

February 20, 2017

Dear Public Law Workshop Participants:

Attached is a preliminary draft of a project related to Orange County's prosecutor-run DNA database, colloquially known as "Spit and Acquit." I am still in the midst of data collection; I recently received approval to conduct wider recruitment efforts, along with a collaborator at UC Irvine, Simon Cole, to speak with people whose DNA is in the database. I also have imminent plans to litigate the denial of several Public Records Act requests I have made to the Orange County District's Attorney's Office, and to make several additional PRA requests of the county. As a result of these ongoing collection efforts, the attached draft is necessarily tentative. Still, it gives a sense of the direction of the project, and (hopefully) of why I find Spit and Acquit so intriguing.

Thanks so much for your time and feedback.

Best,

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# Prosecutorial Policymaking: Reflections on “Spit and Acquit”

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## INTRODUCTION

Forensic DNA databases have, no doubt, revolutionized law enforcement. The Combined DNA Index System (CODIS), the national network of federal, state, and local offender databases administered by the Federal Bureau of Investigation (FBI), now boasts over 14 million offender profiles and nearly 750,000 crime scene profiles. As of November 2016, CODIS has produced

over 355,535 so-called “cold hits” to crime scene profiles and, according to the FBI, has aided in more than 340,554 investigations.<sup>1</sup> Law enforcement officials and Innocence Project lawyers alike laud DNA as a “truth machine” that rightly convicts the guilty and exonerates the innocent who, respectively, would have evaded responsibility or been wrongfully accused in a system reliant on lesser forms of proof.<sup>2</sup>

Notwithstanding DNA’s awesome crime-solving power, legislatures have been unwilling to expand the reach of DNA databases beyond a certain point. While every state requires a DNA sample from convicted felons, strict protocols govern the purposes for which the samples may be used; the methods of collecting and retaining the samples; and whether databases can be searched for partial matches, a controversial practice offering potential investigative leads but also bringing under state surveillance family members of those in the database. And although several states have begun requiring samples from felony arrestees as well, all allow an arrestee to expunge her profile from the database if the case does not end in conviction.<sup>3</sup> While the Supreme Court in a 5-4 decision upheld the constitutionality of Maryland’s felony arrestee database against a Fourth Amendment challenge, it did so on narrow grounds related to the need to accurately identify felony arrestees at the time of arrest, suggesting that further expansion would not necessarily pass muster.<sup>4</sup> In any event, no state requires samples from misdemeanor arrestees or those merely detained, but not arrested. And the occasional call for a universal database is typically met with scorn by civil liberties groups, at least in the United States and United Kingdom.<sup>5</sup>

An enterprising group of prosecutors in Orange County, California, however, has found a way to significantly expand its local database beyond existing legal limits. It has done so through the “Public Safety, Crime Prevention and Deterrence DNA Program,”<sup>6</sup> colloquially known to locals as “Spit and Acquit.” Since April 2007, the Orange County District Attorney’s Office (OCDA) has offered certain defendants accused of misdemeanors and low-level felonies a choice: give us a DNA sample, and we will show you

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<sup>1</sup> CODIS – NDIS Statistics, available at <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics>.

<sup>2</sup> See generally Jay D. Aronson & Simon A. Cole, *Science and the Death Penalty: DNA, Innocence, and the Debate over Capital Punishment in the United States*, 34 L. & SOC. INQUIRY 603 (2009) (noting the innocence movement’s role in cementing DNA’s “truth machine” status).

<sup>3</sup> See discussion *infra* at I.A.1.

<sup>4</sup> *Maryland v. King*, 133 S. Ct. 1958, 1971-72 (2013).

<sup>5</sup> See, e.g., SHELDON KRIMSKY & TANIA SIMONCELLI, GENETIC JUSTICE: DNA DATABANKS, CRIMINAL INVESTIGATIONS, AND CIVIL LIBERTIES 143-64 (2011) (arguing against a universal database on efficacy, fairness, and privacy grounds); Nigel Morris, *A “Chilling” Proposal for a Universal DNA Database*, INDEPENDENT, Sept. 5, 2007; *Universal DNA Database would Make Us All Suspects*, NEW SCIENTIST, Sept. 19, 2007.

<sup>6</sup> See DNA Collection Waiver Form 1.05 R12-10.

leniency in your criminal case. Sometimes that leniency is in the form of an agreement to an outright dismissal; sometimes it is a “Deferred Entry of Judgment” (DEJ), in which the charged individual pleads guilty but gets his case dismissed if he abides by certain conditions for a period of time; and sometimes it is an otherwise traditional plea bargain, where the charged individual pleads guilty to a lesser offense and other counts are dismissed. The media’s and public’s frequent use of “Spit and Acquit” as an umbrella term for these varying exchanges is a bit of a misnomer; many such arrangements begin, if not end, with a guilty plea.

Indeed, by all accounts, nearly every plea deal in Orange County to a “non-qualifying offense” (an offense not requiring DNA under existing statutes) now requires that the charged individual walk down the hallway and give OCDA a buccal (cheek) swab of his DNA.<sup>7</sup> Most deals are made between the charged individual and a line prosecutor in the hallway of the courthouse (if the person is out of custody) or at the jail (if the person is in custody), with no defense lawyer in sight. Even when counseled by a defense attorney, though, nearly all charged individuals faced with a choice between leniency or keeping their DNA out of the database choose leniency.<sup>8</sup> As a result, OCDA now owns the full genome of – and has uploaded into its proprietary database the DNA profile of – nearly 150,000 people who would not otherwise have to give a sample to the state.<sup>9</sup>

Spit and Acquit is worthy of study in its own right, but it is also an example of a broader phenomenon: collective action by prosecutors – facilitated by an ostensibly consensual exchange with a criminal defendant – to implement a policy that bypasses existing legislative or constitutional limits. Prosecutorial DNA databases are not yet widespread, although police departments across the country have joined forces with biotechnology companies to create “shadow” DNA databases that prosecutors could easily harness to house profiles collected beyond statutorily authorized limits,<sup>10</sup> and at least two police departments populate their shadow database with profiles extracted from suspects allegedly by consent.<sup>11</sup> In addition, at least two other states now have little-known provisions buried in their DNA collection statutes that allow the

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<sup>7</sup> See discussion *infra* at I.B.1.

<sup>8</sup> See discussion *infra* at I.B.2.

<sup>9</sup> See Letter to Andrea Roth from ADA Denise Hernandez, Jan. 17, 2017.

<sup>10</sup> See generally Jason Kreag, *Going Local: The Fragmentation of Genetic Surveillance*, 95 B.U. L. REV. 1491 (2015); Stephen Mercer & Jessica D. Gabel, *Shadow Dwellers: The Underregulated World of State and Local DNA Databases*, 69 N.Y.U. ANN. SURV. AM. L. 639 (2014).

<sup>11</sup> See, e.g., Kreag, *supra* note 8, at 19 (quoting a police chief’s acknowledgement that “most samples” in the Palm Bay, Florida police department’s database “were obtained from persons who had given consent”); Lauren Kirchner, *DNA Dragnet: In Some Cities, Police Go From Stop-and-Frisk to Stop-and-Spit*, PROPUBLICA, Sept. 12, 2016.

collection of samples even from those charged with an otherwise non-qualifying offense where the sample is “voluntary” or plea-negotiated.<sup>12</sup>

One also sees glimpses of such collective action by prosecutors in other corners of criminal law. For example, in New York, record sealing laws are relatively robust compared to other states, allowing not only for mandatory, automatic record sealing after acquittals and dismissals, but for mandatory, automatic partial sealing of police and prosecutor records related to low-level violations and traffic infractions.<sup>13</sup> In Manhattan, however, prosecutors routinely ask that defendants, as a condition of a non-criminal disposition, agree to have their cases remain unsealed for a certain time period.<sup>14</sup> Certain individual prosecutors also engage in “ad hoc plea bargaining,” requiring a defendant to give charitable contributions, undergo forced sterilization, register as a sex offender,<sup>15</sup> join the military, be subject to public ridicule, or agree to banishment in exchange for leniency.<sup>16</sup>

In a sense, of course, all plea bargaining is prosecutorial policymaking through consent (or alleged consent), even where the only concession extracted from the defendant is the forgoing of trial and appellate rights. In such traditional plea bargains, prosecutors arguably act as “the criminal justice system’s real lawmakers”<sup>17</sup> by setting the level and type of punishment that flows from certain conduct. Not only is this sort of “lawmaking” acceptable, it is encouraged by the legislative branch; legislatures arguably increase maximum penalties and enact mandatory minimum sentencing schemes, beyond the level otherwise demanded by constituents, precisely to empower prosecutors in plea negotiations.<sup>18</sup> Recognizing these trends, and the high rate of guilty pleas, Gerard Lynch famously termed our system one of “prosecutorial

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<sup>12</sup> See discussion *infra* at I.A.

<sup>13</sup> See N.Y. Crim. Proc. Law §§ 160.50; 160.55.

<sup>14</sup> See Email from Assistant Public Defender, Legal Aid Society - Manhattan, Feb. 3, 2017. See also *People v. Wei Chen*, 430 N.Y.S.2d 469 (1980) (holding that while waiver of 160.50 rights is disfavored, it was knowing and intelligent and therefore enforceable). *But see* *People v. Ricci*, 448 N.Y.S.2d 610, 612-13 (1980) (holding that such waivers are invalid and unenforceable because inherently coercive and inconsistent with thrust of 160.50). I thank Issa Kohler-Hausmann for alerting me to this New York practice.

<sup>15</sup> See, e.g., *In re Stanley Doe*, 855 A.2d 1100, 1107 n.13 (D.C. 2004) (declining to reach the validity of this plea condition, on grounds that defendant was required to register in any event under court’s interpretation of statute).

<sup>16</sup> See generally Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TULANE L. REV. 695 (2001) (exploring and condemning such plea conditions as without legal authority).

<sup>17</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) (arguing that “tacit cooperation between prosecutors and legislators” has led to an overbroad substantive criminal law intended to facilitate guilty pleas) Stuntz (2001), *supra* note 11, at 506.

<sup>18</sup> *Id.* at 510.

adjudication,” in which guilt and punishment are determined by an “administrative decision by a state functionary” rather than by jury and judge.<sup>19</sup>

Spit and Acquit is prosecutorial policymaking of a different, less scrutinized sort than traditional plea bargaining.<sup>20</sup> It harnesses the prosecutor’s power at the plea-bargaining stage not to secure particular sentences for particular types of conduct, but to engage in rulemaking in a context unrelated to the adjudication itself. Unlike traditional plea bargaining, in which the bargained-away right (trial) has the same ostensible goal as the administrative substitute, Spit and Acquit has a goal – database expansion – arguably separate from, and perhaps even at odds with, the goals of adjudication. Moreover, Spit and Acquit is a widescale policy contemplating collective action, rather than merely an attempt to influence certain defendants’ behavior. As such, it is different both from ad hoc plea bargaining and from judicial imposition of surveillance as a condition of parole or probation in individual cases.<sup>21</sup> In contexts like Spit and Acquit, prosecutorial policymaking acts as an end run around legislative choices, rather than as a practice openly encouraged by legislatures. Just as we have an “administrative system of criminal justice,” in Lynch’s words, we also appear to be moving toward an administratively and systematically expanded surveillance regime, one that might well be unconstitutional if attempted directly by the legislature.

This Article explores Spit and Acquit as a case study of prosecutorial policymaking. In Part I, it explains the rise of Spit and Acquit as a response to prosecutorial frustration with legislative limits on forced sampling, a response facilitated and encouraged by federal funding and private partnerships. The Article then offers a detailed description of how Spit and Acquit works on the ground, based on public records and interviews with prosecutors, judges, defense attorneys, and defendants, as well as on my observation of arraignment court and hallway conversations between prosecutors and defendants. It describes the criteria that appear to drive decisions to require a DNA sample; the realities of how defendants are advised about, and consent to, the program;

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<sup>19</sup> Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2120 (1998).

<sup>20</sup> Several commentators have mentioned Orange County’s database as an example of “shadow” DNA databases, *see, e.g.*, Mercer & Gabel, *supra* note 8, at 669. In addition, student notes have argued that Spit and Acquit raises privacy concerns and might be an “excessive fine” under the Eighth Amendment. *See* Linda Bartusiak, *Plea Bargaining for DNA: Implications on the Right to Privacy*, 13 *J. CONST. L.* 1115 (2011); Michael Purtill, *Everybody’s Got a Price: Why Orange County’s Practice of Taking DNA Samples from Misdemeanor Arrestees Is an Excessive Fine*, 101 *J. CRIM. L. & CRIMINOLOGY* 309 (2011). Two other commentators have argued that Spit and Acquit raises privacy issues and ethical issues related to charging decisions. Elizabeth N. Jones & Wallace Wade, *“Spit and Acquit”: Legal and Practical Ramifications of the DA’s DNA Gathering Program*, 51 *ORANGE CO. LAWYER MAGAZINE* (2009). This article is the first to offer a detailed description of the program and to theorize it as a form of prosecutorial policymaking.

<sup>21</sup> *See* discussion *infra* at II.A.

and how OCDA and its partners in private industry collect, analyze, upload, use, and store the samples.

In Part II, the Article analyzes OCDA program’s legality and desirability as a policymaking tool. On the legality front, the Article considers whether Spit and Acquit might be unconstitutional in that it conditions a government benefit on the forgoing of a constitutional right to be free from state genetic surveillance, and examines whether the consent given is knowing and voluntary. On the efficacy front, the Article explores how consent-based databasing fares in comparison to legislative databasing with respect to the goals of crime detection and deterrence; other systemic criminal justice goals such as efficiency, retributive justice, democratic accountability, and deterrence of police and prosecutor misconduct; and genetic privacy and racial equity. As it turns out, the efficacy of consent-based DNA databasing is hindered by its reliance on convenience sampling and other incentive-goal mismatches. Unlike statutory databases that directly target risky populations, Spit and Acquit targets, and allows self-selection by, precisely those charged individuals least likely to be risky. Moreover, while DNA databasing by an elected prosecutor holds promise for being democratically accountable, it could be that OCDA focuses more on maximizing its hit rate – a “readily observable variable”<sup>22</sup>—through questionable collection and search methods rather than pursuing strategies that best enhance public safety.

Part III of the Article explores lessons Spit and Acquit might offer in assessing prosecutorial policymaking in general. On the one hand, prosecutorial policymaking like Spit and Acquit has the potential to harness prosecutorial expertise, adapt nimbly to technological change, and better reflect true participant preferences than legislation alone. On the other hand, prosecutorial policymaking poses several risks. First, prosecutorial innovations dependent on defendant consent might tend, like Spit and Acquit, to be convoluted and coercive. Spit and Acquit’s reliance on convenience sampling and ad hoc modifications to work around judicial resistance tend to corroborate Robert Kagan’s description of plea bargaining as “adversarial legalism’s ugly child,”<sup>23</sup> and Shep Melnick’s observation that “backdoor” executive attempts to fill legislative voids “often create[] convoluted, ineffective Rube Goldberg policies.”<sup>24</sup> Second, prosecutorial policymaking outside traditional plea bargaining might tend to hinder other important adjudicative goals. Spit and Acquit is different from what scholars have termed

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<sup>22</sup> See, e.g., Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 64 (1988) (noting that prosecutors might be incentivized to maximize their “batting average” through “readily observable variable[s]” rather than pursuing strategies that best enhance public safety).

<sup>23</sup> ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 83 (2001).

<sup>24</sup> See R. Shep Melnick, *Adversarial Legalism Meets Partisan Polarization*, Kagan Lecture in Law & Regulation, U.C. Berkeley School of Law, Mar. 10, 2016.



“managerial justice,” the use of misdemeanor court by judges and prosecutors primarily to “mark” or “hassle” populations rather than to adjudicate guilt.<sup>25</sup> While some forms of marking and hassling attempt to achieve adjudication’s goals on the cheap (the “process is the punishment,” in Malcolm Feeley’s words), Spit and Acquit strays from adjudicative goals to work around existing legislative limits, and thus might be more likely to advance goals not shared by the public, such as maximizing hit rate through questionable search practices. Third, consent-based prosecutorial practices like Spit and Acquit might often need to operate outside existing legal apparatuses, making such practices both less transparent and more susceptible to the pull of profiteers who may be incentivized to encourage net-broadening practices beyond what a constituency would otherwise desire.<sup>26</sup> The Article concludes by offering suggestions for regulating consent-based prosecutorial policymaking.

## I. “SPIT AND ACQUIT”: PROSECUTORIAL POLICYMAKING IN ACTION

This Part explains the rise of Spit and Acquit as a response to existing legislative limits on forced sampling, with the considerable help of federal funding and private industry. It then presents a detailed description of how Spit and Acquit works on the ground based on interviews, court observations, and public records.

### A. *The Rise of Spit and Acquit in Orange County*

#### 1. OCDA’s Legislative Maneuvering

Forensic DNA typing emerged as a crime-solving tool in the late 1980s.<sup>27</sup> In 1994, Congress passed the DNA Identification Act, authorizing the Federal Bureau of Investigation (FBI) to establish a national database of offender DNA profiles, the Combined DNA Index System (CODIS), against which crime scene evidence might be compared for a potential match.<sup>28</sup> At that point, only people convicted of certain serious federal crimes were required to give a sample.<sup>29</sup> In 2004, Congress authorized forced sampling from all convicted felons in federal custody and authorized funding for states to create their own

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<sup>25</sup> See, e.g., Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014).

<sup>26</sup> See, e.g., Malcolm M. Feeley, *Entrepreneurs of Punishment: How Private Contractors Made and Are Remaking the Modern Criminal Justice System – An Account of Convict Transportation and Electronic Monitoring*, 17 CRIM., CRIM. JUSTICE, L. & SOC. 1 (2016) (describing how profiteers have widened the social control net through alleged alternatives to execution and incarceration).

<sup>27</sup> *Maryland v. King*, 133 S. Ct. at 1966.

<sup>28</sup> See <https://www.fbi.gov/services/laboratory/biometric-analysis/codis>.

<sup>29</sup> See <https://www.fbi.gov/services/laboratory/biometric-analysis/federal-dna-database>.

databases for offenders convicted of serious crimes. The following year, Congress authorized expansion of the database to include those arrested for any federal offense.<sup>30</sup> Federal officials began forcibly sampling DNA from arrestees in 2009,<sup>31</sup> and at least 29 states have followed suit by requiring DNA from certain arrestees.<sup>32</sup> In 2013, Congress authorized the Attorney General to award grants to states that develop a felony arrestee collection process, suggesting that more states will eventually add arrestees to their databases.<sup>33</sup> As of 2016, CODIS – which includes an interconnected web of federal, state, and local offender databases authorized by statute – contains over fourteen million offender profiles.<sup>34</sup>

While the scope of federal and state offender DNA databases has steadily expanded over the years, neither Congress nor any state legislature has been willing to authorize forced sampling beyond felony arrestees and a handful of sex-related misdemeanors.<sup>35</sup> For example, in California, the state may force a DNA sample only from offenders convicted (or found not guilty by reason of insanity) of a felony or certain misdemeanors involving death or sexual assault, and offenders arrested for a felony.<sup>36</sup> Moreover, no legislature in the country has authorized forced sampling beyond those arrested for a crime (such as suspects questioned by police on the street or pulled over in a vehicle). And all states that authorize arrestee sampling allow arrestees to remove their profile from the database if their case is subsequently dismissed or if a jury finds the arrestee not guilty of the charged offense. Indeed, 13 of the 29 states that allow arrestee sampling provide for automatic expungement upon dismissal or acquittal, with no action required by the arrestee.<sup>37</sup>

One reason for the natural stopping point at felony arrestees is cost; DNA backlogs exist in every jurisdiction, and to add misdemeanor arrestees or even convicted misdemeanants to the mix would greatly exacerbate those backlogs. Another reason, however, is that legislators appear wary of extending the scope of genetic surveillance to include low-level offenses or police-citizen contacts that a large swath of the population might well endure at some point.<sup>38</sup> For

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<sup>30</sup> See DNA Fingerprint Act of 2005, Pub. L. 109-162, § 1004(a), codified at 42 U.S.C. § 14135a (a)(1)(A).

