern District of California limited its finding to "DNA testing after a judicial finding or grand jury determination of probable cause."<sup>86</sup> In a similar case involving an indicted defendant who refused to provide a DNA sample, the Third Circuit found the DNA Act constitutional under the totality of the circumstances test by analogizing DNA profiles and fingerprints, finding that a DNA profile "is used solely as an accurate, unique, identifying marker."<sup>87</sup> The court reasoned that arrestees have "a diminished expectation of privacy" because enough probable cause existed to justify their arrest and concluded that this amount of probable cause has been used historically to collect fingerprints and photographs of arrestees.<sup>88</sup> While these two cases may seem to conclude DNA collection at arrest is constitutional, they

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83. In upholding the constitutionality of sampling convicted individuals in *Kriesel*, the Ninth Circuit clarified: "We emphasize that our ruling today does not cover DNA collection from arrestees or non-citizens detained in the custody of the United States, who are required to submit to DNA collection by the 2006 version of the DNA Act." *Kriesel*, 508 F.3d at 948-49.

84. See Bail Reform Act, 18 U.S.C. § 3142(b), (c)(1)(A) (2006); DNA Fingerprinting Act, 42 U.S.C. § 14135a (2006).

85. *United States v. Pool*, 645 F. Supp. 2d 903, 909 (E.D. Cal. 2009).

86. *Id.* ("The judicial or grand jury finding of probable cause within a criminal proceeding is a watershed event which should be viewed differently from mere pre-judicial involvement gathering of evidence.").

87. *United States v. Mitchell*, 652 F.3d 387, 410 (3d Cir. 2011) (calling DNA profiles "fingerprints for the twenty-first century"), *cert. denied*, 132 S. Ct. 1741 (2012) (mem.).

88. *Id.* at 412; see also *Pool*, 645 F. Supp. 2d at 910 ("An arrestee has a diminished expectation of privacy in his own identity. Probable cause has long been the standard which allowed an arrestee to be photographed, fingerprinted and otherwise be compelled to give information which can later be used for identification purposes." (citations omitted)).

both based their analyses on probable cause determined by a *grand jury or judge* prior to arrest and leave unanswered whether probable cause determined by an *officer* alone is sufficient.<sup>89</sup>

## 2. United States v. Buza: Arrestees with an Absence of Judicial Probable Cause

In August of 2011, the California Court of Appeals in *People v. Buza* addressed the collection of DNA based on the probable cause determination of the arresting officer and found the California statute for DNA collection from arrestees, Proposition 69, unconstitutional.<sup>90</sup> The analysis and reasoning of the court in *Buza*, examining the constitutionality of taking DNA samples from non-convicted persons at arrest under the Fourth Amendment, asserted that the emerging practice of DNA collection at arrest should be reconsidered.<sup>91</sup> In *Buza*, the court began by looking at *Haskell v. Brown*, the only case

89. The court in *Buza* explained:

[I]n both *Pool* and *Mitchell*, the defendants had been indicted before law enforcement officers sought to obtain DNA samples. Whereas *Pool* grounded its analysis on the fact that the defendant's DNA sample was collected after a judicial or grand jury determination of probable cause for felony charges had been made, *Mitchell* expressly left open the question whether an arresting officer's probable cause determination could be sufficient.

*People v. Buza*, 129 Cal. Rptr. 3d 753, 765 (Ct. App.) (footnote omitted) (citations omitted), *cert. granted*, 262 P.3d 854 (Cal. 2011).

90. *See id.* In October 2011, the Arizona Court of Appeals reviewed ARIZ. REV. STAT. § 8-238, a statute requiring juveniles to submit to DNA sampling following arrest for certain offenses. *Mario W. v. Kaipio*, 265 P.3d 389, 393 (Ariz. Ct. App. 2011), *vacated*, 281 P.3d 476 (Ariz. 2012). While this Note does not distinguish between juvenile and adult arrestees in its analysis, the Arizona Court of Appeals found that sampling juveniles who were arrested on an officer's probable cause alone would be unconstitutional. *Id.* at 400. The court held:

For the two juveniles . . . who have been arrested or accused but for whom there has been no judicial finding of probable cause to believe that the juveniles have committed the offenses for which they are charged, evaluating the totality of the circumstances leads me to the opposite result. Without the watershed event of a judicial finding of probable cause, I conclude that application of A.R.S. § 8-238 to take DNA samples from these two juveniles would be unconstitutional.

*Id.*; *see also In re Welfare of M.L.M.*, 813 N.W.2d 26 (Minn. 2012) (examining constitutionality of MINN. STAT. § 609.117, subdiv. 1(2) (2010) from juvenile arrestee perspective).