<sup>31</sup> The DNA Fingerprint Act of 2005 went into effect in 2009. See 28 C.F.R. § 28.12(b).

<sup>32</sup> See DNA Arrestee Laws, National Conference of State Legislatures (2014), available at [http://www.ncsl.org/Documents/cj/ArresteeDNA\\_Laws.pdf](http://www.ncsl.org/Documents/cj/ArresteeDNA_Laws.pdf) [hereinafter NCSL (2014)].

<sup>33</sup> NCSL (2014) at 3.

<sup>34</sup> See <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics>.

<sup>35</sup> NCSL (2014), *supra* note , at 2 (listing 8 states that require DNA from certain enumerated misdemeanors; all other arrestee-sampling states limit sampling to felonies).

<sup>36</sup> Cal. Penal Code §§ 296(a)(1)-(4).

<sup>37</sup> NCSL (2014), *supra* note , at 2.

<sup>38</sup> See, e.g., Andrea Roth, *Maryland v. King and the Wonderful, Horrible DNA Revolution in Law Enforcement*, 11 OHIO ST. J. CRIM. L. 295 (2013) (arguing that statutory and constitutional limits on genetic surveillance reflect privacy concerns of socially powerful elite).

some legislators, this last concern is one about genetic privacy. Legislators are surely well aware, for example, of the “pervasive and profound resistance to universal databases.”<sup>39</sup> For others, it may be a concern about the declining value-added of low-level offenders arguably unlikely to commit a DNA-solvable rape or homicide.<sup>40</sup>

For still others, the limit at felony arrestees might stem from a concern that further expansion would be declared unconstitutional by courts. In 2013, the Supreme Court in *Maryland v. King* held that forcing a person to give a buccal (cheek) swab for DNA typing is a “search” for purposes of the Fourth Amendment prohibition against unreasonable searches and seizures.<sup>41</sup> Specifically, the *King* Court upheld the constitutionality of a Maryland law that extended forced sampling to those arrested for certain serious felonies.<sup>42</sup> The Court reasoned that the law was justified by the critical need to accurately identify those arrested for crimes.<sup>43</sup> Notably, the Court did not rely on the database’s most obvious value – its ability to solve or deter future crimes – suggesting a hesitance to embrace a justification that would apply to the general population.<sup>44</sup> *King* did not offer definitive guidance to states as to whether a more expansive law would be unconstitutional, such as one requiring sampling from all arrestees, including for petty misdemeanors or infractions, or one that does not provide for expungement upon dismissal or acquittal. Before *King*, some lower courts had made explicit that forced sampling of misdemeanor arrestees might be constitutionally problematic.<sup>45</sup>

Frustrated with the limits on CODIS, many law enforcement officials believe that low-level offenders and suspects should also be in the database.<sup>46</sup> One former prosecutor who worked with OCDA Tony Rackauckas reported that Rackauckas was motivated by an authentic concern that violent crime is primarily committed by local residents and that perpetrators of violent crimes often have a misdemeanor arrest record but nothing else.<sup>47</sup> Attorneys in

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<sup>39</sup> Murphy, *Relative Doubt* (2010), at 326.

<sup>40</sup> See *Maryland v. King* dissent (arguing that arrestees whose cases end in dismissal or acquittal are the least likely to be risky).

<sup>41</sup> See *Maryland v. King*, 133 S. Ct. 1958 (2013) (discussing the history of forensic DNA typing).

<sup>42</sup> *Id.* at 1960.

<sup>43</sup> *Id.*

<sup>44</sup> See Roth (2013) (arguing that the Court’s conspicuous and illogical failure to cite crime-solving as a justification for the law may have reflected its desire not to embrace a justification that would apply to the general population).

<sup>45</sup> See, e.g., *United States v. Pool*, 645 F. Supp. 2d 903 (E.D. Cal. 2009).

<sup>46</sup> See, e.g., Rockne Harmon, *The Power of LDIS*, FORENSIC MAG., Apr. 16, 2013 (applauding local database innovation as a way of improving on the 30% success rate of CODIS). See also Kreag, *supra* note , at 13 (quoting Bensalem Township Police Chief) (“America is plagued with small crime [that CODIS doesn’t address].”) (alteration in original).

<sup>47</sup> Interview with former prosecutor, Mar. 23, 2016. The OCDA has publicly stated that its local DNA program was inspired by the United Kingdom’s DNA database, which allows the

OCDA’s DNA Unit described Prop 47, which took many low-level felony offenses out of the scope of CODIS by downgrading them to misdemeanors, as inflicting “major collateral damage” to CODIS.<sup>48</sup>

An elected prosecutor might also support DNA database expansion for its potential to enhance the *appearance* of success.<sup>49</sup> One defense attorney with whom I spoke, who described himself as generally a fan of Rackauckas, said he thought Rackauckas wanted to be able to boast the largest local database in the United States (and, so far, it is). Others have suggested that Rackauckas’s decision to create the database was inspired by a turf war with the sheriff’s office over who would control the crime laboratories.<sup>50</sup> To be fair, though, many outside the law enforcement community have called for expansion as well, typically on grounds that expanding the scope to the general public would maximize the crime-solving capabilities of DNA; minimize the risk of wrongful conviction based on lesser forms of proof such as confessions, eyewitness testimony, and non-DNA forensic evidence; ameliorate the vast racial disparities that exist in arrestee databases; and inspire a more robust privacy debate.<sup>51</sup>

Given these preferences, one would naturally expect that law enforcement officials would seek ways around existing legal limits on database expansion. But in doing so, they would have to find a way to counter the forces imposing the natural limit at felony arrestees; that is, they would have to find a *cheap, constitutional* means of database expansion that their constituencies would either be *unaware* of, or would *accept* as legitimate. And they have, indeed, found a way: “shadow” databases created with the help of biotechnology firms, filled with volunteered and abandoned DNA samples.<sup>52</sup> Orange County’s database is the largest in the country, and the only one run by a prosecutor’s office.<sup>53</sup>

OCDA’s journey toward consent-based DNA databasing began with a direct maneuver around CODIS limits, using the public initiative process. In

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taking of samples from arrestees for any recordable offense (punishable by potential imprisonment). OCDA Response to Grand Jury Report, July 27, 2010, at 15.

<sup>48</sup> Telephone interview with Scott Scoville & Camille Hill, Feb. 23, 2016.

<sup>49</sup> See Sanford C. Gordon & Gregory A. Huber, *The Political Economy of Prosecution*, 5 ANN. REV. L. & SOC. SCI. 135, 138 (2009) (noting agency cost when prosecutor’s payoff in pursuing an alternative path exceeds that under the “contract” with constituents).

<sup>50</sup> See Jones & Wade, *supra* note , at 5-6 (describing the “political power struggle” that predated the database).

<sup>51</sup> See David H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413, 459; Erin E. Murphy, *Relative Doubt* (2008); Andrea Roth, *Maryland v. King and the Wonderful, Horrible DNA Revolution in Law Enforcement*, 11 OHIO ST. J. CRIM. L. 295 (2013); Michael Seringhaus, *To Stop Crime, Share Your Genes*, N.Y. TIMES, Mar. 14, 2010, at A23.

<sup>52</sup> See generally Mercer & Gabel (2011); Kreag (2015).

<sup>53</sup> In Orange County, participants volunteer DNA in exchange for leniency; in police-citizen exchanges, participants apparently volunteer DNA gratuitously upon police request, suggesting a fair amount of confusion or coercion. See Kirchner (2016), *supra* note 9.

2004, OCDA inserted language into a public initiative it drafted, Proposition 69,<sup>54</sup> that would not only allow forced sampling of felony arrestees, but would allow consensual sampling as part of *plea negotiations* and would allow such volunteered samples to be uploaded to the state offender database.<sup>55</sup> The provision was the first of its kind in the country, although Hawaii and Alaska<sup>56</sup> have since followed suit. And in California, at least two other state DA's offices have sent representatives to Orange County to learn about OCDA's program for possible replication.<sup>57</sup> Notably, nothing in the published summaries of the initiative alerted the public to the change. Instead, the summaries incorrectly stated that the law would only add certain convictions and felony arrests to the list of qualifying offenses.<sup>58</sup> Even major opposition groups, in their critiques of Proposition 69, did not appear aware that the law reached consensual samples given in non-qualifying cases.<sup>59</sup>

Even after Prop 69, CODIS rules prohibited the uploading of samples taken consensually as part of a dismissal or diversion program, rather than as part of plea negotiations. Presumably motivated by a desire to create a DNA-for-dismissal exchange, OCDA “began the planning” of its own proprietary database in which to house consensual samples.<sup>60</sup> In April 2007, OCDA officially began uploading samples into its own database and created its own DNA Program.<sup>61</sup> Soon thereafter, OCDA held a training session with representatives from the local crime laboratory, the public defender's office, the local private defense bar, and OCDA, to explain how the program works.<sup>62</sup>

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<sup>54</sup> See <http://orangecountyda.org/civica/press/display.asp?layout=2&Entry=4819>, May 27, 2016 (noting, in a tribute to recently deceased Assistant District Attorney Camille Hill, that Ms. Hill was “one of the principal authors of” the initiative). An Orange County judge similarly told me his understanding that Ms. Hill was the “chief architect” of Proposition 69.

<sup>55</sup> Cal. Penal Code § 296(5) (“Nothing in this chapter shall be construed as prohibiting collection and analysis of specimens . . . as a condition of a plea for a non-qualifying offense.”).

<sup>56</sup> See ALASKA REV. STAT. § 44.41.035(b)(3) (allowing samples of “voluntary donors”); HAW. REV. STAT. ANN. § 844D-31(d) (“Nothing in this section shall be construed as prohibiting collection and analysis of specimens, samples, or print impressions as a condition of a plea for a non-qualifying offense”).

<sup>57</sup> Scoville & Hill, 2/23/16. Mr. Scoville explained that other offices in California could request samples as part of plea deals without having to create their own database, because the samples could be uploaded to CODIS pursuant to Prop 69.

<sup>58</sup> See, e.g., California Voter Foundation Summary of Prop 69, available at <http://www.calvoter.org/voter/elections/2004/props/prop69.html>; Legislative Analyst's Office Analysis of Prop. 69, available at [http://lao.ca.gov/ballot/2004/69\\_11\\_2004.htm](http://lao.ca.gov/ballot/2004/69_11_2004.htm); League of Women Voters Prop 69 guide, available at <http://www.smartvoter.org/2004/11/02/ca/state/prop/69/#sources>.

<sup>59</sup> See, e.g., Tania Simoncelli & Barry Steinhardt, *California's Proposition 69: A Dangerous Precedent for Criminal DNA Databases*, in *Expert Testimony: Bridging Bioethics and Evidence Law*, Summer 2005, at 279 (not mentioning pleas to non-qualifying offenses).

<sup>60</sup> OCDA 2009-10 Report at 3, 12.

<sup>61</sup> 2009-10 Report at 14.

<sup>62</sup> Interview with defense attorney 204, Jan. 11, 2017.

A month before the database debuted, OCDA submitted a proposed ordinance to the County Board of Supervisors that would approve and regulate the database.<sup>63</sup> The public had three weeks' notice of the language and of the upcoming vote.<sup>64</sup> Only two members of the public, repeat players who frequent board meetings, spoke during the public comment period, and the Board unanimously approved the ordinance. It provides that all “[d]atabase information” in OCDA’s database “be confidential,” and makes unlawful disclosure a misdemeanor crime punishable by six months jail or \$1000 fine.<sup>65</sup> It has no expungement provision, allowing permanent retention of participants’ samples. And it allows the office to disclose anonymized records as necessary to third parties, “for training, research, statistical analysis of populations, or quality assurance.”<sup>66</sup> The ordinance also does not require any particular type of consent from, nor counsel for, those giving samples as part of a plea or dismissal.

In 2015, members of the California legislature briefly scrutinized, and attempted to amend, the provision to add more protections for low-level offenders giving samples as part of plea negotiations. Assemblymember Mike Gatto introduced a bill that would preserve, with some modifications, California’s DNA collection regime in the event that the California Supreme Court declared the regime unconstitutional in a pending Fourth Amendment challenge in *People v. Buzza* (as of this writing, the *Buzza* case is still pending oral argument).<sup>67</sup> The bill retained the language from Proposition 69 allowing the uploading of samples given as part of a plea negotiation.

Although the plea-negotiation provision had been around for eleven years, January 2015 was the first time civil liberties groups officially commented on it, perhaps because no one had previously noticed it. The ACLU opposed the bill,<sup>68</sup> as did the California Public Defenders’ Association (CPDA), with the latter arguing that collection and uploading of DNA from non-qualifying offenses was unconstitutional.<sup>69</sup> Specifically, CPDA argued that many people providing a sample in exchange for dismissal in a misdemeanor or infraction case “will not be afforded counsel,” who “could arguably explain the significance of providing DNA.”<sup>70</sup> With or without counsel, CPDA reasoned, “[a]n innocent person may decide it is easier to provide a DNA sample than to

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<sup>63</sup> See Memorandum from Thomas G. Mauk, County Executive Officer, to Board Chairman, Exception to Rule 21, Mar. 2, 2007 .

<sup>64</sup> 3/6/07 Staff Report at 1 (directing clerk to publish notice to public of ordinance and March 27 public hearing).

<sup>65</sup> Orange County Mun. Ord. §§ 3-17-2(a), 3-17-3(a).

<sup>66</sup> *Id.* at §§ 3-17-4(a), (d), (e)(5).

<sup>67</sup> See CA AB 1942 (Apr. 23, 2015).

<sup>68</sup> E-mail from Natasha Minsker, Dec. 15, 2016.

<sup>69</sup> See Letter from California Public Defender Association to Assembly Member Mike Gatto.

<sup>70</sup> *Id.*

miss another day of work to defend his case in court without fully understanding the significance of his decision.”<sup>71</sup>

This input from civil liberties groups inspired a statement of legislative intent in the bill to require, when a DNA sample is taken “as a condition of a plea or reduction or dismissal of charges,” that “all uses of the DNA sample have been *disclosed to the defendant in writing, that consent has been obtained in writing, and that the defendant has signed a written agreement* allowing” the exchange.<sup>72</sup> The bill was later amended to require “that the defendant shall have the *opportunity to consult with counsel* prior to signing the agreement.”<sup>73</sup> The decision to place these safeguards in nonbinding language, rather than to explicitly require counsel and consent, was apparently a compromise born of “dueling schools of thought” on the committee.<sup>74</sup>

In the end, however, the Appropriations Committee stripped the bill of these safeguards, and the stripped version became law.<sup>75</sup> The final version also stripped language that would have prohibited law enforcement agencies in California from attempting to solve cold cases through use of local databases not linked to CODIS.<sup>76</sup> Thus, as of today, the practice of collecting plea-negotiated or dismissal-related DNA samples is both legal and unregulated other than by the Orange County ordinance maintaining confidentiality.

## 2. The Role of Federal Funding and Private Partnerships

While cost has been a natural limit on state database expansion, the availability of federal funding to localities for innovative DNA practices has

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<sup>71</sup> Letter from California Public Defender Association to Gov. Edmund G. Brown, Request for Veto of AB 1492 (Gatto/Atkins) .

<sup>72</sup> See CA AB 84, § 2 (Jan. 6, 2015) (emphasis added), available at <https://legiscan.com/CA/text/AB84/id/1060673>.

<sup>73</sup> Report, Calif. Senate Comm. on Public Safety, AB 1492 (July 14, 2015), at 9.

<sup>74</sup> Interview with Mike Gatto, Jan. 24, 2017.

<sup>75</sup> See AB 1492, 9/4/15 Amendments, available at [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160AB1492](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1492). Gatto described the Appropriations Committee as generally hostile to nonbinding legislative intent language.

<sup>76</sup> See AB 1492, 4/30/15 Version as Amended, at 11 (“A law enforcement agency may use a publicly available database, *excluding a law enforcement database that is not linked to the Combined DNA Index System (CODIS)*, if the case being investigated involves a homicide or sexual assault involving force and the case is unsolved and all investigative leads have been exhausted, in which case the law enforcement agency shall review nonforensic information in order to identify additional evidence bearing on relatedness.”) (emphasis added); 8/31/15 Amendments to 1492, available at [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160AB1492](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1492) (deleting this language).

encouraged the growth of non-CODIS databases.<sup>77</sup> In 2005, shortly after Proposition 69's passage, OCDA obtained a grant from the National Institute of Justice (NIJ) to fund additional DNA collection.<sup>78</sup> In 2006, armed with federal money, the office successfully asked the Board of Supervisors to approve purchase of database software from FSS for \$500,000, agreeing to pay \$100,000 a year for maintenance and support.<sup>79</sup> OCDA has since received more funding from NIJ,<sup>80</sup> and the Board has subsequently approved additional purchases related to database startup costs.<sup>81</sup>

Even with adequate funding, a local law enforcement agency generally cannot engage in non-CODIS databasing without the help of private industry, because state-funded DNA laboratories – in counties that even have them – generally test and upload only statutorily authorized samples.<sup>82</sup> As Jason Kreag has put it, the combination of technological advances in DNA and law enforcement frustration with CODIS has produced a “nascent genetic surveillance-industrial complex.”<sup>83</sup> A law enforcement agency's initial interest in developing a consent-based DNA database might itself be sparked by companies, rather than vice versa. For example, the Vice President for Sales and Marketing for Bode Technology Group, the company that contracts with OCDA to test “Spit and Acquit” samples, said he identified nearly 1000 agencies across the country that were large enough to justify having a local offline DNA database but did not already have one.<sup>84</sup>

Orange County is no exception to this trend. From 2007-09, the United Kingdom's Forensic Science Service (FSS) analyzed the samples collected by OCDA through Spit and Acquit. In 2009, OCDA began using Bode to test the

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<sup>77</sup> See, e.g., Kreag, *supra* note , at 1505 (noting the role of federal funding in eliminating the cost barrier to development of local databases).

<sup>78</sup> See OCDA, Effectively Utilizing DNA Technology to Solve Crime in Orange County, 2009-10 Annual Report, at 9, available at [http://projects.nfstc.org/fse/pdfs/ocda\\_dna\\_report\\_2010.pdf](http://projects.nfstc.org/fse/pdfs/ocda_dna_report_2010.pdf).