91. In October 2011, the California Supreme Court granted review of *Buza*, and as of May 2013, the case was fully briefed but no opinion had been issued. *See Appellate Courts Case Information*, CAL. COURTS, [http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc\\_id=1990653&doc\\_no=S196200](http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1990653&doc_no=S196200) (last updated May 24, 2013).

to date to examine DNA collection for “arrestees who have not been subjected to a judicial probable cause determination.”<sup>92</sup> In *Haskell*, the Northern District of California upheld the California statute requiring arrestees to submit DNA samples, basing its decision on two grounds: (1) lessened arrestee privacy expectations and the DNA–fingerprint analogy; and (2) the strong governmental interest in identifying arrestees.<sup>93</sup> The *Buza* court’s analysis of the totality of the circumstances test, as applied in *Haskell*, set forth several arguments against the constitutionality of DNA sampling at arrest under both Fourth Amendment tests.<sup>94</sup>

In *Haskell*, the court asserted that requiring the accused to submit fingerprints for identification purposes is no different than a requirement that the arrestee submit to DNA sampling upon arrest for identification purposes.<sup>95</sup> The *Haskell* court focused on the DNA profile containing only “junk” DNA, instead of the DNA sample itself containing all of the arrestee’s genetic makeup.<sup>96</sup> In *Mitchell*, the court emphasized that CODIS only makes the DNA profile, not the actual sample, available and that strong protections within the Federal DNA Act limit the cross-referencing of DNA to junk DNA exclusively for identification purposes.<sup>97</sup>

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92. *Buza*, 129 Cal. Rptr. 3d at 766 (citing *Haskell v. Brown*, 677 F. Supp. 2d 1187 (N.D. Cal. 2009)).

93. The *Haskell* court examined the continuum of privacy rights:

Arrestees undoubtedly have a greater privacy interest than convicted felons, but Plaintiffs have not shown that that interest outweighs the government’s compelling interest in identifying arrestees, and its interest in using arrestees’ DNA to solve past crimes. Accordingly, based on the evidence presently before the Court, California’s DNA searching of arrestees appears reasonable.

*Haskell*, 677 F. Supp. 2d at 1201. The denial of the injunction by the Northern District of California in *Haskell* was upheld by the Ninth Circuit in *Haskell v. Harris*, 669 F.3d 1049, 1051 (9th Cir.) (concluding “that the Government’s compelling interests far outweigh arrestees’ privacy concerns”), *reh’g en banc granted*, 686 F.3d 1121 (9th Cir. 2012).

94. See generally *Buza*, 129 Cal. Rptr. 3d at 761–68.

95. *Haskell*, 677 F. Supp. 2d at 1197 (rationalizing that “everyday ‘booking’ procedures routinely require even the merely accused to provide fingerprint identification, regardless of whether investigation of the crime involves fingerprint evidence.” (citations omitted)).

96. *Id.* at 1190. DNA profiles that have the thirteen “junk” DNA are made from DNA samples taken at arrest. See H.R. REP. NO. 106-900, pt. 1, at 27 (2000) (“[T]he genetic markers used for forensic DNA testing were purposely selected because they are not associated with any known physical or medical characteristics . . .”). See also discussion *supra* Part I.B.1 for more information on the sampling process.

97. *United States v. Mitchell*, 652 F.3d 387, 407 (3d Cir. 2011) (“[The court is] also reassured by the

As the *Buza* court suggested, this analogy between DNA and fingerprints is flawed for several reasons.<sup>98</sup> First, DNA is more valuable evidence than fingerprints because it tells investigators more about a suspect than a fingerprint and is more frequently found at crime scenes.<sup>99</sup> Scholars dispute whether junk DNA contains only non-genetic identifying characteristics.<sup>100</sup> Perhaps more troubling than the doubt among scientists of what DNA can reveal *today* is the possibility of what DNA can reveal *tomorrow* as technology advances; there is no comparable fear of privacy invasion for fingerprints in the future.<sup>101</sup> DNA sampling also differs from fingerprinting regarding the negative social stigma it carries.<sup>102</sup> Furthermore, the practice of fingerprinting has become routine without being analyzed under current Fourth Amendment jurisprudence, leaving an unstable foundation for the analogy to stand on.<sup>103</sup> As the court in *Buza* noted, the historical basis for allowing

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numerous protections in place guarding against [the] possibility [of misuse]. . . . [T]he [DNA] Act criminalizes the misuse of both the sample and the analysis generated from the sample.” (citing 42 U.S.C. § 14135e(c)), *cert. denied*, 132 S. Ct. 1741 (2012) (mem.). “By using only so-called ‘junk DNA’ to create the profile, the Government ensures that meaningful personal genetic information about the individual is not published in CODIS.” *Id.* at 400.

98. *Buza*, 129 Cal. Rptr. 3d at 767–68.

99. DNA can be recovered from crime scenes in many forms, such as hair, skin, and even sweat. *See supra* note 24. DNA can also reveal information about family members and is used in familial database searches. *See generally* Gabel, *supra* note 5, at 19.

100. *Buza*, 129 Cal. Rptr. 3d at 768; *see also* United States v. Kincade, 379 F.3d 813, 850 (9th Cir. 2004) (“[N]ew discoveries are being made by the day that challenge the core assumption underlying junk DNA’s name—regions of DNA previously thought to be ‘junk DNA’ may be genic after all.”). Some scholars have asserted that DNA may reveal personality traits that lead to criminal behavior and that, therefore, everyone should be sampled to identify these traits early on in life. Simoncelli, *supra* note 71, at 392.

101. While a DNA sample is turned into a DNA profile for entry into the database, almost every state law and the federal DNA law require the laboratory to keep part of the original DNA sample that contains the human genome for an unlimited length of time. *Buza*, 129 Cal. Rptr. 3d at 769. Today, junk DNA samples may indicate an individual’s race or sex, and in the near future, DNA samples promise to reveal more about an individual’s medical characteristics. Eiler, *supra* note 66, at 1211.

102. “That DNA is used most commonly, both in the public perception and in reality, to detect more heinous crimes such as rape and murder [] speaks to this negative perception.” Corey Preston, Note, *Faulty Foundations: How the False Analogy to Routine Fingerprinting Undermines the Argument for Arrestee DNA Sampling*, 19 WM. & MARY BILL RTS. J. 475, 496 (2010). However, fingerprinting has long been accepted without such a negative social stigma. *Id.* at 495–96.

103. Fingerprints have become part of the American way of life, without hesitation by the public:

Because the great expansion in fingerprinting came before the modern era of Fourth Amendment jurisprudence ushered in by *Katz v. United States*, it proceeded unchecked by any judicial balancing against the personal right to privacy. As a consequence, we

fingerprinting is not entirely clear and thus cannot be used as the sole foundation for allowing so-called DNA “fingerprinting” at arrest.<sup>104</sup>

To support the argument that DNA sampling is only for identification, the *Haskell* court defined “identification” as “both who that person is (the person’s name, date of birth, etc.) and what that person has done (whether the individual has a criminal record, whether he is the same person who committed an as-yet unsolved crime across town, etc.).”<sup>105</sup> The “who the person is” use of DNA sampling is less effective and slower than fingerprinting; it takes thirty-one days for a DNA sample to be converted into a DNA profile and uploaded into a database, while it only takes about ten minutes for a fingerprint to be cross-referenced to identify an arrestee.<sup>106</sup> Also, DNA samples are not taken until *after* police identify the individual, and then samples are taken only from individuals who have not already been arrested or convicted and, thus, previously added to the database.<sup>107</sup> Therefore, the primary purpose of DNA sampling cannot be to identify the arrested individual.

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have become accustomed to having our fingerprints on file in some government database. The suggestion that law enforcement agencies, including the FBI, must destroy the fingerprints of those who were wrongfully arrested and booked, and were later released, would today be greeted by reactions ranging from apathy to a disdainful snigger. Why? Because we have come to accept that people—even totally innocent people—have no legitimate expectation of privacy in their fingerprints, and that’s that.

*Kincade*, 379 F.3d at 874 (Kozinski, J., dissenting) (citations omitted).

104. *Buza*, 129 Cal. Rptr. 3d at 770 (finding that routine fingerprinting without Fourth Amendment analysis cannot lead to the conclusion that DNA sampling survives without a separate constitutional analysis).

105. *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1199 (N.D. Cal. 2009). The court stated:

Who the person is can often be checked using fingerprints, but that does not preclude the government from also checking that individual’s identity in other ways. An individual might wear gloves at some point, thwarting fingerprint identification, or wear a mask, thwarting the use of photographs. The more ways the government has to identify who someone is, the better chance it has of doing so accurately.

*Id.* The court in *Buza* considered that the use of DNA for more accurate identification goes to the actual “investigatory value,” not the identification value as *Haskell* claims. *Buza*, 129 Cal. Rptr. 3d at 774.

106. *Buza*, 129 Cal. Rptr. 3d at 772–73. DNA profiles, once in the database, do not contain any identifying personal information such as the name of the individual that the sample was collected from. *Id.* at 1448; *see also* discussion *supra* Part I.B. (explaining the DNA sampling and profile creation process).