<sup>79</sup> OCDA 2009-10 Report at 12; OCDA Response, July 27, 2010, at 14. The Board approved the purchase on January 23, 2007. OC Board of Supervisors Agenda Staff Report, Item S25A, Mar. 6, 2007, at 2 [hereinafter 3/6/07 Staff Report]. In 2009, the office changed its FSS contract to pay for “single-incident repairs” rather than an “all-inclusive maintenance fee,” OCDA Response at 14, but has not disclosed the annual amount it pays to FSS under the new system.

<sup>80</sup> In 2009, the OCDA received a \$799,300 NIJ grant to solve violent cold cases through DNA. 2009-10 Report at 19.

<sup>81</sup> See Grand Jury Report at 3 (\$875,000 for database startup costs).

<sup>82</sup> See Kreag, *supra* note , at 17 (explaining that “private sector development is a necessary ingredient to the continued expansion of local databases”).

<sup>83</sup> Kreag, *supra* note , at 1500.

<sup>84</sup> *Id.* at 1507 (quoting Andrew Singer). When I reached out to Mr. Singer, he said he could confirm that Bode has a contract with OCDA but could not otherwise speak with me about the program, because of a “mutual confidentiality agreement.” Email from Andrew Singer, Jan. 26, 2016.



samples, at a price of around \$1.3 million per year,<sup>85</sup> although OCDA has not disclosed any of the paperwork surrounding this arrangement.<sup>86</sup> In 2013, the office finally sent out a request for proposals to conduct its forensic testing, and received bids from Bode and Cellmark.<sup>87</sup> Bode won the bidding war, and has continued to analyze OCDA's samples. Bode completes testing within 30 days for \$24 per sample.<sup>88</sup> For male samples, Bode also conducts "Y-STR" testing for \$20 a sample.<sup>89</sup>

While Y-STR testing is helpful in solving sexual assault cases with complex male-female mixtures, it is also an integral part of "familial searching," a controversial searching technique outlawed in some states, but not California.<sup>90</sup> In familial searching, the agency searches the offender database not only for perfect matches to a crime scene profile, but for "partial" matches as well, on the theory that if an offender is a near miss to the profile, a close relative of the offender might be the perpetrator. Jurisdictions that engage in familial searching typically use Y-STR typing to further hone in on a likely suspect.<sup>91</sup> The practice has been criticized as justifying police investigation of people who are not in the database and who have done nothing else to arouse suspicion.<sup>92</sup> But it is a practice that is lucrative for the company offering Y-STR typing.

OCDA has also contracted with the biotech firm IntegenX to buy "Rapid Hit" DNA machines for about \$250,000 a piece<sup>93</sup> which, in turn, increase both the need for, and utility of, a local non-CODIS database. IntegenX boasts to agencies that Rapid Hit machines can test reference or crime scene samples within 90 minutes, thus decreasing backlogs and speeding up response in "politically high-profile cases."<sup>94</sup> The promotional brochure notes how Rapid

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<sup>85</sup> See Grand Jury Report at 1. In 2009, the Board of Supervisors approved a \$425,000 payment from OCDA to Bode Technology Group, Inc., to analyze OCDA's collected DNA samples. Amendment Number Five, Contract Between OCDA and Bode Technology Group, Inc., Nov. 19, 2010 [hereinafter 2010 Bode Contract], at 1. In 2010, the contract amount was \$984,500, and in 2011, the annual contract amount grew to \$1.37 million. Tracy Wood, *Supervisors Approve DA's Spit and Acquit Program*, VOICE OF OC, Dec. 14, 2010.

<sup>86</sup> I sent a public records request to OCDA seeking all documentation of its relationship with Bode, including how Bode initially came to be its testing partner, but OCDA disclosed only materials dated 2013 or after, when it sent out an RFP.

<sup>87</sup> See RFP Scoring Sheet, RFP No. 026-543355 .

<sup>88</sup> 2009-10 Report at 13.

<sup>89</sup> Contract between OCDA and Bode, at 19 (as of 2014, charging \$19.45 per sample for autosomal and \$21.45 per sample for Y-STR typing).

<sup>90</sup> See generally Erin E. Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291 (2010) (describing and criticizing the practice).

<sup>91</sup> See Bruce Budowle, *Familial Searching: Extending the Investigative Lead Potential of DNA Typing*, PROMEGA (2010), available at <https://www.promega.com/resources/profiles-in-dna/familial-searching-extending-the-investigative-lead-potential-of-dna-typing/> (noting that Y-STR typing should ideally be done in each familial searching case).

<sup>92</sup> See *id.*

<sup>93</sup> See, e.g., Purchase Order, Dec. 19, 2013 (\$243,000) .

<sup>94</sup> See, e.g., Rapid Hit 200 Promotional Pamphlet 2 (2011).

Hit samples go hand in hand with the creation of a local, non-CODIS database.<sup>95</sup> Not only can Rapid Hit casework samples be uploaded to OCDA's own database, they can be compared immediately with offender samples in the database. In contrast, the crime laboratory can take 4 to 8 weeks to complete its analysis and “corroborate” the Rapid Hit result.<sup>96</sup> Some civil liberties groups have expressed concern that, by rendering offender sampling so cheap and fast, Rapid Hit will “spur new efforts” by law enforcement “to collect ordinary citizens’ genetic code.”<sup>97</sup>

### B. *How Spit and Acquit Operates*

This section offers a description of how Spit and Acquit works on the ground, based on information obtained online and from public records requests, as well as conversations with judges, prosecutors, public defenders, private defense attorneys, and criminal defendants.<sup>98</sup>

#### 1. Who Receives, and Takes, the Deal

As of January 3, 2017, OCDA DNA database contains 149,812 individual profiles and 9,088 crime scene profiles.<sup>99</sup> Over 70,000 samples have been collected pursuant to a plea negotiation, with the remainder being collected pursuant to a dismissal of all charges.<sup>100</sup> The office has told Bode that it expects to add between 13,000 and 20,000 samples each year.<sup>101</sup> Because those arrested for or convicted of a felony already must submit to forced sampling, and because OCDA does not prosecute non-criminal traffic cases, Spit and

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<sup>95</sup> *Id.* (flowchart showing Rapid Hit testing, following by upload into a “local database,” with a “hit report” sent to an officer or detective). Crime scene profiles tested with Rapid Hit are not eligible for uploading to CODIS. *See FBI’s Plans for the Use of Rapid DNA Technology in CODIS*, June 18, 2015, available at <https://www.fbi.gov/news/testimony/fbis-plans-for-the-use-of-rapid-dna-technology-in-codis>. The FBI does allow offender reference samples typed with Rapid Hit to be uploaded, under certain conditions. *Id.*

<sup>96</sup> Statement of Tony Rackauckas, Board of Supervisors, Apr. 21, 2015.

<sup>97</sup> Shane Bauer, *The FBI Is Very Excited About This Machine That Can Scan Your DNA in 90 Minutes*, MOTHER JONES, Nov. 20, 2014. *See also* Urban Institute, *Collecting DNA at Arrest*, at 82 (The FBI’s Rapid DNA Initiative . . . could have far-reaching effects on implementing arrestee DNA laws . . .”).

<sup>98</sup> I am still conducting data collection; interviews thus far have been convenience and snowball samples (three Superior Court judges; four current prosecutors; one former prosecutor; ten private defense attorneys; two public defenders; four former defendants; one state legislator; and three nonprofit amicus litigators). A UC Irvine collaborator and I have recently received IRB approval to conduct broader recruitment of former defendants.

<sup>99</sup> Letter from Denise Hernandez to Andrea Roth, Jan. 17, 2017, at 1.

<sup>100</sup> Scoville & Hill, May 6, 2016.

<sup>101</sup> Contract MA-026-14010833 between OCDA and Bode Technology Group, at 18.

Acquit primarily affects criminal misdemeanor court,<sup>102</sup> where around 50,000 people are charged countywide each year.<sup>103</sup>

Beginning in April 2007, OCDA began offering a certain number of misdemeanor defendants a dismissal of their case, or of certain counts in their case, in exchange for a DNA sample that they would otherwise not be required to give by statute. The offer initially came in one of three forms. First, some defendants receive the “DNA Dismissal Program,” a flat-out dismissal of their case, with no community service or treatment requirements.<sup>104</sup> Second, some defendants received a “Deferred Entry of Judgment” (DEJ), in which the defendant pled guilty and then, if he fulfilled certain conditions over a 90-day period such as community service or life skills classes, his plea would be vacated and case dismissed. Third, some defendants received a more traditional plea offer, that included a promise to dismiss certain counts (but that contemplated a permanent conviction on at least one count) on condition that the defendant submit a DNA sample. Later, in response to some judges’ refusal to approve DEJs conditioned on giving plea samples, OCDA began offering arrangements called “DA Continuances,”<sup>105</sup> in which the DA would request a continuance for six months and, if the charged individual fulfilled certain conditions in the meantime, the DA would dismiss the case at the end.<sup>106</sup> Thus, the term “Spit and Acquit” is misleading when used to refer to such deals, as none involve post-trial acquittals and around half involve a conviction.

According to the office, no written policy dictates when a line DA should offer one of these deals. Instead, line attorneys are told that they may offer dismissal of some or all counts in return for a DNA sample in their discretion, so long as the case presents no “public safety issue,”<sup>107</sup> is not a “serious or violent type of crime,” including a domestic violence offense,<sup>108</sup> is not a juvenile case,<sup>109</sup> and where the person has not already provided a sample.<sup>110</sup> But

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<sup>102</sup> Before 2009, the OCDA would often offer to reduce charges even in serious felony cases, such as a robbery down to a felony grand theft person, if the offender was willing to submit a DNA sample. Interview with former OC public defender, Jan. 21, 2016.

<sup>103</sup> GJ Report at 25 (listing figures for 2005-09). I discuss changes in charging and dismissal rates in Parts II and III.

<sup>104</sup> OCDA Response to Grand Jury Report, July 27, 2010, Appendix A, at 21-22. On February 9, 2016, the day I observed arraignment court, I witnessed one man receive a no-conditions dismissal on a public intoxication charge. The OCDA represented to me that there are only “specialized situations” where a line DA will offer a no-conditions dismissal. Scoville & Hill 2/23/16.

<sup>105</sup> See Offender Treatment Program / District Attorney Continuance Form, 11/19/15 version. See also Scoville & Hill, 2/23/16.

<sup>106</sup> The office prefers DEJ to DA continuances, because the addition of the guilty plea “adds more weight” to the other program requirements. OCDA researcher, July 12, 2016.

<sup>107</sup> ADA Scoville & Hill, 2/23/16.

<sup>108</sup> Interview with former OCDA prosecutor, 3/23/16.

<sup>109</sup> Interview with Scoville & Hill, May 6, 2016.

these lines are not strictly enforced. For example, the office has begun taking samples even from some people who have previously given a sample, to preempt any argument that the previously signed informed consent form is outdated or inadequate.<sup>111</sup> And a supervisor in the public defender's office reported that in the "dark days of the recession," where the DA's office sought both decreased caseloads and wanted the database to grow, the office seemed to be "very liberal" with Spit and Acquit, even offering it for some minor violent crimes, like non-domestic simple assault cases (mostly barfights).<sup>112</sup> OCDA research manager also confirmed that cases that do not fit the general guidelines might still be given a DA continuance or DEJ, in the discretion of the line DA.<sup>113</sup> In sum, according to the office, Spit and Acquit is a "hit or miss type of situation."<sup>114</sup> One former ADA likewise reported that the program was "ad hoc" from the beginning, with "no real consistent policy from the top."<sup>115</sup>

OCDA has refused to disclose, in response to public records requests, the offenses of arrest or conviction for those people in its Case Management System (CMS) who have given a DNA sample for inclusion in OCDA database.<sup>116</sup> From all accounts, typical crimes offered Spit and Acquit include first-time DUI alcohol and marijuana, petty theft, hit-and-runs, public intoxication, driving without a license or on a suspended license, shoplifting, vandalism, receipt of stolen property, and drug possession offenses.<sup>117</sup> The head of the DNA Unit explained that a number of defendants offered dismissal in exchange for DNA are repeat drug offenders who are no longer eligible for "drug diversion" DEJ under Penal Code § 1000.<sup>118</sup> As a snapshot, on one slow afternoon in arraignment court in February 2016, I saw two men offered DEJ in exchange for DNA; one faced DUI charges involving property

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<sup>110</sup> Scoville & Hill Interview, 2/23/16.

<sup>111</sup> Interview with OCDA researcher, July 12, 2016. One defense attorney gave the example of a client charged with felony DUI alcohol with injury, who had already give a DNA sample on a previous driving-on-suspended-license charge. The client was below the legal BAC limit by the time he was tested, and the injuries were minor. The DA offered him a misdemeanor plea with credit for time served, on condition of giving another DNA sample. The attorney said the previous sample "didn't affect the offer. They're just trying to get [DNA]" when they can. Interview with defense attorney 202, Feb. 9, 2016.

<sup>112</sup> Interview with supervising public defender, Jan. 21, 2016.

<sup>113</sup> Interview with OCDA researcher, July 12, 2016.

<sup>114</sup> Interview with Scoville & Hill, May 6, 2016.

<sup>115</sup> Interview with former OCDA prosecutor, Mar. 23, 2016.

<sup>116</sup> See 1/17/17 letter from Denise Hernandez.

<sup>117</sup> Before 2009, felony drug arrests not ending in conviction did not trigger forced sampling under Prop 69. Between 2009 and 2014, felony drug arrestees were required to give a CODIS sample, but could get their profile expunged upon dismissal or acquittal. After passage of Prop 47 in 2014, drug possession offenses were reclassified as misdemeanors. The office used to routinely seek a DNA sample in misdemeanor marijuana possession cases, but have not done so since the act was decriminalized in 2011. Scoville & Hill 2/23/16.

<sup>118</sup> OCDA researcher, July 12, 2016.

damage, and one faced four counts related to possession of drug paraphernalia, false documents, and a knife. Two men, one accused of public intoxication and one charged with driving on a suspended license, were both offered outright dismissal. And a man charged with the misdemeanor of public urination took a plea down to an infraction, but was not asked to give DNA, perhaps because he was already in the database.<sup>119</sup>

The lack of uniformity in Spit and Acquit also derives, according to the office, from “judge-driven” differences between courtrooms. At least one judge previously assigned to misdemeanor arraignment court in the Central Justice Center in Santa Ana – the largest courthouse in Orange County – would apparently refuse to accept Spit and Acquit dismissals and DEJs on a regularly basis.<sup>120</sup> An OCDA researcher told me that some judges are still reluctant to approve of deals requiring a DNA sample, even several years into the program.<sup>121</sup> In 2008, OCDA attempted to meet judicial resistance by drafting an ordinance that would have explicitly allowed the taking of a DNA sample pursuant to a DEJ. But eventually enough judges “came around,” that the office pursued the ordinance no further.<sup>122</sup> OCDA, for its part, suspects that some judicial resistance stemmed from an incorrect assumption that the local database was largely duplicative of CODIS and therefore wasteful.<sup>123</sup> One judge I spoke with did voice such a concern, speculating that the DA wanted results faster than the sheriff’s department could give them, so that they could resolve cold cases more quickly.<sup>124</sup>

Some judges attempt to thwart Spit and Acquit by offering the defendant an alternative *judicial plea* – a promise to give a certain sentence if the defendant pleads “open” to all counts in the charging document – without requiring a DNA sample.<sup>125</sup> In some cases, the possibility of a judicial plea negates nearly any benefit to Spit and Acquit. For example, in DUI alcohol cases, most defendants are charged with two counts, Vehicle Code 23152(a) (under the influence) and (b) (.08% BAC per se limit). But nearly all first-time offenders receive a standard sentence of 3 years’ probation, and the sentences for (a) and

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<sup>119</sup> My speculations as to the defendants’ ethnicity were based on surname and personal observation and could be incorrect.

<sup>120</sup> In-person interview with defense attorney 201, Feb. 10, 2016; this was corroborated by several other attorneys with whom I spoke. While the prosecution initiates a case, once a case exists, it is the judge who has the sole power to dismiss the case “in furtherance of justice.” Cal. Penal Code § 1385(a).

<sup>121</sup> OCDA researcher, July 12, 2016.

<sup>122</sup> See Draft Ordinance, Nov. 25, 2008, available at

[http://cams.ocgov.com/Web\\_Publisher\\_Sam/Agenda11\\_25\\_2008\\_files/images/O00908-002404A.DOC](http://cams.ocgov.com/Web_Publisher_Sam/Agenda11_25_2008_files/images/O00908-002404A.DOC).

<sup>123</sup> Scoville & Hill, 2/23/16.

<sup>124</sup> OCSC Judge 2, Mar. 15, 2016.

<sup>125</sup> Interview with Scott Scoville, Feb. 23, 2016; interview with defense attorney, Jan. 20, 2017.

(b) merge.<sup>126</sup> Unless the defendant cares deeply about having two counts on his record rather than one, or unless the DA offers a further reduction of charges down to a so-called “wet reckless” offense,<sup>127</sup> the best course would be to take the judicial plea to avoid giving a DNA sample. I witnessed at least one defendant take a judicial plea after being advised by the judge that the DA plea required DNA.

## 2. Hallway Justice: The Offer and Acceptance

Misdemeanants in Orange County are either out of custody, in which case they are arraigned in a large public courtroom in one of the four courthouses in the county, or are in custody (typically on a bench warrant or probation or parole violation), in which case they are arraigned in the jail across from the Central Justice Center in Santa Ana. The jail arraignments are conducted in a small room, with the public watching on closed circuit television. The defendants, even those in custody, are not represented by counsel,<sup>128</sup> although a defendant can request a postponement of the arraignment to seek retained counsel or be interviewed for eligibility for a public defender.<sup>129</sup> According to one judge I spoke with, 75-80% of misdemeanor cases in Orange County resolve on the first appearance without an attorney.<sup>130</sup> A supervisor in the Public Defender’s office told me that judges in the Central courthouse have refused the office’s request to give a “general speech” to unrepresented defendants about the potential risks and benefits of giving DNA to the local database.<sup>131</sup>

For out-of-custody defendants, the line prosecutor assigned to arraignments will call out names of a few people and ask them to step out into the hallway if they would like to speak about their case. Once in the hallway, the prosecutor addresses each defendant in turn and offers them a deal of some kind, sometimes on the condition that they submit a DNA sample down the hall. The line ADAs I witnessed all made clear they were not the defendants’ attorneys, and made clear that the defendants could ask to speak with an attorney if they wanted to. For those cases in which the prosecutor

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<sup>126</sup> See CAL. PENAL CODE § 654.

<sup>127</sup> A DA might offer a plea in a DUI case to reckless driving, Veh. Code 23103.5, but with a notation that it involved drugs or alcohol, making it a “priorable” offense like DUI, but with fewer potential administrative consequences. In-person interview with defense attorney 202, Feb. 9, 2016.

<sup>128</sup> Interview with public defender supervisor, Feb. 2, 2017.

<sup>129</sup> Interview with supervising public defender 1, Jan. 21, 2016.