107. The court explained:

The first step in collecting a DNA sample by means of the “standard DNA collection kit” provided by the DOJ to local and state law enforcement agencies is to “identify the subject,” indicating the immediate means of “identification” is *not* the subject’s DNA.

Because DNA is less efficient than fingerprints in identifying arrestees, the second definition of identification used by *Haskell*, the “what the person has done” definition, must be the real purpose behind DNA sampling of arrestees. The court in *Buza* considered *Haskell*’s definition and concluded that the real purpose of DNA sampling is to determine if the individual has committed *a different* crime “unrelated to the crime for which they were arrested.”<sup>108</sup> A closer examination of the intent of California’s DNA Act shows the ultimate purposes of the Act are the use of DNA for crime-solving and the need to expand the database to include more potential leads for law enforcement.<sup>109</sup> The *Buza* court concluded that the only limitations imposed on DNA samples are that they be used for law enforcement and may not be used to identify characteristics such as gender or race for “non-law enforcement purposes.”<sup>110</sup> “By merging the ordinarily distinct concepts of verification of identity and criminal investigation,” the *Buza* court held, “the DNA Act authorizes suspicionless criminal investigation of arrestees in the name of ‘identification,’ absent any true need or ability to use the material collected to verify identity at the time of arrest.”<sup>111</sup>

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Further demonstrating this point, since DNA samples are not taken from arrestees who have already had samples taken, the arrestee’s identity must be verified by other means before a DNA sample can be collected.

*Buza*, 129 Cal. Rptr. 3d at 773 (citations omitted).

108. *Id.* at 770–77. When a DNA sample is taken and a profile is created, it is checked against a database of unsolved crimes. See discussion *supra* Part I.B.2. “There can be no doubt that this use of DNA samples is for purposes of criminal investigation rather than simple identification.” *Buza*, 129 Cal. Rptr. 3d at 774; see also *Haskell v. Harris*, 669 F.3d 1049, 1080 (9th Cir. 2012) (Fletcher, J., dissenting) (“Proposition 69 does not authorize the taking of DNA samples from felony arrestees for identification purposes. Rather, it authorizes the taking of DNA samples for solely investigative purposes. Such takings are unconstitutional . . .”), *reh’g en banc granted*, 686 F.3d 1121 (9th Cir. 2012); *King v. State*, 42 A.3d 549, 580 (Md. 2012) (holding the Maryland DNA arrestee sampling act constitutional in the narrow use “as a means to identify an arrestee, but not for investigatory purposes, in any event”).

109. See *Buza*, 129 Cal. Rptr. 3d at 774–75. The *Buza* court also questioned the actual success rates of DNA databasing given a recent California Department of Justice study and averred that many of the people arrested are already convicted and have their DNA in the database. This would logically result in only a minimal increase in the success of the database with the inclusion of arrestee DNA. *Id.* at 776–77. For more on the governmental interests behind the federal DNA Act and the expansion of CODIS at the federal level, see Eiler, *supra* note 66, at 1221 nn.126–27.

110. *Buza*, 129 Cal. Rptr. 3d at 776.

111. *Id.* This is similar to the Supreme Court’s finding in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), in which the Court struck down a roadblock checkpoint program designed to “detect evidence of ordinary criminal wrongdoing,” as it could not qualify as a special need. *Id.* at 38. Ordinary

The government's interest in investigating crime through DNA sampling of arrestees must still be weighed against the arrested individual's reasonable expectation of privacy. While a convict or parolee's expectation of privacy is diminished enough to be outweighed by the governmental interest in collecting DNA samples, the arrestee inherently can expect a higher level of privacy.<sup>112</sup> The treatment of arrestees vastly differs from the treatment of convicts or parolees, as arrestees are not subject to mandatory searches, are less likely to reoffend, and thus must have a greater expectation of privacy.<sup>113</sup> An arrestee has not been found guilty, and unless a judge has found probable cause, the current DNA regime allows sampling based only on the probable cause of the arresting officer.<sup>114</sup> This creates a welcoming temptation for officers to arrest possible suspects of a crime on other grounds to obtain a sample of their DNA to prove their investigative theory.<sup>115</sup>

The expungement process exacerbates the problem of potential officer abuse. The federal DNA statute allows DNA sampling at arrest, while some state statutes require DNA sampling immediately after arrest.<sup>116</sup> This immediate sampling at arrest means that even if

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investigations do not satisfy the special needs test, and a warrant with sufficient probable cause is required. Eiler, *supra* note 66, at 1220 (“The special needs exception[] . . . presents an insurmountable obstacle for the federal all-arrestee law because the law enforcement rationale behind expanding CODIS is so obviously paramount.”); *see also King*, 42 A.3d at 578 (“A finding of probable cause for arrest on a crime of violence under the Maryland DNA Collection Act cannot serve as the probable cause for a DNA search of an arrestee.”).

112. *United States v. Weikert*, 504 F.3d 1, 10–11 (1st Cir. 2007); *Banks v. United States*, 490 F.3d 1178, 1185 (10th Cir. 2007); *United States v. Kincade*, 379 F.3d 813, 839 (9th Cir. 2004); *see also* Bina Ghanaat, Comment, *Technology and Privacy: The Need for an Appropriate Mode of Analysis in the Debate over the Federal DNA Act*, 42 U.C. DAVIS L. REV. 1315, 1341–43 (2009) (asserting that courts now have the opportunity to potentially uphold all-arrestee DNA statutes given the Supreme Court's failure to articulate a clear rule regarding the totality of the circumstances test).

113. *Buza*, 129 Cal. Rptr. 3d at 761. *But see Lockard v. City of Lawrenceburg*, 815 F. Supp. 2d 1034, 1049 (S.D. Ind. 2011) (“[A]lthough an arrestee may have a larger expectation of privacy than a prisoner, the arrestee's expectation of privacy is still shrunken compared to society at large.”).

114. Eiler, *supra* note 66, at 1218.

115. *Id.* at 1226. Thus, an officer can churn up probable cause to arrest an individual to collect a DNA sample to confirm a suspicion on an entirely separate case that lacked the requisite probable cause for arrest. *Id.*

116. 42 U.S.C. § 14135a(a)(1)(A) (2006) (“The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested, facing charges, or convicted or from non-United States persons who are detained under the authority of the United States.”); *see also, e.g., CAL. PENAL CODE* § 296.1(a)(1)(A) (West, Westlaw through Ch. 3 of 2013 Reg.

the arrest is later determined to be without cause, the DNA sample will remain in the database until the individual applies for expungement and will be continually cross-referenced with new samples from crime scenes, creating additional, reoccurring privacy violations with each search.<sup>117</sup>

### III. MODIFYING SAMPLING SUBMISSION AND EXPEDITION OF EXPUNGEMENT

The current statutory scheme used by most states and the federal government allowing DNA sampling at arrest fails to meet the special needs or the totality of the circumstances tests. Accordingly, should the Supreme Court have the opportunity to hear a case challenging the DNA Act or any of the similarly modeled state statutes, the Court should follow the rationale of the *Buza* court and hold that these statutes violate the Fourth Amendment. Although the possibility of review and judicial remedy by the Supreme Court<sup>118</sup> remains uncertain, the constitutional conflicts that DNA databasing presents may quickly and easily be remedied by modifying federal and state statutes.

While each state law could be modified individually, a nationwide statutory remedy would be more easily effectuated by Congress. Using its power to fund state DNA programs, Congress could add a requirement that mandates consistent DNA databasing and retention

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Sess.) (“Each adult person arrested for a felony offense . . . shall provide the buccal swab samples and thumb and palm print impressions and any blood or other specimens required pursuant to this chapter immediately following arrest, or during the booking or intake or prison reception center process or as soon as administratively practicable after arrest, but, in any case, prior to release on bail or pending trial or any physical release from confinement or custody.”).

117. *Buza*, 129 Cal. Rptr. 3d at 780 (noting that the use of the profile in the database will continue until the arrestee has it successfully expunged from the database).

118. Some scholars have proposed that a judicial remedy may be achieved by the Supreme Court modifying the special needs test back to a “barebones version of the special needs doctrine” that does not consider “law enforcement purpose” or else establish a new exception to the warrant requirement for DNA searches. Eiler, *supra* note 66, at 1229. Others have asserted that the Supreme Court will find DNA arrestee laws unconstitutional and will strike them down, but this would not clarify the Fourth Amendment standard to be applied to DNA sampling and would offer little guidance to legislatures as to what expansions of DNA sampling are constitutional. *Id.* at 1230.



standards at the state level.<sup>119</sup> Because all state samples are eventually submitted into CODIS, the federal DNA database, Congress can also create uniform conditions for acceptance of DNA profiles into CODIS and require expedition of the expungement process.