<sup>130</sup> OCSC Judge 2. Courts are constitutionally required to appoint counsel in misdemeanor cases only if the defendant is actually sentenced (included a suspended sentence) to a period of incarceration. See *Scott v. Illinois*, 440 U.S. 367, 383-84 (1979).

<sup>131</sup> Interview with supervising public defender 1, Jan. 21, 2016.

asks for a DNA sample, he or she hands the defendant a page-long “DNA Collection Waiver” form and orally explains what will happen.

The waiver form (attached as Appendix A) is a small-font, one-page form that requires the charged individual to state that he understands that his case “will be dismissed and not re-filed” if he agrees, among other things: to provide a DNA sample “for permanent retention”; to allow his DNA to be “checked and/or searched against other DNA”; to “[w]aive and give up” the right to have the sample removed from the database; to waive the right to challenge whether the sample was obtained or used illegally; and to pay a \$75 “administrative fee.”<sup>132</sup> OCDA told me that the \$75 administrative fee is waivable for those who cannot afford to pay it, and that the determination of a defendant’s ability to pay is left to the discretion of the line DA.<sup>133</sup> In the discussions I witnessed in the hallway of the Central Justice Center, no line DA mentioned to any defendant the possibility of waiving the \$75 fee.

I witnessed and transcribed several conversations in the hallway between prosecutors and defendants about DNA. One man, accused of a traffic-related misdemeanor, was told by the prosecutor, “if you’re willing to give a DNA sample, we would dismiss this case. It costs \$75 to give a sample.”<sup>134</sup> The DA explained that the defendant would put a “cotton swab” in his mouth and the sample would be “put into a database.” The DA then told him that “when they find DNA at a crime scene of a very serious crime then they look at a database to see who was at that crime scene.”<sup>135</sup> The defendant responded, “OK, that’s fine,” and took the paperwork down the hall. A similar conversation occurred with a man charged with three misdemeanors – driving while under the influence, driving while having above a .08% blood-alcohol level, and driving without a valid license. He was offered, and took, three years of probation and a dismissal of count 3 in exchange for DNA.

After speaking with the DA, the charged individual goes down the hall to give a sample to OCDA employees at the collection office (Fig. 1).<sup>136</sup> Once the defendant comes back into court, the judge recalls the case. In one typical colloquy, the judge told the defendant, “the People are moving to dismiss this matter against you because you’ve provided a DNA sample. So I’ll dismiss

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<sup>132</sup> DNA Collection Waiver Form, Version 1.05 R12-10.

<sup>133</sup> Interview with Scoville & Hill, Feb. 23, 2016.

<sup>134</sup> On February 9 and 10, 2016, I observed arraignment court in Santa Ana and took verbatim notes of several conversations both in the courtroom and in the hallway outside C-54 (notes on file with author).

<sup>135</sup> It is not clear why the line ADA suggested that DNA is only collected in “very serious crimes,” or what a “very serious crime” is. Numerous property and gun possession crimes involve collected DNA, for example. I witnessed two other colloquies with two line ADAs, all of which were substantially similar.

<sup>136</sup> When Spit and Acquit first started, the DA collected samples in the arraignment courtroom itself. Phone interview with defense attorney 206, Jan. 26, 2016.

your case at this time.”<sup>137</sup> When the defendant asked a question about the waiver form, the judge responded, “those are legal questions I can’t answer. Do you want to speak with an attorney?” The defendant said no, and left.

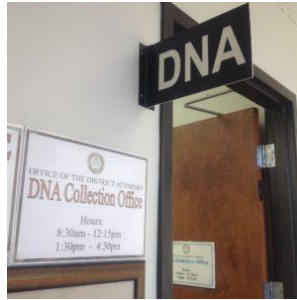


Fig. 1 DNA Collection Office in Santa Ana

The judges and defense attorneys with whom I spoke seemed to agree that few unrepresented defendants refuse a DNA-leniency exchange unless offered a similarly lenient judicial plea without DNA as a condition. As for whether the presence of an attorney changes the acceptance rate,<sup>138</sup> several defense attorneys I spoke with said that nearly all of their clients likewise take the deal when offered. One public defender reported that close to 100% of the office’s clients agree to give DNA when it is a condition of a plea or dismissal.<sup>139</sup> One judge told me that the public defenders in his courtroom would typically advise clients not to take the deal and would state on the record that they disagreed with the practice, but would allow the defendant to take the deal.<sup>140</sup>

The two apparent exceptions – in which having a lawyer does seem to matter to acceptance rate – are in DUI and drug cases. A represented first-time DUI defendant is more likely to understand the low value of the DNA exchange, given the standard probationary sentence and merging of counts for sentencing purposes.<sup>141</sup> And a defendant charged with a first-time drug offense who has a lawyer might be more likely to opt for drug diversion programs like PC 1000 or Prop 36 that also end in dismissal but do not require DNA. When I asked OCDA research manager how first-time drug offenders decide to do

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<sup>137</sup> Judge Jeannie Joseph, C-54, Central Justice Center, Feb. 9, 2016.

<sup>138</sup> The related question, whether having an attorney changes the *offer* rate and type, is more difficult to answer based on the data I have collected so far. A person charged with a misdemeanor is not assigned *appointed* counsel unless he requests it at arraignment, presumably after the line DA has already decided whether or not to offer a DNA exchange. Those who show up to arraignment with *retained* counsel may well have characteristics that cause prosecutors to consider them low risk or low culpability, and thus good candidates for an outright dismissal without further conditions.

<sup>139</sup> Interview with supervising public defender 1, Jan. 21, 2016.

<sup>140</sup> Interview with OCSC judge 1, Mar. 15, 2016.

<sup>141</sup> The four attorneys whose caseload is primarily DUIs all corroborated this.



Spit and Acquit rather than PC 1000 or Prop 36, she explained that the two variables seem to be personal preference and whether the defendant has a lawyer. The people with lawyers are more likely to take Prop 36 or PC 1000, because the process takes longer (these programs are offered at the pretrial stage rather than at arraignment), and there is a decent chance the case will be dismissed anyway somewhere along the line.<sup>142</sup> The reason to choose DNA would be to avoid the drug treatment requirement; thus, defendants who are both self-aware and likely to relapse might pick DNA.

The reactions of defense attorneys to the database were quite mixed. One told me that he believes it is a “positive thing overall,” at least for clients who have the chance to get a dismissal at the earliest possible stage, and because – all else equal – the database is good for public safety and objectivity in factfinding.<sup>143</sup> Several others agreed, although several also thought the program was coercive and unfair. One attorney who used to practice in Orange County said that the “attorneys on the ground are too afraid to say anything against it” for fear that their clients will lose dismissal deals.<sup>144</sup> Regardless of their views on dismissals, every attorney with whom I spoke was frustrated that DNA has become a standard condition of misdemeanor plea offers.

The handful of Spit and Acquit participants with whom my interviewing collaborator and I have spoken also had differing reactions. One woman, a white university employee cited for the misdemeanor of walking a dog off leash, learned of the program from a judge, who told her it was a “unique opportunity” that would prevent her from going to trial, that it was “advantageous,” and that most judges would not be “as lenient.” The judge did not mention to her that she had a right to an attorney. She also is a lawful permanent resident, and was concerned about the consequences of a misdemeanor conviction for her citizenship application. Nonetheless, in retrospect, she said, it was a “mistake.”<sup>145</sup> A white man who had just had his public intoxication case dismissed without conditions (except DNA) told me that his case was “all a misunderstanding” but that he did not have the time to fight it in court. He said he was “a little nervous” about having his DNA in the hands of the government, but that it was better than having a misdemeanor on his record, or even having to come back to court.<sup>146</sup> A 25-year-old Latino college student was offered expungement of his “expired registration” charge in exchange for a plea of “no contest” and a DNA sample. When asked why he took the deal, he said that at the time he was thinking, “who cares if they have my DNA?” “Now that I look at it,” he said, giving his DNA was “not a

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<sup>142</sup> OCDA researcher, July 12, 2016.

<sup>143</sup> Defense attorney 205, Mar. 23, 2016.

<sup>144</sup> Defense attorney 206, Jan. 26, 2016.

<sup>145</sup> Participant 104.

<sup>146</sup> Participant 101.

great idea.”<sup>147</sup> The one participant with whom I spoke who did have an attorney was a white school employee, charged with petty theft along with her boyfriend, who asserted her innocence through the day of the trial call. The DA offered the boyfriend flat-out dismissal in return for DNA, and offered the woman dismissal with community service and DNA. Both refused. By the time of trial, the DA agreed to dismiss the boyfriend’s case without DNA if he gave a \$200 contribution to a victim’s fund, but continued to insist on the woman’s DNA. When the DA announced ready for trial, the woman finally agreed to give DNA and do ten hours of community service in exchange for a dismissal.<sup>148</sup>

### 3. Collection, Testing, Retention, and Database Searching

When the charged individual walks down the hallway to OCDA’s collection office to give a sample, she is met by “investigative assistants with specialized training,” who take the individual’s photograph, have them sign a number of forms, and take a buccal swab using a \$5 Bode test kit.<sup>149</sup> Only participants and OCDA employees are allowed inside the office; one participant told me it was akin to a “bank teller” window.<sup>150</sup> The participant stands in front of a webcam, states her name and that she has read the waiver form, and then gives over the swab.<sup>151</sup> OCDA assistants then prepare the swab for shipping to Bode in Virginia.<sup>152</sup> Bode, in turn, develops a DNA profile from the swab and then ships the physical sample and forensic report back to OCDA for “quality assessment, data review and upload of genetic data.”<sup>153</sup>

Once Bode returns the sample, two OCDA forensic scientists secure and store the sample indefinitely in a “secure location”;<sup>154</sup> review the reports; and upload the sample to the database, which the two scientists are in charge of maintaining.<sup>155</sup> OCDA represents that it has “developed and tested IT security procedures and regulations to protect the database,”<sup>156</sup> that the database is

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<sup>147</sup> Participant 102.

<sup>148</sup> Participant 103.

<sup>149</sup> Contract between OCDA and Bode, at 19 (\$4.70 for kit without information card; \$5.95 per kit for kit that also includes gloves, fingerprint strip, and field consent form).

<sup>150</sup> Participant 103.

<sup>151</sup> Defense attorney 204, Jan. 11, 2017.

<sup>152</sup> 2009-10 Report at 14.

<sup>153</sup> 2009-10 Report at 14. An Orange County Grand Jury asked the County Auditor to conduct a cost analysis to determine whether the OC Crime Laboratory should conduct the collection, testing, and analysis of Spit and Acquit samples, rather than Bode. The Auditor declined, citing resource constraints. Board of Supervisors/County Executive Officer/Internal Audit Responses to 2009-10 Grand Jury Report, at 1-2.

<sup>154</sup> Email from Scott Scoville, Dec. 15, 2016.

<sup>155</sup> *Id.* at 13.

<sup>156</sup> 2009-10 Report at 15.

audited annually,<sup>157</sup> and that it has “detailed protocols” to govern the use of samples,<sup>158</sup> but has so far declined to disclose what those procedures and protocols are.<sup>159</sup> It did report that the two scientists are the only personnel in the office who have access to the profiles,<sup>160</sup> and that the office takes seriously the need to “protect metadata.”<sup>161</sup> The forensic scientists are also in charge of performing searches on the database, and for reporting any matches between crime scene samples and an offender profile, or from one crime scene profile to another (a “case-to-case” hit), to OCDA’s “crime analysts.”<sup>162</sup>

OCDA has not disclosed what “stringency” it uses in searches, meaning whether it looks only for perfect matches, or for partial matches or near misses. DA Tony Rackauckas did tell the Board in 2015 that when the analyst compares profiles, “she’s looking for investigative leads,” not evidence to present in court, implying that the office does indeed also look for partial matches.<sup>163</sup> The DNA unit supervisors told me the office does not do “familial searching” but might do so in the future.<sup>164</sup>

The ordinance governing OCDA database allows law enforcement to use the database not only for investigation, but for “statistical analysis of populations,” potentially raising the specter of government research on ethnic groups’ propensity for certain behaviors or pathologies.<sup>165</sup> Such a possibility is not necessarily far-fetched; in one notorious example, the Havasupai tribe allowed Arizona State University to collect DNA of members in relation to a diabetes study, only to learn that the school had also conducted, and published, research indicating the tribe’s rate of inbreeding and propensity for mental illness.<sup>166</sup> When I asked the DNA Unit supervisors what they intended by “statistical analysis of populations,” they said they simply wanted to ensure that the office could validate the database for “frequency estimate purposes.”<sup>167</sup> When I later spoke with the primary researcher in OCDA DNA Unit, she said she was also using the data to conduct studies on recidivism of those in the database.<sup>168</sup>

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<sup>157</sup> Scoville & Contini, Aug. 2, 2016.

<sup>158</sup> Scoville & Hill, 2/23/16.

<sup>159</sup> See Letter to Andrea Roth from Denise Hernandez, Jan. 17, 2017.

<sup>160</sup> Scoville & Hill, 2/23/16.

<sup>161</sup> Interview with Scoville & Hill, May 6, 2016.

<sup>162</sup> Scoville & Contini, Aug. 2, 2016.

<sup>163</sup> Statement of Tony Rackauckas, Board of Supervisors, Apr. 21, 2015.

<sup>164</sup> Scoville & Hill, Feb. 23, 2016.

<sup>165</sup> See *Maryland v. King*, Am Br., Public Defender Service for the District of Columbia (noting that Maryland statute allowed use of database for “research,” opening the door for abuse).

<sup>166</sup> See Amy Harmon, *Indian Tribe Wins Fight to Limit Research of Its DNA*, N.Y. TIMES, Apr. 21, 2010, at A1.

<sup>167</sup> Interview with Scoville & Hill, May 6, 2016.

<sup>168</sup> Interview with OCDA researcher, July 12, 2016.

One area of controversy with respect to OCDA DNA unit is its relationship to the county crime laboratory, which used to be the sole testing site for crime scene samples collected by police departments in the county. When OCDA launched its own database in 2007, it secured permission from police departments (memorialized in memoranda of understanding between police departments and the county crime laboratory)<sup>169</sup> to forward samples to OCDA, and also successfully lobbied the Board to allow OCDA partial governance of the laboratory.<sup>170</sup> A Grand Jury investigated the laboratory overlap in 2009 and recommended that the crime laboratory revert to being governed solely by the Sheriff-Coroner.<sup>171</sup> The County declined, stating that joint governance had “improved communication and cooperation” among law enforcement entities.<sup>172</sup>

Since OCDA added Rapid Hit machines to its arsenal in 2013, the office itself has been testing and uploading crime scene samples. Now, when a police sample comes to the county laboratory, the laboratory splits the sample “in half,” keeping half and sending half to the basement of OCDA, where the Rapid Hit machines are kept.<sup>173</sup> There, a “supervising investigator” gives the sample to an “investigating assistant,” who places the sample in the machine. The machine’s resulting analysis is sent to the forensic scientist, who interprets the results and uploads the profile to the local database to look for a match.<sup>174</sup>

Another area of controversy has been the extent to which OCDA DNA Unit’s and county crime laboratory’s analyses are free of law enforcement bias. One member of the Board, Todd Spitzer, is a political foe of Rackauckas and declared at a Board meeting in 2015 that the office should not be in charge of DNA analyses at all.<sup>175</sup> Spitzer cited testimony from a county crime laboratory DNA analyst, Danielle Wieland, that an OCDA DNA Unit attorney had pressured her to change the results in a carjacking case from an exclusion to an inclusion of the suspect,<sup>176</sup> allegedly telling Wieland, “I don’t care if it’s 1 in 2 or 1 in 3. I want him not excluded.”<sup>177</sup> The suspect, James Ochoa, was later exonerated after the DNA from the crime scene matched another offender,

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<sup>169</sup> Email from ADA Jennifer Contini, Aug. 22, 2016.

<sup>170</sup> *Id.*

<sup>171</sup> 2009-10 Grand Jury Report at 7.

<sup>172</sup> Audit Response at 2.

<sup>173</sup> Statement of Tony Rackauckas, Board of Supervisors, Apr. 21, 2015.

<sup>174</sup> *Id.*

<sup>175</sup> Todd Spitzer, Board of Supervisors, Apr. 21, 2015.

<sup>176</sup> See Tony Saavedra, *Trust Issues at Heart of Fight Over Proposed DNA Lab*, OC REGISTER, Aug. 14, 2008.

<sup>177</sup> Statement of Patricio Marquez, Assistant Attorney General of Washington, to Board of Supervisors, Apr. 21, 2015 (quoting Deposition of Danielle Wieland, Feb. 5, 2008, at 69). The OCDA DNA Unit attorney, in response, told the Board that these allegations were untrue and “devastating” to her, and cited her work as coordinator of the office’s Innocence Review panel. Statement of Camille Hill to Board of Supervisors, Apr. 21, 2015.

who confessed.<sup>178</sup> In response to questioning from the Board about the Ochoa incident, Rackauckas acknowledged that the DNA Unit “consists of attorneys and investigators who are familiar with the facts and make a determination as to the importance of that DNA hit . . . .”<sup>179</sup> When Supervisor Do asked the DA whether the DNA analyst in the county crime laboratory might be “unduly influenced” by case information or office politics, Rackauckas answered, “No. If you knew her you wouldn’t ask that.”<sup>180</sup>

## II. THE LEGALITY AND DESIRABILITY OF “SPIT AND ACQUIT” AS GENETIC SURVEILLANCE POLICY

This Part assesses the legality and desirability of Spit and Acquit as a prosecutor-created expansion of existing legislatively authorized DNA databases. The final Part will suggest lessons from this legal and policy analysis for assessing prosecutorial policymaking in general.

### *A. Consent as a Legal Justification for DNA Database Expansion*

#### 1. Knowing and Voluntary Waiver

A guilty plea, like all waivers of constitutional rights of the accused, must be “knowing,” meaning entered “with sufficient awareness” by the defendant “of the relevant circumstances and likely consequences,” and “voluntary,” meaning that the plea is the “expression of [the defendant’s] own choice.”<sup>181</sup> Presumably, a waiver of a constitutional right to be free from forced DNA sampling, in exchange for a full dismissal rather than guilty plea, must also be knowing and voluntary.<sup>182</sup> The Spit and Acquit waiver form – which not all participants read<sup>183</sup> – certainly makes clear that the profile will be permanently uploaded to the database and searched, and that the defendant gives up a number of trial and appellate rights by participating. But neither the form nor

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<sup>178</sup> James Ochoa, Innocence Project, available at <http://www.innocenceproject.org/cases/james-ochoa/>.

<sup>179</sup> *Id.*

<sup>180</sup> Rackauckas, Board of Supervisors, 4/21/15.

<sup>181</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970).

<sup>182</sup> The OCDA appears to acknowledge this point in an internal memorandum assessing the legality of Spit and Acquit. *See* Memorandum, *Legality of OCDA’s Office DNA Collection and Crime Deterrence Program*, Mar. 25, 2009, at 2 (on file with author) (“[T]he court should apply traditional plea-bargaining principles in determining whether [a dismissal] agreement is lawful.”) (citing *Hoins v. Barney’s Club, Inc.*, 28 Cal.3d 603 (1980)).

<sup>183</sup> One database participant, a university faculty member, said that she tried to read the waiver form carefully but had to make a quick decision, and wanted to get out of the courthouse as quickly as possible. She found the form difficult to understand, but did not ask the judge or her attorney questions. Participant 103. A college student did not read the waiver form at all before signing it. Participant 104.

the conversation with the prosecutor in the hallway gives the defendant a sense of the likelihood that his case will end in dismissal or acquittal (or at least “beat the plea offer,” as they say) if he refuses the deal. As a supervisor in the public defender’s office put it, the form is fine “as far as it goes,” but people “should have a chance to speak with an attorney about the strength” of their case before deciding the value of the dismissal-DNA exchange.<sup>184</sup>

One answer to this concern is that the defendant himself is in the best position to assess his own guilt, given that he knows his conduct and mental state.<sup>185</sup> But knowledge of one’s mental state and conduct does not equate to a legal understanding of whether these facts meet the elements of a given offense, nor to whether the defendant might have a successful constitutional or statutory claim to suppress or exclude certain evidence, or might face a hurdle in presenting exculpatory evidence. Several defense attorneys with whom I spoke shared their sense that OCDA tends to offer Spit and Acquit more often in those cases that present proof or suppression issues and that might be dismissed anyway. That way, according to one attorney, the DA “can put something in the file like, ‘possible Fourth Amendment issue, defense counsel filed motion, offered to dismiss for DNA’ to save face.”<sup>186</sup>

Moreover, from all accounts, numerous defendants are unaware of the full consequences of allowing the state to permanently retain their DNA sample and search their forensic DNA profile. As one university instructor who gave a sample said, “I’m not a murderer,” so being in the database should be safe, so long as the government does not sell the information.<sup>187</sup> But the interests at stake in Spit and Acquit extend beyond a trespass into one’s mouth by a state bureaucrat and the chance – for the indefinite future – of being caught for a serious crime one has committed. First, having one’s profile in a forensic database could lead one to being *falsely accused* of a crime through a coincidental or erroneous hit. While coincidental matches to a robust crime scene profile would presumably be exceedingly rare even if we had a national database of 300 million people,<sup>188</sup> not all crime scene profiles are robust. Many are degraded or of low quantity, resulting in fewer genetic markers to compare to

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<sup>184</sup> Interview with former chief public defender, Jan. 21, 2016.

<sup>185</sup> *Cf.* United States v. Ruiz, 536 U.S. 622, 630 (2002) (noting that the defendant himself has “independent knowledge of the prosecution’s potential case”).

<sup>186</sup> Email from defense attorney 202, Jan. 11, 2017.

<sup>187</sup> Participant 102.

<sup>188</sup> A subject’s forensic DNA profile consists of her two alleles and each of thirteen locations – chosen by the FBI for their hypervariability among humans – along the genetic strand. The “random match probability” (RMP) for most 26-allele profiles, meaning the chance that a person randomly selected from the population would match the profile by coincidence, is typically very small – one in a trillion or less. *See* Andrea Roth, *Safety in Numbers? Deciding When DNA Alone Is Enough To Convict*, 85 N.Y.U. L. REV. 1130, 1136-37, 1136 n.25 (2010) [hereinafter Roth (2010)]. The chance of finding a match in a database of 300 million, assuming a profile with an RMP of 1 in a trillion, would be about 3 in 10,000.

“known” samples. In such a case, the change of getting a coincidental match could be much higher.<sup>189</sup> An innocent person in the database might also be falsely implicated in a crime through an erroneous or misleading match resulting from malfeasance,<sup>190</sup> interpretive error,<sup>191</sup> DNA “transfer,”<sup>192</sup> or contamination.<sup>193</sup> Second, the state’s permanent retention of a participant’s full genome raises the specter not just of selling the information to third parties, which is prohibited by the ordinance, but of government research on crime propensity, which is not. And third, the state could use DNA to track one’s movements and activities, which law enforcement might interpret as legitimate “investigation” or “identification,” even absent suspicion of a crime.<sup>194</sup>

Of course, even if defendants had this information, most would surely take the offer, unless they had strong reason to believe they would attain similar leniency in their criminal case if they refused. The potential for these privacy intrusions likely remains abstract and remote in the minds of most defendants compared to the urgency of avoiding a misdemeanor conviction (in the case of dismissals) or conviction on more serious or more numerous counts (in the case of misdemeanor pleas). Reality on the ground seems to support this assumption. One judge I spoke with, who had presided over numerous Spit and Acquit cases, said he had never heard of a defendant going back on the deal, and that he could not imagine OCDA allowing it, given that the prosecution would have to “resurrect the case” and would “look foolish.”<sup>195</sup>

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<sup>189</sup> A recent California case involving a degraded sample had an RMP of 1 in 1.1 million. *See* Roth (2010) at 1131. In a database of 300 million people, one would expect to find at least 300 profiles that match the crime scene profile purely by chance.

<sup>190</sup> Malfeasance might include the deliberate planting of a person’s DNA at the crime scene or in a place one would reasonably expect only the perpetrator of a crime to leave DNA. *See* Aronson & Cole, *supra* note , at 626 (describing the potential for malicious planting of DNA evidence).

<sup>191</sup> *See, e.g.,* Erin E. Murphy, *The Art in the Science of DNA: A Layperson’s Guide to the Subjectivity Inherent in Forensic DNA Typing*, 58 EMORY L.J. 489, 503-08 (2008) (discussing various sources of interpretive error).

<sup>192</sup> *See, e.g.,* Osagie Obasogie, *High-Tech, High-Risk Forensics*, N.Y. TIMES, July 25, 2013, at A27 (discussing a San Jose case where a match between a convicted felon’s DNA and DNA found at a murder scene turned out to be the result of the felon’s DNA being transferred onto an EMT worker who treated the felon for acute intoxication and subsequently responded to the unrelated murder).

<sup>193</sup> *See, e.g.,* Erin E. Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CAL. L. REV. 721, 755 n.151 (2007) (discussing examples of cold hits due to contamination); William C. Thompson, *Tarnish on the “Gold Standard”:* *Understanding Recent Problems in Forensic DNA Testing*, 30 THE CHAMPION 10, 10, 13 (2006) (discussing two cold hits caused by contamination).

<sup>194</sup> *Cf. United States v. Kincade*, 379 F.3d 813, 874 (9th Cir. 2004) (Kozinski, J., dissenting) (dissenting from opinion upholding forced DNA sampling of federal supervisees, and “mourn[ing] the loss of anonymity” in a “world where the government can keep track of everyone’s whereabouts”).

<sup>195</sup> Interview with OCSC judge 1, Mar. 15, 2016.

Even if a defendant's decision to give DNA in exchange for leniency is intelligent, is it really an expression of the defendant's free will? Perhaps not, in the sense that any rational defendant would likely take the offer, given their predicament. This is surely particularly true for in-custody defendants. As one judge who had presided over jail arraignments put it, "you're told that if you're willing to swab your cheek today, you can go home."<sup>196</sup> Another judge noted that in-custody misdemeanor defendants with substance abuse problems often appear to be shaking, and have no access to detoxification medication. For these defendants, Spit and Acquit arguably "exploits" them in their "most vulnerable state."<sup>197</sup>

But under existing law, the fact that an offer is too good to refuse does not make it involuntary. Indeed, the Supreme Court blessed as voluntary the notorious plea in *Bordenkircher v. Hayes*, in which a man charged with writing a bad \$88 check was threatened with life in prison if he did not take a five-year plea deal.<sup>198</sup> Courts have also upheld plea bargains conditioned on a waiver of the right to appeal,<sup>199</sup> to litigate a motion to suppress,<sup>200</sup> and to be told of exculpatory evidence in the state's possession.<sup>201</sup> In the Spit and Acquit context, just as in *Bordenkircher* and in cases where defendants give up fundamental trial and appellate rights, the defendants are not seeking to undo the deal as involuntarily entered. If anything, they would presumably hope to undo the condition and assert a legal right to a better deal, a separate claim I take up in the next Section.

When I have mentioned this project to bioethics scholars who are not lawyers, they have suggested that Spit and Acquit raises the ethical issue of genetic sampling of a "vulnerable population" in exchange for a benefit. The World Medical Association's Declaration of Helsinki states that "[s]ome research populations are vulnerable and need special protection."<sup>202</sup> Doctors, for example, face special scrutiny when offering prisoners benefits in exchange

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<sup>196</sup> Telephone interview with OCSC judge 1, Mar. 15, 2016.

<sup>197</sup> Telephone interview with OCSC judge 2, Mar. 11, 2016.

<sup>198</sup> 434 U.S. 357, 358 (1978).

<sup>199</sup> See Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2029 (2000) (noting that waiver-of-appeal plea condition is "particularly widespread" and accepted by courts).

<sup>200</sup> *Id.*

<sup>201</sup> The Supreme Court has upheld a plea agreement conditioned on waiver of the right to impeachment and "affirmative defense" evidence, *United States v. Ruiz*, 536 U.S. 622 (2002), though lower courts are split on whether *Ruiz* sanctions pleas conditioned on a full waiver of all rights to exculpatory evidence. See Michael Nasser Petegorsky, *Plea Bargaining in the Dark: The Duty To Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3624 (2013).

<sup>202</sup> Revised Decl. of Helsinki (2000), WMA 52<sup>nd</sup> Gen. Assem., para. 8.



for participation in a medical research study.<sup>203</sup> While adequate compensation can ameliorate exploitation,<sup>204</sup> many countries, as well as the legal profession, place limits on the commodification of the human body.<sup>205</sup> Relatedly, legal scholars have suggested – while not invoking bioethics literature – that some rights waivers might be prohibited for reasons unrelated to standard contracting problems, such as vindicating societal views of “personhood.”<sup>206</sup>

Of course, offering someone a misdemeanor dismissal in exchange for a buccal swab is not equivalent to, say, exposing them to high levels of Agent Orange.<sup>207</sup> But it is a payment (of a sort) in exchange for the giving of bodily tissue. The potential benefit to society of this exchange is evident, but there are societal benefits to organ donation and medical research studies as well. Would a court approve a plea deal conditioned on organ donation or participation in a medical research study? While courts will generally not enforce a waiver that is “against public policy,”<sup>208</sup> modern courts have approved plea deals conditioned on forced sterilization,<sup>209</sup> among numerous other rights. While Spit and Acquit differs from these practices in that it is ostensibly a crime-fighting surveillance measure within the usual ambit of the police function rather than a wholly unrelated social experiment, it uses the extraction of bodily tissue from a vulnerable person as the means to achieve these utilitarian ends.

## 2. DNA Sampling as an Unconstitutional Condition

Even if the Spit and Acquit exchange is knowing and voluntary, a defendant still might argue that it unconstitutionally conditions a benefit on the forgoing of a constitutional right. While no defendant has yet made such an

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<sup>203</sup> See, e.g., International Ethical Guidelines for Biomedical Research Involving Human Subjects, Geneva, Switzerland, Guideline 13:64 (including prisoners and poor or unemployed people as enumerated examples of “vulnerable persons”).

<sup>204</sup> See Ruth Macklin, *Bioethics, Vulnerability, and Protection*, 17 *BIOETHICS* 472, 475-76 (2003).

<sup>205</sup> See, e.g., Anya Adair & Stephen J. Wigmore, *Paid Organ Donation: The Case Against*, 93 *ANN. R. COLL. SURG. ENGL.* 191 (2011).

<sup>206</sup> Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 *FLA. ST. U. L. REV.* 913, 917 (2005).

<sup>207</sup> See Keramet Reiter, *Experimentation on Prisoners: Persistent Dilemmas in Rights and Regulations*, 97 *CAL. L. REV.* 501, 502 (2009) (discussing Albert Kligman’s Agent Orange prisoner study).

<sup>208</sup> *Cowan v. Superior Court*, 14 Cal.4th 367, 371 (1996) (citing *Patton v. United States*, 281 U.S. 276 (1930)). See also *Alhusainy v. Superior Court*, 143 Cal.App.4th 385, 391-93 (2006) (invalidating plea bargain requiring defendant to go to Iraq); *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995) (suggesting that the right to conflict-free counsel might not be waivable); *United States v. Gambino*, 59 F.3d 353, 359-60 (2d Cir. 1995) (holding that Speedy Trial Act right is not waivable).

<sup>209</sup> See Sam P.K. Collins, *Tennessee Prosecutor Insisted Woman Undergo Sterilization as Part of Plea Deal*, THINKPROGRESS (Mar. 31, 2015). One prosecutor was fired, but the pleas do not appear to have been vacated. Cf. Rory Riley, Note, *A Punishment That Does Not Fit the Crime: The Use of Judge-Ordered Sterilization as a Condition of Probation*, 20 *QUINN. PROB. L.J.* 72 (2006).

“unconstitutional conditions” argument, its logic – and not concerns about knowing and voluntary waiver – seems to capture what defense attorneys in Orange County believe is problematic about the exchange.

Before analyzing the legality of the exchange, the threshold question is whether Spit and Acquit participants are forgoing a *constitutional* right to be free from forced DNA sampling. Whether a legislature could force those arrested for a misdemeanor or infraction to give a DNA sample to the state for permanent retention, with no possibility of expungement upon dismissal or acquittal, is questionable. While *Maryland v. King*’s “identification” logic would appear to extend to misdemeanor arrestees,<sup>210</sup> even *King* relied heavily on the fact that felony arrestees under Maryland’s law are able to have their profiles expunged once the prosecution ends. And while a future Court could likely write a coherent opinion upholding a misdemeanor arrestee database on reasonableness grounds with crime-solving as the compelling state interest,<sup>211</sup> the *King* Court studiously avoided doing so for felony arrestees.<sup>212</sup> Moreover, many Spit and Acquit participants were given citations and notices to reappear, or received summonses in the mail, rather than being booked at the stationhouse. The need to augment fingerprinting at the booking stage with DNA simply does not arise for this subgroup of offenders.

Assuming participants in Spit and Acquit forgo a constitutional right, is the Spit and Acquit exchange constitutionally suspect? In several contexts outside criminal law, the Court has declared unconstitutional the conditioning of a government benefit on the forgoing of a constitutional right. Thus, for example, the Court has struck down the State of California’s offer of a building permit conditioned on the owner allowing a public easement to the beach;<sup>213</sup> an offer of public broadcasting funds conditioned on a radio station’s agreement not to editorialize;<sup>214</sup> and an offer of unemployment benefits conditioned on a Seventh-Day Adventist being willing to work on the Sabbath Day of her faith.<sup>215</sup> Such cases “reflect the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a

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<sup>210</sup> Given the record, however, OCDA would be hard-pressed to argue its purpose is to identify arrestees rather than investigate crime. *See, e.g.*, Statement of Rackauckas to Board of Supervisors, Mar. 6, 2007, Item S25A (“[T]he purpose of it is [to] investigate criminal cases and for ID or exclusion with respect to criminal suspects.”); Statement of Tony Rackauckas to Board of Supervisors, April 21, 2015, Item 20 (describing OCDA database as a “very powerful investigative tool”); *id.* (“This is now part of the DA investigative function.”); Statement of Bill Campbell, Board of Supervisors, Mar. 6, 2007 (“this is for zeroing in on a perpetrator.”).

<sup>211</sup> Roth (2013) at 300-01.

<sup>212</sup> *Id.* at 297-300.

<sup>213</sup> *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

<sup>214</sup> *FCC v. League of Women Voters*, 468 U.S. 364, 399-402 (1984).

<sup>215</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963).

condition on its receipt.”<sup>216</sup> This so-called “unconstitutional conditions doctrine” is also “overwhelmingly supported” by legal scholars.<sup>217</sup>

Even so, the Court has approved the conditioning of state benefits on waiver of constitutional rights in several other contexts,<sup>218</sup> including – as the previous section addressed – plea bargaining. While the Court has never explicitly stated that the doctrine of unconstitutional conditions has no place in criminal law, it has always used a deferential “criminal waiver” test to determine the constitutionality of plea bargains and other defendant waivers.<sup>219</sup> Scholars have had notorious difficulty in fashioning a generally applicable theory that coherently explains both the divergent results in civil cases that present the conditional offer puzzle, and the curious failure to apply the doctrine at all in criminal cases.<sup>220</sup>

In fact, plea bargaining seems an obvious example of the conditional offer puzzle, given that it is an offer of leniency in exchange for waiver of at least one, and perhaps numerous, constitutional rights.<sup>221</sup> And yet, plea deals are not only an entrenched part of the American criminal justice system but may well be a necessary palliative to the excesses of the carceral state.<sup>222</sup> To declare them all unconstitutional simply because they condition a benefit on the waiver of a constitutional right seems quite radical, and few scholars suggest that route. One theory distinguishing plea bargains from problematic conditional offers is that the plea process itself is a substitute for the constitutional trial rights waived, and one that comports with due process so long as it is not too likely to convict the innocent.<sup>223</sup> But that theory would only excuse waivers of trial

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<sup>216</sup> Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

<sup>217</sup> *Id.* at 1415 n.1.

<sup>218</sup> See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980) (upholding selective subsidy of childbirth expenses but not abortion); *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) (conditioning a tax benefit on nonprofit’s agreement not to engage in direct lobbying); *Lyng v. International Union, UAW*, 108 S.Ct. 1184 (1988) (conditioning food stamp payments on recipients’ willingness to be subject to speech and association restrictions).

<sup>219</sup> See generally Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801 (2003) (noting the inherent conflict between “criminal waiver” doctrine and the “unconstitutional conditions” doctrine, and proposing a “middle course” focused on the public nature of the right).

<sup>220</sup> See, e.g., Sullivan, *supra* note 204, at 1416 (describing case law as a “minefield”); Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 5 (2001) (noting the lack of a “unified theory”) [hereinafter Berman (2001)]; Farber, *supra* note , at 914 (describing the doctrine as an “intellectual and doctrinal swamp”).

<sup>221</sup> See, e.g., Berman (2001), *supra* note , at 98 (“Plea bargains present a classic unconstitutional conditions problem.”); Blank, *supra* note, at 2061 (“[T]he doctrine of unconstitutional conditions seems particularly well suited to the analysis of plea bargain waivers.”).

<sup>222</sup> See, e.g., Bowers, *supra* note , at 1121 (“[I]n a world of overcriminalization, defendants are better off with plea bargaining than without it.”) (citing Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1930-33 (1992)).

<sup>223</sup> Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 915 (1980).

rights, not waivers of rights unrelated to adjudication, such as the right of free speech or the right to be free from genetic surveillance by the state.