#### A. Limiting When To Sample And Submit

The first solution to the constitutional dilemma of DNA sampling is the modification of *when*, in the judicial process, the sampling of an individual takes place. The current federal statute allows the collection of “DNA samples from individuals who are arrested, facing charges, or convicted,” and many state statutes require DNA sampling immediately following arrest.<sup>120</sup> Reviewing the limited case law on DNA collection at arrest, courts have upheld the statutes in situations where probable cause has been determined by a *grand jury or judge* prior to arrest but have held them unconstitutional in situations where an *officer alone* determined probable cause.<sup>121</sup> Because of the imprecise language of the statute, the line is blurred and outcomes vary under the same statutory language. Drawing a

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119. The Debbie Smith DNA Backlog Grant Program lays out the eligibility requirements for a state to receive federal funding for its DNA sampling and database system, which includes quality controls and inclusion of the samples into CODIS. 42 U.S.C. § 14135a (2006). Modification of the program requirements would be the most efficient way to ensure state compliance because the majority of state databases rely on federal funding programs to finance their crime labs and DNA databasing systems. See LISA HURST & KEVIN LOTHBRIDGE, 2007 DNA EVIDENCE AND OFFENDER ANALYSIS MEASUREMENT: DNA BACKLOGS, CAPACITY AND FUNDING 9 (2010), available at [www.ncjrs.gov/pdffiles1/nij/grants/230328.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/230328.pdf) (finding that when surveying publicly funded crime laboratories that were accredited and operating forensic DNA analysis programs, “[n]early 90%, or 133 laboratories, responded that they would not have sufficient funding” if federal funding were no longer available).

120. 42 U.S.C. § 14135a(a)(1)(A) (2006); see also, e.g., CAL. PENAL CODE § 296.1 (West, Westlaw through Ch. 3 of 2013 Reg. Sess.) (“Each adult person arrested for a felony offense . . . shall provide the buccal swab samples and thumb and palm print impressions and any blood or other specimens required pursuant to this chapter immediately following arrest, or during the booking or intake or prison reception center process or as soon as administratively practicable after arrest, but, in any case, prior to release on bail or pending trial or any physical release from confinement or custody.”); FLA. STAT. § 943.325(3)(a) (West, Westlaw through 1st Reg. Sess. of 23d Leg.) (“Each qualifying offender shall submit a DNA sample at the time he or she is booked into a jail, correctional facility, or juvenile facility.”).

121. See *United States v. Mitchell*, 652 F.3d 387, 415–16 (3d Cir. 2011), cert. denied, 132 S. Ct. 1741 (2012) (mem.); *United States v. Pool*, 645 F. Supp. 2d 903, 917 (E.D. Cal. 2009); *People v. Buza*, 129 Cal. Rptr. 3d 753, 783 (Ct. App.), cert. granted, 262 P.3d 854 (Cal. 2011).

statutory line—requiring an adequate amount of probable cause at arrest to meet the totality of the circumstances test—remedies this inconsistency.<sup>122</sup> While an arrestee can expect a diminished amount of privacy upon arrest, there is a clear difference between the privacy expected by an arrestee—who has the evidence against him reviewed by a grand jury of his peers or by a judge—and one who has been arrested on the conclusion of a single officer’s (sometimes instant) determination of probable cause for arrest.<sup>123</sup>

North Carolina’s DNA database statute recognizes this differentiation between the kinds of probable cause:

The arresting law enforcement officer shall obtain, or cause to be obtained, a DNA sample from an arrested person at the time of arrest, or when fingerprinted. However, if the person is arrested without a warrant, then the DNA sample shall not be taken until a probable cause determination has been made pursuant to G.S. 15A-511(c)(1).<sup>124</sup>

Under this statutory scheme, “[t]he magistrate must determine whether there is probable cause to believe that a crime has been committed and that the person arrested committed [the crime] . . . .”<sup>125</sup> Waiting to collect the DNA sample of an arrestee until after the *judicial* determination of probable cause solves the

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122. The “totality of the circumstances” test weighs the interest in the “individual’s privacy against the government’s interest in conducting a search.” *Buza*, 129 Cal. Rptr. 3d at 760–61; *see also* discussion *supra* Part II.

123. When considering the continuum of privacy expected by individuals—from convicts to parolees to arrestees—arrestees’ determinations of probable cause create separate “categories.” *See Buza*, 129 Cal. Rptr. 3d at 782 (“[W]ithin the category of arrestees, an individual . . . who has not yet been the subject of a judicial determination of probable cause, falls closer to the ordinary citizen end of the continuum than one as to whom probable cause has been found by a judicial officer or grand jury.”).

124. N.C. GEN. STAT. § 15A-266.3A(b) (West, Westlaw through S.L. 2013-36 of 2013 Reg. Sess.).

125. *Id.* § 15A-511(c)(1). “A judicial official may issue a warrant for arrest only when he is supplied with sufficient information, supported by oath or affirmation, to make an independent judgment that there is probable cause to believe that a crime has been committed and that the person to be arrested committed it.” *Id.* § 15A-304(d). Probable cause in North Carolina must be established by affidavit or by sworn oral testimony. *Id.*

problem of arrestee privacy issues raised in *Buza* and also meets the purpose of expanding CODIS.<sup>126</sup>

On the federal level, Congress can require states to implement the probable cause threshold before granting any money to state DNA databases and accepting any DNA sample to be included in CODIS. In Virginia, when a DNA sample is taken and sent to the state DNA database, a copy of the warrant establishing probable cause has to be attached to the sample.<sup>127</sup> If Congress required a similar showing of probable cause before a sample may be admitted into CODIS and made it a condition for a state database to receive federal grants under the Debbie Smith DNA Backlog Grant Program,<sup>128</sup> states would be encouraged to ensure the privacy of arrestees as mandated by the Fourth Amendment.<sup>129</sup>

### *B. Expediting The Expungement Process*

The second remedy needed to ensure the constitutionality of DNA databasing is expediting the expungement of DNA samples and profiles and shifting the burden of responsibility in the expungement process. Under the current federal statutory scheme, the Director of the FBI as well as the individual states must expunge any DNA sample and profile from the database upon receipt of

a certified copy of a final court order establishing that [the qualifying offense] conviction has been overturned; or . . . a certified copy of a final court order establishing that [the qualifying offense] charge has been dismissed or has resulted in an acquittal or that no charge was filed within the applicable

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126. “[T]he [DNA Fingerprinting] act will allow the creation of a comprehensive, robust database that will make it possible to catch serial rapists and murderers before they commit more crimes.” 151 CONG. REC. S9472, 9528 (daily ed. July 29, 2005) (statement of Sen. John Kyl), 2005 WL 1797658 (Westlaw).

127. VA. CODE ANN. § 19.2-310.3:1(A) (West, Westlaw through 2013 Reg. Sess. cc. 2 and 3) (“The sample shall be secured to prevent tampering with the contents and be accompanied by a copy of the arrest warrant or *capias*.”).

128. 42 U.S.C. § 14135(a) (2006).

129. See U.S. CONST. amend IV.

time period.<sup>130</sup>

The federal statute makes it clear that the DNA samples and profiles of those certified not guilty are to be promptly expunged from the database, yet, with varying state law, it remains unclear as to *who* has to request the expungement. Some states require the arrestee to apply for expungement, which can be a lengthy and complicated process.<sup>131</sup> Furthermore, some states will not invalidate DNA database matches obtained due to a failure to expunge or a delay in expungement by the state.<sup>132</sup> Under this statutory uncertainty, not only does the arrestee carry the burden of requesting expungement, but he also has no recourse if the state fails to expunge his DNA profile even after he meets this burden. The state, therefore, has no incentive to promptly comply with the court order to expunge, as it has nothing to lose.

North Carolina's newly adopted statutory scheme, which went into effect in June 2012, shifts the expungement burden to the prosecutor by requiring her, within thirty days of acquittal or dismissal of the case, to submit an official "verification form" to the State Bureau of Investigations (SBI) including verification of the facts, the arrestee's last known address, and the signature of a judge validating the acquittal or dismissal of the case.<sup>133</sup> Within thirty days of receiving

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130. 42 U.S.C. § 14132(d) (2006).

131. *See, e.g.*, HAW. REV. STAT. § 844D-72(a) (West, Westlaw through Act 5 of 2013 Reg. Sess.) (requiring the arrestee to submit a "written request for expungement"; "[a] certified copy of the court order" or a "letter from the prosecuting attorney certifying that . . . the case [was] dismissed"; proof that "written notice [of the request for expungement] has been provided to the prosecuting attorney and the department"; "[a] court order verifying that no retrial or appeal of the case is pending"; and that at least 180 days have passed since the prosecuting attorney received notice of the request for expungement and has not objected); VA. CODE ANN. § 19.2-310.7 ("A person whose DNA profile has been included in the data bank . . . may request expungement on the grounds that the felony conviction on which the authority for including his DNA profile was based has been reversed and the case dismissed."); *see also* *People v. Buza*, 129 Cal. Rptr. 3d 753, 758–59 (Ct. App.), *cert. granted*, 262 P.3d 854 (Cal. 2011).