Recent scholarship on conditional offers suggests a coherent “sorting mechanism”<sup>224</sup> for determining when a plea condition is constitutionally troubling. Mitch Berman has argued that the state unconstitutionally “penalizes” a party’s exercise of a constitutional right when it imposes consequences on the party “that are adverse relative to the consequences that the state would impose (or allow to obtain) but for the state’s purpose” of discouraging the right, or punishing the rightholder.<sup>225</sup> In a later work, Berman restated the test this way: “government may not take the expected fact that a proposed action would make exercise of some constitutional right more costly, burdensome, or difficult as a reason to favor that action.”<sup>226</sup> Thus, in Berman’s view, *Bordenkircher* presented an unconstitutional conditions problem if the prosecutor overcharged the case, beyond what the state should otherwise have charged based on its professional judgment and proper penological goals, with the purpose of discouraging the defendant from exercising his trial right.<sup>227</sup> On the other hand, if the plea bargain truly offered a “discount” below what the state would otherwise do when motivated by proper purposes,<sup>228</sup> to reflect that the defendant has accepted responsibility and saved the state time and money, the bargain would be constitutional.<sup>229</sup>

While a comprehensive defense of Berman’s “wrongful coercion” test is beyond the scope of this project (and the author’s expertise), the test is consistent with other scholars’ proposals in this area. For example, Josh Bowers has suggested that the constitutionality of a plea be determined according to a “normative baseline grounded in an entitlement to proportional punishment,”<sup>230</sup> which seems equivalent to Berman’s test when applied to pleas. The test also seems consistent with Dan Farber’s suggestion that the unconstitutional conditions doctrine might be viewed as a flawed but well-intended attempt to restrict exchanges that present agency costs associated

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<sup>224</sup> Mitchell N. Berman, *Conditional Spending and the Conditional Offer Puzzle*, in *THE AFFORDABLE CARE ACT DECISION: PHILOSOPHICAL AND LEGAL IMPLICATIONS* 257, 258 (2014) (Fritz Allhoff & Mark Hall, eds.).

<sup>225</sup> Berman (2001), *supra* note , at 35.

<sup>226</sup> Berman (2014), *supra* note , at 263.

<sup>227</sup> *Id.* at 100-102.

<sup>228</sup> Berman’s test – because it focuses on what the prosecution *should* do, when motivated by proper purposes – is thus different from Seth Kreimer’s conception of coercion as measured against the baselines of “history” (what the offeree started with); “equality” (what similarly situated parties enjoy) and “prediction” (what we expect the state would do in a counterfactual world). Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984). Kreimer’s baselines have been substantially criticized. Berman, *supra* note , at 13-14.

<sup>229</sup> *Id.* at 100.

<sup>230</sup> Josh Bowers, *Plea Bargaining’s Baselines*, 57 WM. & MARY L. REV. 1083, 1089 (2016).

with officials primarily motivated by a desire to discourage the right, rather than a desire to fulfill their public function.<sup>231</sup> There may be other reasons to prohibit offers conditioned on waiver of a constitutional right as well.<sup>232</sup> But many scholars and courts seem to agree, whether implicitly or explicitly, that prohibiting wrongful coercion is one of them.

In any event, a “wrongful coercion” test seems a good place to start in thinking about whether Spit and Acquit implicates the conditional offer problem. The question becomes, then, what consequence the state would impose on the defendant in a counterfactual world where it was not motivated primarily by a desire to force him to give a DNA sample for permanent retention. The question is ultimately one of “moral desert” rather than “empirical desert,”<sup>233</sup> but the empirical story surely offers some guidance. First off, every indication is that the DNA condition is standard on every misdemeanor plea offer, regardless of the circumstances. By 2015, the DA had all but acknowledged this fact to the Board: “In a disposition of a case, . . . when we’ve reached an agreement as to how the case is going to be settled, one of the requirements is that we take a DNA sample from those people.”<sup>234</sup> Every defense attorney I spoke with corroborated this account, other than to note the occasional case in which OCDA realized that a defendant – because he lived out of town and waived his appearance – would suffer a severe hardship if he were to have to return to give a sample.<sup>235</sup> While the fact that DNA is a condition of every offer does not necessarily mean that each offeree would have received the same plea deal regardless,<sup>236</sup> it does suggest a blanket policy – one more add-on to a contract of adhesion<sup>237</sup> – whose primary purpose is to populate the database.

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<sup>231</sup> See Farber, *supra* note , at 917, 943-44.

<sup>232</sup> See, e.g., Sullivan, *supra* note , at 1483-85 (arguing that distributional justice and personhood concerns are a coherent basis for prohibiting certain conditional offers); Farber, *supra* note , at 917, 945 (noting that valid personhood and equality concerns might be what flawed legal tests like “germaneness” in the conditional offer setting are attempting to capture).

<sup>233</sup> Bowers, *supra* note , at 1124.

<sup>234</sup> Statement of Tony Rackauckas, Board of Supervisors, Apr. 21, 2015, at 1:13.

<sup>235</sup> Interview with defense attorney 204, Jan. 11, 2017 (noting a client from Australia who recently received a DUI plea with no DNA condition, stating this was a rare exception).

<sup>236</sup> Orange County is one of three counties for which felony disposition data from 2005-14 is unavailable online. Such data would shed light on whether felony filings resulting in misdemeanor pleas have increased under Spit and Acquit.

<sup>237</sup> See Farber, *supra* note , at 938 (noting that courts might be more likely to uphold “bargained-for conditions” rather than contracts of “adhesion” where the condition is “unilaterally demanded by the government”); Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEORGETOWN L.J. 291, 297 (2016) (arguing that probation conditions are contracts of adhesion and are not justified under a consent theory).

With respect to dismissals, the question is more difficult to answer. While I am awaiting county-wide data on disposition of filings,<sup>238</sup> data released by OCDA about the Central Justice Center (CJC) in Santa Ana (Fig. 2) shows that the number of total misdemeanor dismissals and diversions (not ending in a plea or trial) did moderately rise with the advent of Spit and Acquit in 2007. But misdemeanor pleas and trials also significantly increased that year (even though total misdemeanor filings did not significantly increase),<sup>239</sup> while felony dismissals, diversions, pleas, and trials all decreased:

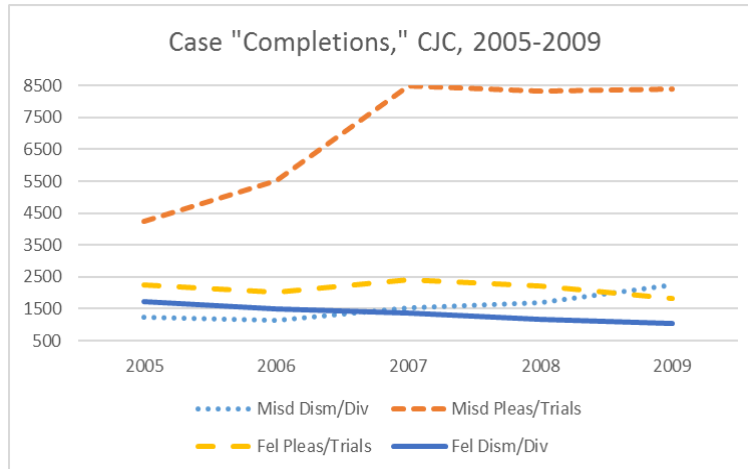


Fig. 2 Central Justice Center Filings and Completions, 2005-09<sup>240</sup>

This data might reflect the fact that a moderate number of charged individuals would not have received a dismissal offer but for Spit and Acquit, and that the total amount of leniency from OCDA toward misdemeanor and felony defendants has grown because of Spit and Acquit. The growth in misdemeanor pleas and trials still is a mystery, though. It might also be that a number of felony cases that would previously have been dismissed were pursued more doggedly as misdemeanors after 2007 because of the possibility of getting a DNA sample, suggesting that overall leniency did not increase, even as the dismissal rate might have risen.<sup>241</sup> In any event, the counterfactual world without Spit and Acquit is still hazy based on data disclosed by OCDA.

<sup>238</sup> Of all counties in California, Orange is one of three whose data for misdemeanor and infraction dispositions is missing from the state crime reports for 2002-14. I have PRA requests pending with the Superior Court and OCDA.

<sup>239</sup> Total CJC misdemeanor filings were 11,255 in 2005; 12,078 in 2006; 12,055 in 2007; 13,168 in 2008; and then dropped to 10,837 in 2009. GJ Report at 24. The Report does not explain the disposition of misdemeanor filings not ending in plea, trial, dismissal, diversion, or a DNA program, and I am still investigating the disposition of the remaining filings.

<sup>240</sup> Data taken from OCDA Response to GJ Report, July 27, 2010, at 24-25. Total misdemeanor filings in CJC were 11,255 in 2005; 12,078 in 2006; 12,055 in 2007; 13,168 in 2008; and 10,837 in 2009. *Id.* at 24.

<sup>241</sup> *Id.* at 24-25.

Several judges and defense attorneys with whom I spoke offered anecdotal accounts that shed light on what a world without Spit and Acquit might look like. One judge told me that shortly after Spit and Acquit started, judges began to worry that OCDA was filing cases knowing they were never going to pursue the case unless they absolutely had to, just to “get the DNA.”<sup>242</sup> Another judge reported that, between the start of Spit and Acquit in 2007 and the passage of Prop 47 in 2014, OCDA seemed to be filing wobbler offenses as felonies every time they could, presumably to gain leverage in plea negotiations down to a misdemeanor conviction.<sup>243</sup> One defense attorney said the office seemed to be charging “disturbing the peace” in particular – a misdemeanor/infraction wobbler – more often as a misdemeanor than before 2007, allowing the office to offer a plea bargain down to an infraction in exchange for DNA.<sup>244</sup> As another attorney told me, “when I was a kid, if a cop showed up to break up a party, he would illegally frisk you. If he found a glass weed pipe, he would throw it away. But now, cops are writing citations for that. A 11364 paraphernalia charge. And they get DNA out of it.”<sup>245</sup> A public defender said that their office had also been concerned that Spit and Acquit encouraged “bad filings,” but did not wish to speculate.<sup>246</sup>

These suspicions are obviously difficult to test, given so many confounding variables affecting filing rates. Countywide misdemeanor filings stayed relatively stable between 2004 and 2009, with no obvious increase or decrease around 2007, when Spit and Acquit launched. Misdemeanor filings fell dramatically from 2009 to 2014, and then rose sharply again in 2014, coinciding with a drop in felony filings.<sup>247</sup> The misdemeanor spike in 2014 likely relates to Prop 47, which transformed several felony-misdemeanor “wobblers” into misdemeanors. Another explanation for the misdemeanor decline from 2009 to 2014 could be that, after 2009, OCDA had an incentive to file cases as felonies that would otherwise have been misdemeanors, both to get DNA at arrest (under Prop 69) and gain leverage to encourage a misdemeanor conviction with a DNA condition attached. That strategy would

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<sup>242</sup> OCSC judge 1, Mar. 15, 2016.

<sup>243</sup> OCSC judge 2, Mar. 11, 2016.

<sup>244</sup> See Cal. Penal Code § 415; in-person interview with defense attorney 201, Feb. 10, 2016.

The number of arrests for “disturbing the peace” resulting in a misdemeanor complaint being filed rose from 267 in 2005 and 265 in 2006 to 330 in 2007, but decreased modestly in the next six years. CJSC Misdemeanor Statistics, Orange County, Cal. Att. Gen. Office, [www.oag.ca.gov/crime/cjsc/stats/arrest-dispositions](http://www.oag.ca.gov/crime/cjsc/stats/arrest-dispositions). I am still seeking offense-specific filing and disposition information on infractions.

<sup>245</sup> Defense attorney 202, Feb. 9, 2016.

<sup>246</sup> Interview with former chief public defender, Jan. 21, 2016.

<sup>247</sup> These data are culled from the Court Statistics Reports for Orange County from 2005 to 2014. See <http://www.courts.ca.gov/13421.htm>. The total filing numbers for misdemeanors for 2005-09 are slightly lower than those reported by OCDA in the grand jury report, for reasons I do not yet understand but am investigating.

have been unavailable for many offenses after 2014, with Prop 47's passage. But there was only a modest increase in felony filings in 2009, showing little obvious support for such a theory from filing data alone.<sup>248</sup>

The likelihood of a case's dismissal in a counterfactual world without Spit and Acquit might also change depending on the charged offense. One DUI attorney, who has seen scores of clients give a local DNA sample, speculated to me that most DUI defendants would still get a plea deal if they had an attorney and pushed the case, because the risk associated with going to trial is minimal where the two DUI counts merge for sentencing. Because the defendant is able to credibly threaten trial, he has leverage.<sup>249</sup> With respect to drug offenses, many Spit and Acquit participants would otherwise qualify for dismissal under PC 1000 or Prop 36, but only upon fulfilling drug treatment and other conditions, which OCDA said about 80% of participants successfully do. In the drug context, the problem with Spit and Acquit might well be that OCDA is "*overpay[ing]* for the waiver" because it is more interested in populating its database than about reducing recidivism through drug treatment.<sup>250</sup> With respect to other crimes, when I asked OCDA research manager whether the office was giving the same number of people DEJ before the DNA program came along, she said "probably not." When I asked whether that was because of the DNA program, she acknowledged that she was not sure, in part because of a timing issue: around the time the office began the DNA program, it also contracted with a new, more efficient provider of life skills classes, which enhanced the office's ability to offer widescale diversion.<sup>251</sup>

Of course, plea bargaining is not the only setting in criminal law in which leniency is conditioned on waiving constitutional rights. Judges often restrict the movement of pretrial arrestees as a condition of release, or require as a condition of probation that an offender agree to be subject to searches at any time. But judges granting pretrial release or probation act pursuant to statutory authority allowing the imposition of such conditions, so long as they reasonably relate to ensuring the defendant's future appearance and the safety of victims (for pretrial release) or legitimate purposes of punishment (for probation). And courts have determined that probationers may constitutionally be subject to "special needs" searches,<sup>252</sup> suggesting that search conditions must be independently justified as reasonable under the Fourth Amendment

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<sup>248</sup> Again, Orange County is one of three counties missing disposition data from the county statistical reports available online. PRA requests are pending.

<sup>249</sup> In-person interview with defense attorney 201, Feb. 10, 2016.

<sup>250</sup> Farber, *supra* note , at 943 (emphasis added).

<sup>251</sup> Interview with OCDA researcher, July 12, 2016.

<sup>252</sup> *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868 (1987) (upholding warrantless searches of probationers under a "special needs" warrant exception).



rather than justified solely on consent-waiver grounds.<sup>253</sup> Indeed, DNA sampling of parolees and probationers has always been understood to require reasonableness under the Fourth Amendment.<sup>254</sup> Scholars have heavily criticized add-on probation conditions as contracts of adhesion,<sup>255</sup> and at least some courts have declined to uphold probation conditions where a full 70% of the state’s defendants received probation, on recognition that probation was not an act of “unusual clemency.”<sup>256</sup> In any event, judicially imposed conditions also rely on, and are limited by, existing law enforcement apparatuses. Judges do not impose DNA as a probation or pretrial condition in an otherwise non-qualifying case because CODIS would not allow it.

### *B. Consent as a Genetic Surveillance Policymaking Tool*

This Section explores the desirability of Spit and Acquit as a mode of expanding existing legislatively authorized offender databases. It first considers database efficacy, including crime-solving and crime deterrence. It then considers how Spit and Acquit advances or hinders other goals of the criminal justice system, including efficiency, retributive justice, and deterrence of government misconduct. Finally, it considers Spit and Acquit’s effect on genetic privacy and racial equity.

#### 1. Crime Detection and Deterrence

*“I love OC because I feel safer. . . . At least when we have a database we know who did it.”*

– Orange County Supervisor Michelle Steel, April 21, 2015

The *raison d’être* of Spit and Acquit, according to OCDA, is to investigate and solve crimes above and beyond what existing CODIS-linked databases can accomplish, and to reduce systemic costs by dismissing low-level offenses. CODIS databases, of course, are categorical by offense: in some states, only serious felonies and those convicted of crimes qualify; in others, felony arrestees and those convicted of sex-related misdemeanors also qualify. In all states, however, the database scope rests on the premise that offenders in the database are, based on their offense, *a heightened risk of committing a future crime solvable through DNA*, in comparison to those not in the database. When the

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<sup>253</sup> See also *United States v. Scott*, 450 F.3d 863, 867 (9th Cir. 2005) (rejecting grounds that consent justifies an otherwise unreasonable search of a pretrial releasee). *But see* *United States v. Yeary*, 740 F.3d 569, 581-83 (11th Cir. 2014) (upholding warrantless search condition of pretrial release on a voluntary consent theory).

<sup>254</sup> See, e.g., *United States v. Kincade*, 379 F.3d 813, 874 (9th Cir. 2004).

<sup>255</sup> See generally *Doherty*, *supra* note (arguing that numerous probation conditions are illegal).

<sup>256</sup> *State v. Martin*, 580 P.2d 536, 539 n.3 (Or. 1978).

mechanism for creating the database is *forcible* sampling authorized by statute, the state can target risk in this way, within constitutional limits.

A consent-based program like Spit and Acquit, on the other hand, does not target participants based on high risk. In fact, a consent-based regime may sometimes do the opposite. Instead of being able to force high-risk people to give a sample, the state in a consent-based regime must rely on what is essentially a convenience sample – the people who are willing to consent, in exchange for leniency. The state does not wish to – and likely cannot politically afford to – offer a dismissal or lenient misdemeanor plea to high-risk offenders. Indeed, office policy is that anyone deemed a “public safety” risk is ineligible to receive a DEJ, DA continuances, or flat-out dismissal conditioned on giving a DNA sample. Moreover, among those offered Spit and Acquit, the self-selecting group who is willing to accept the deal might well be the least likely group to commit a future crime solvable by DNA. While future rapists and killers do not always act in their own self-interest, the group saying “yes” may well be lower risk, on average, than the group refusing to give DNA.

Still, even convenience sampling adds to the database, a fact to which the 150,000 participants whose profiles would not otherwise be in a DNA database can attest. In turn, the addition of these 150,000 misdemeanor arrestees and convicted misdemeanants might enhance public safety in either of two ways. First, it might be used to identify and prosecute perpetrators of DNA-solvable crimes that would otherwise go unsolved. Second, the very fact that a person is in the database might have a deterrent effect, causing them to abstain from committing a crime they would otherwise have committed.

With respect to crime-solving, OCDA boasted in its latest biennial report that its DNA database program “has led to an unprecedented number of cold cases including murders being solved, closure for grieving families, removal of sexual predators from the streets . . . and the protection of property from recidivist thieves.”<sup>257</sup> As of July 2016, there were 758 “hits” from crime scene profiles to offender profiles that can be uniquely attributed to the office’s DNA program: 336 hits to participants whose cases were dismissed (and who are only in the local database), and 422 to participants who agreed to give a sample as part of a plea bargain (and who are in both the local database and CODIS, but only by virtue of the plea bargain).<sup>258</sup> In April 2015, the reported number was 525 hits; 256 to dismissal-related samples and 269 to plea-related samples.<sup>259</sup> Put differently, the program averaged about 65 hits a year in its first eight years (adding an average of 15,423 profiles a year), and 233 in the most recent 15 months (with the addition of 26,427 profiles). The fact that more

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<sup>257</sup> 2015 Biennial Report, Orange County District Attorney, at 9, available at <http://orangecountyda.org/civicax/filebank/blobload.aspx?BlobID=22656>.

<sup>258</sup> See Letter to Andrea Roth from Denise Hernandez, Jan. 17,

<sup>259</sup> Statement of Tony Rackauckas, Bd. Of Sup., Apr. 21, 2015.

crime scene profiles match to plea-negotiated samples than to dismissal samples should not be surprising for at least two reasons. First, those offenders who plead guilty to a misdemeanor might, on average, be in a higher risk category than those whose cases are dismissed. Second, plea-negotiated samples are uploadable to CODIS pursuant to California statute, meaning that a vastly larger number of crime scene samples are being compared to them. What should perhaps be surprising is the fact that the number of hits between the two groups was nearly equal for the first eight years of the program.