132. *See, e.g.*, O.C.G.A. § 35-3-165(b) (2012) (West, Westlaw through 2012 Reg. Sess.) ("A DNA sample obtained in good faith shall be deemed to have been obtained in accordance with the requirements of this article and its use in accordance with this article is authorized until a court order directing expungement is obtained and submitted to the bureau."); HAW. REV. STAT. § 844D-72(d) ("Any identification, warrant, probable cause to arrest, or arrest based upon a data bank match shall not be invalidated due to a failure to expunge or a delay in expunging records.")

133. N.C. GEN. STAT. § 15A-266.3A(j) (2011) (West, Westlaw through S.L. 2013-36 of 2013 Reg. Sess.); *see also* VA. CODE ANN. § 19.2-310.2:1 ("The clerk of the court shall notify the Department of

the form, the SBI must determine if there is another legal provision requiring the arrestee's DNA sample to remain in the state database and if not, must "remove the [arrestee's] DNA record and samples" from the database.<sup>134</sup> This statutory scheme places the burden not only on the prosecutor but also the SBI—as the administrator of the state's database—to ensure expungement of DNA samples.

The North Carolina statute also provides that within thirty days of receiving the verification form from the prosecutor, the SBI must mail the arrestee a notice documenting the removal and destruction of the DNA sample and profile from the database or notice that the "sample d[id] not qualify for expunction."<sup>135</sup> If this expungement process is not enacted by the prosecuting attorney or the SBI within the prescribed time period, the arrestee may file a motion to review, and any "identification, warrant, probable cause to arrest, or arrest based upon a database match of the defendant's DNA sample which occurs after the expiration of the statutory periods prescribed for expunction" is "invalid and inadmissible in the prosecution of the [arrestee] for any criminal offense."<sup>136</sup>

If a statutory scheme similar to North Carolina's were adopted on a federal level, it would vastly reduce the burden on the arrestee in the expungement process. Granting the arrestee statutory standing to enforce the automatic expungement of DNA samples and profiles would cure many of the *Buza* court's concerns with continual cross-referencing of DNA samples in CODIS and lessen the fear of "dirty cop" techniques to collect DNA samples.<sup>137</sup> Congress could also enact this scheme by placing the burden of automatic expunction of DNA profiles and samples on the state as another requirement for a state database to receive federal grants under the Debbie Smith DNA

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final disposition of the criminal proceedings. If the charge for which the sample was taken is dismissed or the defendant is acquitted at trial, the Department shall destroy the sample and all records thereof, provided there is no other pending qualifying warrant or capias for an arrest or felony conviction that would otherwise require that the sample remain in the data bank." (emphasis added).

134. N.C. GEN. STAT. § 15A-266.3A(k).

135. *Id.* § 15A-266.3A(k)(3).

136. *Id.* § 15A-266.3A(l)–(m).

137. See discussion *supra* Part II.

Backlog Grant Program<sup>138</sup> to ensure a uniform and constitutional scheme nationwide.

#### CONCLUSION

DNA has forever changed the way crime is investigated, and many of its intricacies remain to be discovered.<sup>139</sup> With the expansion of DNA sampling from convicts to parolees to arrestees, a line must be drawn to prevent “encroachment on Fourth Amendment privacy rights”<sup>140</sup>—a line to prevent the “Orwellian prospect” of population-wide DNA sampling.<sup>141</sup> Using the two tests for constitutionality under current Fourth Amendment search jurisprudence—the totality of the circumstances test and the special needs test—the *Buza* court found California’s all-arrestees DNA databasing statute unconstitutional.<sup>142</sup>

An examination of the scale of expected privacy rights reveals that there is a difference in the probable cause determinations of judicial officials versus the probable cause determinations of arresting officers.<sup>143</sup> Given this difference, the federal arrestee DNA databasing statute, as well as many arrestee state statutes, is unconstitutional. This constitutional defect is easily remedied, however, by adding two conditions to receiving federal DNA database funding: requiring *judicial* probable cause before DNA is admitted into CODIS and state databases; and rewriting state statutes to place the burden of expungement on the *state* instead of the arrestee.<sup>144</sup> Under this proposed scheme, constitutional rights of those who are not found guilty are safeguarded and protected from suspicionless searches, while the governmental interest of expanding databases and catching criminals in DNA collection is promulgated through a mutually beneficial statutory scheme.

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138. 42 U.S.C. § 14135(a) (2006).

139. See discussion *supra* Part I.

140. Preston, *supra* note 102, at 475.

141. *People v. Buza*, 129 Cal. Rptr. 3d 753, 783 (Ct. App.), *cert. granted*, 262 P.3d 854 (Cal. 2011).

142. See discussion *supra* Part II.

143. See discussion *supra* Part II.

144. See discussion *supra* Part III.

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