The next question is whether these “hits” actually helped solve crimes. This question arises with respect to CODIS-linked databases as well, but the CODIS hit rate might be more meaningful than the Spit and Acquit hit rate for two reasons. First, by CODIS rules, a crime scene sample cannot be uploaded for comparison purposes unless it is both “unknown” and “attribut[able] to the putative perpetrator.”<sup>260</sup> A profile not likely to be probative of perpetrator identity, or a profile developed from an item taken directly from a known suspect, would not be eligible.<sup>261</sup> In a database without such restrictions, hits are less likely to be probative of a crime. Second, CODIS also reports the number of “investigations aided” by its hits, although that term is vague and not further defined by the FBI.<sup>262</sup>

Of course, even assuming the hits are all plausibly connected to a crime, “hit rate” alone is a questionable basis for determining a DNA database’s crime-solving value.<sup>263</sup> The profiles might match by coincidence;<sup>264</sup> might be the result of innocent presence, justifiable or consensual noncriminal conduct, or DNA transfer; or might be the result of contamination or malfeasance.<sup>265</sup> A match also might not lead to an arrest or conviction. Even when it does, there is the question whether the same outcome was probable because of persuasive non-DNA evidence of guilt, such as a confession, eyewitness, or video recording.<sup>266</sup> The hit rate should also be judged in light of the size and age of

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<sup>260</sup> Frequently Asked Questions on CODIS and NDIS,

<https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet>.

<sup>261</sup> See *id.*; see also Dan Noyes, *Audit Critical of Santa Clara County Crime Lab*, ABC7CHICAGO.COM, Oct. 21, 2012 (noting that local Santa Clara, California crime laboratory was improperly uploading samples not likely to be probative, such as a cigarette butt found in a public park across the street from a homicide not allegedly involving a smoking suspect).

<sup>262</sup> See <https://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics>. The Urban Institute has called for jurisdictions to establish a uniformly applied definition of “investigations aided.” URBAN INSTITUTE, COLLECTING DNA AT ARREST 82 (2013).

<sup>263</sup> See generally The Efficacy of DNA Databanks, Ch. 17, in SHELDON KRIMSKY & TANIA SIMONCELLI, GENETIC JUSTICE: DNA DATABANKS, CRIMINAL INVESTIGATIONS, AND CIVIL LIBERTIES 305-20 (2011).

<sup>264</sup> The OCDA DNA Unit told me they are aware of no “erroneous” matches to an innocent person in the decade of the program’s existence. Scoville & Contini, Aug. 2, 2016.

<sup>265</sup> See, e.g., Roth (2013) at 301-02 n. 38 (discussing contaminated cold hit examples).

<sup>266</sup> KRIMSKY & SIMONCELLI, *supra* note , at 311-12.

the database and the number of total crime investigations in the jurisdiction.<sup>267</sup> Finally, the hit rate alone does not indicate with precision the relationship between the scope of the database and solving crime. For example, it might be that nearly all the hits to OCDA's database have been to those with petty theft or drug convictions, and no hits to those whose charges were dismissed for driving on a suspended license.

Data collection on hit sources, hit outcomes, and numbers of total investigations is therefore key to assessing a database's true law enforcement value. Such data is already hard to come by for legislatively created databases, although some states have created a "CODIS Hit Outcome Project" (CHOP) to track outcomes.<sup>268</sup> But it is particularly hard for OCDA, which views its operation as proprietary. While the office told me that its 758 hits are part of a CHOP,<sup>269</sup> the office has declined to disclose any of this follow-up information in response to public records requests, citing law enforcement privilege.<sup>270</sup>

Given these caveats, a comparison of the Spit and Acquit hit rate to CODIS hit rates is likely of limited value. As illustrative examples, though, the Connecticut State DNA database has 107,773 profiles, all from convictions, and has aided around 3,000 investigations since its inception in 1999.<sup>271</sup> Arkansas's database has around 175,000 profiles, nearly all from convictions, and has aided 4,493 investigations since its inception in 1997. Kentucky's 150,165-profile database has yielded 1,745 hits since 2003.<sup>272</sup> Roughly speaking, these databases appear to have a higher hit rate than OCDA's database, but that is to be expected for a few reasons. First, state offender profiles are linked to CODIS, and are thus compared to unsolved crimes nationwide. In contrast, OCDA samples taken pursuant to dismissals are not CODIS eligible, and OCDA nearly exclusively limits its comparisons to crime scene samples from

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<sup>267</sup> *Id.* at 308.

<sup>268</sup> *See, e.g.*, Louisiana CHOP, <https://lspcl-chop.dps.louisiana.gov/> (restricted access). Some California counties have a CHOP, although a recent bill that would have required all counties to have a CHOP database died in committee in the California State Senate. *See* SB-1079, DNA Evidence: CODIS Hit Outcome Project (died Nov. 30, 2016), available at [http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill\\_id=201520160SB1079](http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201520160SB1079).

<sup>269</sup> Scoville & Contini, Aug. 2, 2016. Each hit, if investigated, receives an "I-Case number," converted to a file number if the case is charged. If the case is "rejected," that data is recorded in the case management system (CMS). The DNA Unit noted that a "rejection" might not mean that the hit was not a true "hit" or not helpful to an investigation. Rather, it might mean that the office already has open cases with respect to the offender and there are reasons not to charge the offender with an additional crime. *Id.*

<sup>270</sup> *See* Letter to Andrea Roth from Denise Hernandez, Jan. 17, 2017.

<sup>271</sup> *See* CODIS-NDIS Statistics, Connecticut; CT. GEN. STAT. § 54-102kk.

<sup>272</sup> CODIS – NDIS Statistics, Kentucky (Nov. 2016); KY. REV. STAT. 17.175 (implemented effective May 1, 2003).

county police departments.<sup>273</sup> A sample from a crime scene in Los Angeles or San Diego typically will not be compared to OCDA dismissal-related profiles.

Spit and Acquit's hit rate might also be expected to be lower than state offender databases assuming OCDA database participants have a lower average risk of committing a DNA-solvable offense than CODIS participants. To be sure, in justifying the program to the Board of Supervisors, ODCA has relied heavily on the premises that crime is local<sup>274</sup> and that low-level offenders go on to commit more serious crimes in significant numbers. In particular, OCDA relies on data showing that between 2009 and 2014, over half of persons charged with a serious or violent felony in Orange County had a prior misdemeanor or non-serious felony charge on their record.<sup>275</sup> But the relevant question in determining Spit and Acquit's added value is how many perpetrators of DNA-solvable offenses – primarily homicide, rape, gun, and property crimes – had *only* a misdemeanor arrest or conviction on their past record (or a felony charge ending in dismissal or acquittal, which may have allowed expungement of a sample taken at felony arrest)? That question has not been studied. Relatedly, how many people who have only a misdemeanor arrest or conviction go on to commit a DNA-solvable offense? On this second question, despite the ubiquity of studies examining the predictive value of prior criminal history, few studies focus on low-level offenses in particular. One comprehensive review of 30,000 New York arrestees for marijuana possession – a frequent Spit and Acquit candidate crime, before 2011 – found that rate of felony conviction among marijuana arrestees “appears to be lower than the rate of felony conviction for the national population, taking into account age, gender, and race.”<sup>276</sup>

On the other hand, Spit and Acquit's investigative potential might be buoyed by hits produced in expansive searches that would be prohibited under CODIS.<sup>277</sup> While OCDA (like many states and the FBI) currently eschews the

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<sup>273</sup> Interview with Scoville & Contini, Aug. 2, 2016. The OCDA has MOUs with all county police departments, but none with out-of-county agencies. Once every few months, OCDA might receive a request from a detective or investigator at out-of-county police department who “finds out about” the OCDA's database. *Id.*

<sup>274</sup> See, e.g., Statement of Tony Rackauckus, Orange County Board of Supervisors, Apr. 21, 2015 (“about 8% of the people commit ... more than 80% of the crime”; “most crime is committed locally”).

<sup>275</sup> See email from Scott Scoville, Oct. 11, 2016, citing <http://orangecountyda.org/civicax/filebank/blobdload.aspx?BlobID=23410> (in response to informal request for data showing a criminological basis for Spit and Acquit).

<sup>276</sup> Issa Kohler-Hausman, *A Red Herring: Marijuana Offenders Do Not Become Violent Felons*, HUMAN RIGHTS WATCH 1, 26 (2012).

<sup>277</sup> A database's value also includes its potential to exonerate the innocent. Because OCDA's database compares only samples from local crimes, its exonerating potential is limited. As of May 2016, there had been none linked to the database. Interview with Scoville & Hill, May 6, 2016. Requests by defense attorneys to run searches in state and federal databases are

controversial practice of familial searching,<sup>278</sup> it is less restrictive than CODIS-linked databases in other ways. For example, CODIS administrators will not allow a DNA mixture profile to be uploaded for comparison unless the profile is sufficiently discriminating, with a combined probability of inclusion (CPI) of no more than 1 in 10 million.<sup>279</sup> OCDA has no such limitations on its searches. As one prosecutor told me, “who decides 1 in 10 million? That threshold is much greater than probable cause, in my view.”<sup>280</sup> And Spit and Acquit does appear to be responsible for bringing a perpetrator to justice in at least one case highlighted by OCDA.<sup>281</sup> A 2008 Buena Park robbery of a movie theater, where police had no suspects but were able to develop a DNA profile from latex gloves found at the scene. The profile later matched a person, Fernando Ruiz, who gave a DNA sample in an unrelated misdemeanor case in 2010 as part of OCDA’s DNA program. Ruiz pled guilty and was sentenced to seven years in prison.<sup>282</sup> Notably, though, the other two stories OCDA publicly highlights in touting its DNA program offer scant evidence of Spit and Acquit’s added value.<sup>283</sup>

Some critics have argued that CODIS expansion to arrestees may actually hinder crime control by exacerbating backlogs and trading off with a more fruitful focus on crime scene sample testing<sup>284</sup> and police officer funding,<sup>285</sup>

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common, *see, e.g.*, Illinois v. Griffin, No. OO CR 16901 (Cook Cty. Cir. Ct. Ill.); Coleman v. Bradshaw, No. 3:03cv299 (S.D. Ohio); Rivera v. Mueller, 596 F. Supp. 2d 1163 (N.D. Ill. 2009), but OCDA claims it has never received such a request. Interview with Scoville & Contini, Sept. 23, 2016.

<sup>278</sup> See discussion *supra* n.93.

<sup>279</sup> Scoville & Contini, Aug. 2, 2016.

<sup>280</sup> *Id.*

<sup>281</sup> The DNA Unit said in November 2016 it would send me more “examples” of “successes” linked to its DNA program, but I have not yet received any.

<sup>282</sup> 2015 Biennial Report, Orange County District Attorney, at 18, available at

<http://orangecountyda.org/civicax/filebank/blobdload.aspx?BlobID=22656>.

<sup>283</sup> OCDA claims that Francisco Alberto Rodriguez was arrested for robbing a Santa Ana couple at gunpoint in 2009, based on a cold hit between DNA left on a car window and a sample Rodriguez gave after pleading guilty six months earlier to felony drug possession. *See* OCDA 2009-10 Report at 11-12. The case has still not ended in a conviction; a jury trial is set for late February 2017. In any event, in 2009, felony arrestees were required by statute to give a sample. The hit in Rodriguez’s case was to the local database only because his profile was erroneously never uploaded to CODIS. *See* <http://orangecountyda.org/civicax/filebank/blobdload.aspx?BlobID=22661> (Rodriguez “was ordered to submit his DNA” in 2009 but the system erroneously listed his DNA as already in CODIS). The OCDA also highlights the case of Jose Mejia, who raped three prostitutes in 2009 and 2010. OCDA DNA Analysis, <http://orangecountyda.org/civicax/filebank/blobdload.aspx?BlobID=23410>. He was arrested in September 2010 for evading a peace officer, a felony, but pled to a misdemeanor. Soon thereafter, the DNA from rape kits matched Mejia’s CODIS profile. It is thus technically not a case for which Spit and Acquit can take credit, although it might have been if the sample comparison were done months later, assuming his profile would have been eventually expunged after dismissal of the felony count.

<sup>284</sup> *See, e.g.*, KRIMSKY & SIMONCELLI, *supra* note , at 318-19.

while also leading to expensive litigation due to erroneous matches to, or even framing of, innocent people falsely accused. Of course, the beauty – or danger, depending on one’s perspective – of Spit and Acquit is that much of its funding comes from federal grants and defendant fees, and the testing is conducted by private companies. Thus, OCDA database expansion likely does not present the same direct opportunity cost as CODIS expansion, which relies on state and county laboratories to type offender samples and thus cuts into laboratory time for testing crime scene samples.

Measuring Spit and Acquit’s effect on behavior – the deterrence argument – is also challenging. Only one existing academic paper explores the effect of existing CODIS databases on crime rates, and finds (1) that presence in the database reduces the likelihood of any new conviction within five years of release for “serious violent” and “serious property” offenders; and (2) that, between 2000 and 2010, “increasing the size of state databases lowered crime rates.”<sup>286</sup> But these conclusions do not speak to how much less likely a misdemeanor arrestee or convicted misdemeanant is to commit a DNA-solvable crime now that he is in a database, particularly one that only compares samples from crimes committed within the county. A reasonable presumption might be that the effect on such low-level offenders is minimal, given the low likelihood that such offenders will commit a DNA-solvable crime like rape, murder, robbery, and the like. In addition, the fact that expansion of state databases between 2000 and 2010 reduced overall crime levels does not mean further expansion to misdemeanor arrestees and convicts would. In 2010, most state databases housed profiles only of those convicted of crimes; the wave of state arrestee sampling laws did not come until after the 2013 *King* decision.

The head researcher for OCDA DNA Unit reported that she has followed the progress of those in the database and has found a lower recidivism rate among people who complete the program. She acknowledged that it is difficult to know the extent to which the DNA sample is doing the work, or the other conditions often placed on the dismissal or plea deal, such as community service or life skills classes.<sup>287</sup> Because a DNA sample is required for nearly any dismissal or plea in Orange County, there is no “control group” of offenders who take the classes but did not give a DNA sample. She also acknowledged that the group willing to give a DNA sample is a self-selecting group, and might be less prone to reoffending for reasons independent of the giving of the sample.<sup>288</sup> Indeed, one critique of Spit and Acquit is that it targets low-risk

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<sup>285</sup> *Id.* at 319-20 (using example of Rockne Harmon, Alameda County District Attorney, complaining that Prop 69 took away resources needed to “place officers on the streets”).

<sup>286</sup> Jennifer L. Doleac, Stanford Institute for Economic Policy Research, *The Effects of DNA Databases on Crime*, Aug. 2016, at 2 (on file with author).

<sup>287</sup> Interview with OCDA researcher, July 12, 2016.

<sup>288</sup> *Id.*

offenders, even though high-risk offenders might most benefit from diversion and DEJ.<sup>289</sup>

Another factor to be considered in assessing Spit and Acquit's impact on criminal behavior is the effect of cases that would have been prosecuted, perhaps to the point of conviction, but for Spit and Acquit. The number of such cases might be quite low, which would buttress the legal claim that Spit and Acquit is an unconstitutional penalty rather than a discount.<sup>290</sup> If the number of cases is high, one might wonder about the effect on offenders whose cases would otherwise have been more harshly prosecuted. A person whose case is dismissed might not receive a punishment – incarceration, shaming, a longer term of supervision – that would have been a more effective deterrent or rehabilitative catalyst than being in the database or completing minimal DEJ terms. And a drug offender who chooses Spit and Acquit over PC § 1000 might not get treatment that would otherwise have helped him battle his addiction. Then again, the offenders who choose Spit and Acquit over PC § 1000 might be precisely that self-selecting group who know they are likely to relapse after treatment. And if Spit and Acquit helps someone keep his job by obtaining release from custody or maintaining a conviction-free record, such a leg-up could remove incentives for future criminal behavior.

In sum, OCDA database surely solves some crime, and surely deters some criminal behavior. The question is how much, given that database expansion is not costless, in terms of genetic privacy and the loss of the deterrent and rehabilitative value of foregone prosecutions. Because of the underregulated nature of the database, there are reasons to believe OCDA's "hit rate" might be even less of a reliable indicator of efficacy than CODIS-linked database "hit rates." And the consensual nature of the database leads to convenience sampling and self-selection that together may be less likely than legislation to target high risk offenders.

## 2. Other Criminal Justice System Goals

*Efficiency.* Beyond public safety, OCDA also argues that Spit and Acquit enhances the systemic goal of efficiency by decreasing court and lawyer costs associated with prosecuting cases. For example, the office told a Grand Jury in 2010 that "[a]s a direct result of local DNA database collection efforts and the close evaluation of felony cases by OCDA 'Strike Team,' the number of preliminary hearings" in felony cases in 2009 "was reduced by 1,000, saving the

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<sup>289</sup> See Franklin E. Zimring, *Measuring the Impact of Pretrial Diversion from the Criminal Justice System*, 41 U. CHI. L. REV. 224, 239 (1974) (noting that diversion programs' targeting of low-risk offenders might help with recidivism statistics, but might not maximize the potential of such programs to enhance public safety).

<sup>290</sup> See discussion *supra* at II.A.2 (unconstitutional conditions doctrine).



County hundreds of thousands of dollars.”<sup>291</sup> The “strike team” was a unit created to combat the “explosion of felony cases clogging the trial courts,”<sup>292</sup> and it remains unclear what the relative impact of the DNA database was during this period, especially given that felony filings countywide, according to OCDA’s data, also went down by over 1000 from 2008 to 2009.<sup>293</sup> And because felony and misdemeanor disposition data is missing from online court statistical reports for Orange County for the years 2005 through 2014, it is difficult to tell from publicly listed data the savings from filings that would otherwise have been fully prosecuted through plea or trial.

The savings realized through Spit and Acquit also depend on whether filings themselves have gone up in any category as a result of the program. As one judge told me, there is a cost of about \$99 per charged case simply to set up a case with a case jacket and paperwork, even if it dismissed at the first appearance. The same judge also noted that the court system receives a dollar out of every fine imposed, meaning lost revenue in cases ending in dismissal that would have otherwise ended in a fine.<sup>294</sup>

*Retributive justice.* Another systemic goal potentially affected by Spit and Acquit is retributive justice. Some might say that dismissal-for-DNA exchanges are nakedly utilitarian in a way that is morally offensive. Under this view, a viable criminal case where the prosecution believes the offender morally deserves punishment should go forward, perhaps especially where there is an identifiable victim.<sup>295</sup> Indeed, in California, a prosecutor does not even have the ability to dismiss a case on her own motion, whether for utilitarian or other reasons. In the nineteenth century, California eliminated the common law practice of *nolle prosequi*, vesting the power to dismiss a criminal case “in furtherance of justice” exclusively in the trial court rather than the prosecutor.<sup>296</sup> In turn, judges might feel uncomfortable exchanging the benefits of prosecution for a DNA swab. One defense attorney told me that judges in the early days of Spit and Acquit were frustrated that OCDA was “giving away the store.”<sup>297</sup>

Of course, many Spit and Acquit offenses are *malum prohibitum* regulatory offenses such as driving on a suspended license or walking a dog off leash,

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<sup>291</sup> 2009-10 Report at 18.

<sup>292</sup> Statement of former ADA Jeff Ferguson, Feb. 9, 2015, <http://ocpoliticsblog.com/2015/02/09/jeff-ferguson-to-be-sworn-in-to-the-o-c-superior-court-on-march-6/>.

<sup>293</sup> See GJ Report at 24 (from 16334 to 14977).

<sup>294</sup> OCSC judge 3, Mar. 2016.

<sup>295</sup> See generally Adam J. MacLeod, *All for One: A Review of Victim-Centric Justifications for Criminal Punishment*, 13 BERKELEY J. CRIM. L. 31 (2008) (describing both “Blackstonian retributivist” and “victim-centric” justifications for criminalization and punishment).

<sup>296</sup> CAL. PENAL CODE §§ 1385-86. See also Jones & Wade, *supra* note , at 4 (noting judges’ occasional refusal to dismiss Spit and Acquit cases under § 1385).

<sup>297</sup> Defense attorney 206, Jan. 26, 2016.

where the moral weight of the prosecution is slight to begin with. But Spit and Acquit dismissals and DEJs are also offered in cases of petty theft, shoplifting, hit-and-run,<sup>298</sup> and DUI with injury or property damage. And perhaps a greater number of similarly *malum in se* felonies have ended in misdemeanor pleas as a result of Spit and Acquit. If the number of lenient misdemeanor pleas has not in fact risen, then DNA would seem to be an add-on plea condition rather than a true bargaining chip, raising the unconstitutional condition concerns discussed in the previous section. In these morally weighted cases, perhaps something is lost in a regime of mass dismissals.

*Democratic accountability.* At least one scholar has argued that courts should declare that local police-run DNA databases are implicitly preempted by existing state legislation related to DNA databases.<sup>299</sup> In the case of Spit and Acquit, the ordinance and database definitely seem to frustrate the objectives of legislatively created safeguards, at least with respect to the inclusion of misdemeanor arrestees and permanent retention of samples with no chance for expungement. Yet in California, state law (after Prop 69) explicitly allows for plea-negotiated samples to be collected. While this language was not highlighted in voter guides and seems to have been glossed over by everyone but OCDA for eleven years, it was technically passed by the People.

Even if Spit and Acquit is not legally preempted, one might argue that it is undesirable because it frustrates the objectives of privacy boundaries “created by democratic institutions.”<sup>300</sup> Of course, the Board of Supervisors is elected, as is the DA. If Spit and Acquit is undemocratic, it is not simply because it augments state legislative action with a local ordinance and acts by local elected officials. Rather, it is because the program is implemented through bargains in the shadows, where the natural constituency to complain about the practice remains silent.<sup>301</sup> While traditional plea bargaining also occurs in the shadows, the high sentences wrought by traditional plea offers have been blessed and even encouraged by state legislatures. Where the policy wrought by pleas is not related to guilt or punishment of the particular offender in a particular case, the policy is more likely to thwart existing legislative choices.

*Deterrence of misconduct.* Finally, Spit and Acquit might hinder the deterrence of police misconduct by fueling the practice of avoiding suppression hearings

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<sup>298</sup> One judge confirmed that he has seen hit-and-run cases be resolved through Spit and Acquit dismissals. OCSC judge 1, Mar. 2016.

<sup>299</sup> David Jaros, *Preempting the Police*, 55 B.C. L. REV. 1149, 1166 (2014) (citing local police-run DNA databases as one of several potential areas for intrastate preemption).

<sup>300</sup> Paul M. Schwartz & William M. Treanor, *The New Privacy*, 101 MICH. L. REV. 2163, 2180-81 (2003) (arguing that Fair Information Practices (FIPs) are facially attractive in part because they are typically democratically created by legislatures).

<sup>301</sup> *Cf. id.* at 2184 (noting, with respect to the intractability of problematic surveillance of welfare recipients, that it is difficult “to discover communal norms in the bureaucratic world of administered social services”).

and trials in cases involving bad searches, excessive force, problematic witnesses, prosecutorial misconduct, and the like.<sup>302</sup> While traditional plea bargaining also “burie[s]” police misconduct,<sup>303</sup> a consent-based policymaking tool like Spit and Acquit adds additional fuel to the fire – by further increasing the number of cases ending in plea or dismissal rather than trial – in a way that nonconsensual legislative DNA databasing does not.

### 3. Genetic Privacy and Racial Equity

CODIS database expansion has been criticized by civil liberties groups and litigants on grounds that it threatens the genetic privacy of those in the database, to an extent not justified by the minimal added value of continued expansions.<sup>304</sup> As Justice Scalia wrote in his *King* dissent, an arrestee database “will solve some extra crimes, to be sure. But so would taking your DNA when you fly on an airplane” or “start public school.”<sup>305</sup> Database expansion has also been criticized by these groups on grounds that racial disparities in the database increase significantly with the addition of arrestees, given the relatively high false arrest rates of minority suspects and the racialized construction of crime to begin with.<sup>306</sup> This section considers how a consent-based database like Spit and Acquit fares with respect to privacy and racial equity, using statutory databases as a baseline.

In Part II, I explained that the potential consequences to personal liberty of being in a DNA database extend beyond simply the buccal swab itself and the possibility of being caught for a crime one has committed, and involve the potential to be falsely accused or to have one’s DNA used for a non-crime-solving research purpose. As explained in the Introduction, all state and federal statutes creating CODIS-linked databases meet these concerns by holding the line at felony arrestees; criminalizing the misuse of DNA; allowing arrestees to expunge their profiles upon dismissal or acquittal; and ensuring confidentiality. In addition, many (but not all) states prohibit controversial methods like familial and low-stringency searches. And CODIS itself, as run by the FBI, requires uploaded profiles to have been developed at accredited laboratories to

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<sup>302</sup> David Jaros, *Preempting the Police*, 55 B.C. L. REV. 1149, 1158 & n.46 (2014) (citing Stephanos Bibas, Response, *Exacerbating Justice*, 157 U. PA. L. REV. PENNUMBRA 53, 56 (2008) (noting that trials, more than guilty pleas, unearth “unjust arrests, crooked police informants, testifying, racial profiling, and the like”).

<sup>303</sup> *Id.* (citing Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L. J. 315, 330 (2005) (describing how police corruption is “buried under an avalanche of guilty pleas”).

<sup>304</sup> See, e.g., *King* amicus briefs; Council for Responsible Genetics statement; EFF; ACLU.

<sup>305</sup> *King*, 133 S. Ct. at 1989 (Scalia, J., dissenting).

<sup>306</sup> See, e.g., Michael T. Risher, *Racial Disparities in Databanking of DNA Profiles*, in RACE AND THE GENETIC REVOLUTION: SCIENCE, MYTH, AND CULTURE (2011) (Sheldon Krimsky & Kathleen Sloan, eds.).

minimize the chance of contamination, and prohibits comparisons with crime scene samples unless they are likely to be related to a crime, reducing the likelihood of ensnaring the innocently present.<sup>307</sup>

Spit and Acquit is more expansive and intrusive than CODIS in terms of scope and sample retention, and might well raise constitutionally cognizable privacy concerns under the Fourth Amendment if it were nonconsensual. The database's governing ordinance does require confidentiality and criminalizes the misuse of DNA, and OCDA's contract with Bode does prohibit the company from using, selling, or transferring data and requires destruction of any remaining DNA product or extracts after testing.<sup>308</sup> But unlike CODIS, OCDA's database extends to people charged with misdemeanors, even those given summonses rather than arrested; it contemplates permanent retention of all samples, with no possibility of expungement;<sup>309</sup> and appears to be entirely unregulated by law or official policy in terms of type and stringency of searches. If OCDA imposes restrictions on the type and quality of sample uploaded to its database, those restrictions are not public and not required by law. Given that OCDA's DNA Unit is not an accredited laboratory,<sup>310</sup> and that samples analyzed with OCDA's Rapid Hit machines are uploaded to the database, accreditation does not appear to be a requirement.

A comparison of OCDA and CODIS databases along racial lines is harder, and one might have competing intuitions about which is more racially inequitable. CODIS-linked arrestee databases are certainly racially disparate; as an example, African-Americans represent only 6.6% of the population of California, but 22.6% of those arrested for felonies in the state.<sup>311</sup> And there are certainly reasons to suspect that OCDA database might exacerbate those disparities. Scholars have described license-related prosecutions, for example, as a primary entry point into the criminal justice system for members of marginalized communities.<sup>312</sup> And aggressive infraction prosecutions against the majority-minority population of Ferguson, Missouri for revenue-generation

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<sup>307</sup> See generally National DNA Index System Operational Procedures Manual, Jan. 1, 2017 (Version 5).

<sup>308</sup> Contract between OCDA and Bode, at 18.

<sup>309</sup> *King* did not definitively hold that permanent retention would be unconstitutional, but it did cite expungement in upholding the law. As a point of comparison, police in the UK cannot retain the DNA profile of a person not convicted of an offense. See Deletion of Records from National Policy Systems, National Police Chiefs' Council, [https://www.acro.police.uk/acro\\_std.aspx?id=699](https://www.acro.police.uk/acro_std.aspx?id=699).

<sup>310</sup> The OCDA did tell me that its forensic scientist has performed validation tests on the office's Rapid Hit machines, Scoville & Hill, 2/23/16, but the office is not an accredited DNA laboratory.

<sup>311</sup> Risher, *supra* note , at 50.

<sup>312</sup> See generally Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012).

purposes has been recognized by the Department of Justice as “unlawful bias.”<sup>313</sup>

On the other hand, there may be reasons to suspect that those in OCDA database are whiter, and wealthier, on average than those in felony arrestee databases. The database is the closest we have in the United States to a universal citizen database, in the sense that it includes individuals cited for very low-level, low-risk activities. One might think that, the closer one gets to universality, the more the database will bring within its reach members of privileged communities. We do know that the database skews more heavily female than other databases,<sup>314</sup> and that crimes likely skewing more white than the average misdemeanor, such as shoplifting and walking a dog off leash, are included. Anecdotally, one public defender explained that a significant portion of the county’s out-of-custody misdemeanors come from the southern, whiter parts of the county, and speculated that a DA might be less nervous about dismissing such cases.<sup>315</sup>

OCDA maintains that it has not analyzed the database composition in terms of ethnicity or age or charged offense. It does maintain a Case Management System that lists each charged individual’s demographic information, disposition, and whether they gave a DNA sample, but the office has declined to disclose this information, even in anonymized form, in response to a public records act request.<sup>316</sup> Absent disclosure of the race of those actually in the database, the database’s racial makeup seems difficult to infer from other sources. To be sure, disparities exist in the racial makeup of total defendant population (first-time and repeat offenders) for crimes frequently targeted by Spit and Acquit. For example, Orange County has hovered around 2% “African-American” in the last two census counts, but

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<sup>313</sup> See U.S. Dep’t of Justice, Investigation of the Ferguson Police Dep’t, Mar. 4, 2015, at 5. See generally Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool for Systemic Reform*, 58 Wm. & Mary L. Rev. 1179 (2017) (noting racially disparate nature of infraction prosecutions and imposed fines in Ferguson).

<sup>314</sup> The OCDA database is about 70% male. Telephone interview with ADA Scott Scoville, Feb. 23, 2016. See also Contract between OCDA and Bode, at 18 (alerting Bode that approximately 70% of submitted samples will require Y-STR testing, which is only done on male samples). In contrast, the Texas state offender database was 87% male, Jianye Ge et al., *Future Directions of Forensic DNA Databases*, 55 CROAT. MED. J. 163 (2014); the California, Illinois, and Virginia databases are between 78 and 84% male, *id.*; and the United Kingdom’s national database, which includes all people arrested for or convicted of recordable (imprisonable) offenses, is over 80% male. See National DNA Database Statistics, Nov. 28, 2016, available at <https://www.gov.uk/government/statistics/national-dna-database-statistics>.

<sup>315</sup> Interview with public defender, Jan. 2016. Anecdotally, one Latino college student who gave a sample said a lot of “white people” were in the group that got the offer with him. Defendant 102. On the other hand, one person who had given a sample told me that among the large group of people (including her) that were offered the deal in arraignment court in Santa Ana, there were “hardly any white faces.” Interview with participant 103, Jan. 22, 2017.

<sup>316</sup> See Letter to Andrea Roth from ADA Denise Hernandez, Jan. 17, 2017.

“Black” defendants made up around 4% of petty theft filings each year between 2005 and 2014.<sup>317</sup> And the county has been about 34% “Hispanic or Latino” for the last two census counts,<sup>318</sup> but “Hispanics” made up nearly 50% of petty theft filings each year between 2005 and 2014.<sup>319</sup> Still, because line ADAs and judges have so much discretion in how the program actually operates on the ground, and because dismissal deals are generally restricted to first-time offenders, the full offender population for a particular list of crimes is surely not representative of the composition of the database.

In sum, OCDA database is not without significant privacy safeguards, but it conspicuously extends genetic surveillance to offenders who arguably have a higher legitimate expectation of privacy than the felony offenders in CODIS-linked databases, and is more intrusive in the sense that it requires permanent retention of offender profiles. Meanwhile, one might have competing intuitions about whether an expansive database of low-level, low-risk offenders is more or less racially disparate than CODIS-linked databases.

### III. LEARNING FROM SPIT AND ACQUIT

This Part draws upon the previous Part’s discussion of the legality and desirability of Spit and Acquit to offer tentative thoughts about the potential promise and perils of prosecutorial policymaking in general. This Article does not purport to offer a “comparative institutional analysis”<sup>320</sup> between prosecutors and legislatures in terms of genetic surveillance or any other sort of rulemaking. But it does suggest that certain lessons from Spit and Acquit might be generalizable to other consent-based prosecutorial innovations.

#### *A. The Promise of Consent-Based Prosecutorial Policymaking*

As a policymaking tool, prosecutorial, consent-based collective action seem to offer at least three potential advantages over legislative policymaking, ones that are inchoate, if not entirely realized, in the DNA databasing context.

*Expertise.* The first advantage is the harnessing of prosecutorial expertise. Legislatively created DNA databases are blunt instruments that use categories of offenses as proxies for risk of committing a future DNA-solvable offense.

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<sup>317</sup> Orange County Census, <http://www.census.gov/quickfacts/table/RHI125215/06059>; CJSC Statistics: Arrest Dispositions, All Races versus Black.

<sup>318</sup> Orange County Census, <http://www.census.gov/quickfacts/table/RHI125215/06059>. California

<sup>319</sup> CJSC Statistics, Arrest Dispositions, “Hispanic,” [www.oag.ca.gov](http://www.oag.ca.gov).

<sup>320</sup> See, e.g., William N. Eskridge Jr., *Expanding Chevron’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WISC. L. REV. 411, 416 (applying Neil Komesar’s “comparative institutional analysis” to statutory interpretation by courts and executive agencies).

Such rule-based laws will necessarily be over and under inclusive. In contrast, consent-based, prosecutorial created databases theoretically allow prosecutors to target offenders on a more granular level, either through more detailed differentiation of categories of conduct within a subgroup of offenses or through case-specific, individualized (albeit on-the-fly) assessments of an offender's likelihood of being caught, or deterred, as a result of being included in the database.

But do prosecutors possess some expertise in risk assessment that legislators lack? Josh Bowers has argued that while prosecutors are experts in determining the evidentiary strength of their cases and the administrative costs of pursuing particular prosecutions, they have no special skills in assessing the “normative merits” of cases, i.e., whether they should be dismissed for “equitable reasons.”<sup>321</sup> The appropriate question in the DNA database context is not so much an assessment of moral blameworthiness, but an assessment of risk: is this offender so unlikely to reoffend that inclusion in the database is inappropriate? Prosecutors are (generally) not criminologists. But they have the same access to actuarial data as legislators do, and they also have case-specific information about risk factors such as prior record and employment history. A robust literature exists about which factors should be considered in assessing an offender's future dangerousness,<sup>322</sup> but if DNA databases are not to be universal, and are to have rational limits, those limits will relate to risk assessment in some way.

It would seem, then, that prosecutors – at least in theory – have access to more relevant information about offender risk than legislators. Unfortunately, other aspects of consent-based policymaking temper the advantages that local prosecutorial expertise might otherwise offer. The problem, as discussed below, is not that legislators are better at determining risk categories than prosecutors. The problem is that the use of consent as a means of implementing policy may skew what would otherwise be rational, expertise-based prosecutorial innovations.

*Adaptability.* A local prosecutorial innovation like Spit and Acquit also might have the potential to better adapt to technological advances in criminal investigation than legislatively created policy. For example, it may be that Rapid Hit machines prove a reliable means of developing a DNA profile from at least some crime scene samples, and that their more frequent use – given existing backlogs – would greatly enhance hit rates.<sup>323</sup> But CODIS does not allow the

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<sup>321</sup> See generally Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not To Prosecute*, 110 COLUM. L. REV. 1655 (2010) (arguing that prosecutors lack expertise to assess normative merits of low-level cases where legal guilt is often obvious).

<sup>322</sup> See, e.g., Sonia B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014) (arguing against actuarial risk assessment).

<sup>323</sup> See ERIN MURPHY, *INSIDE THE CELL* (2016) (arguing that quicker testing of crime scene samples, not database expansion, is the best means of increasing hit rate).

uploading of Rapid Hit forensic samples,<sup>324</sup> nor does it allow uploading of samples from a non-accredited laboratory.<sup>325</sup> While some CODIS regulations are promulgated by the Department of Justice, rather than Congress, even FBI regulations are promulgated in the shadow of congressional oversight of federal DNA collection, and might take longer to incorporate innovative forensic techniques. The dangers of approving new forensic techniques before they are proven reliable are well known, of course.<sup>326</sup> But a full accounting of the effects of policymaking like Spit and Acquit should include any potential benefits of early adoption of new, reliable techniques.<sup>327</sup>

*Reflection of true preferences.* Consent-based policymaking might also arguably better reflect the true preferences of the population affected by a policy. For example, in the Spit and Acquit context, the fact that nearly everyone says yes to the deal might in part reflect that most people are just not that concerned about giving a cheek swab to a bureaucrat for using in a forensic DNA database. One defense attorney, who has represented scores of people who have given DNA through Spit and Acquit, told me he could “count on one hand” the number of people who have “any real concerns about it.”<sup>328</sup> The head of a neighborhood watch group in Orange County told the Board of Supervisors that “DNA is something I . . . am very much backing. You need to get DNA actually from everybody. You know . . . just in case.”<sup>329</sup> If such views are common, then the California legislature’s invocation of genetic privacy as a reason for drawing the line at felony arrestees might not make sense, assuming an even modest crime-solving boost from further database expansion.<sup>330</sup>

Indeed, Spit and Acquit – the largest DNA database in the United States the scope of which extends beyond felony arrestees – arguable offers an unprecedented glimpse into the political feasibility of a universal citizen database. I have argued elsewhere that if the crime-solving potential of expansive DNA databases is as great as courts insist it is, and if the privacy interests triggered by forced sampling are as minimal as courts insist they are, then there is little reason to draw the line at arrestees.<sup>331</sup> Meanwhile, there are compelling reasons *not* to draw the line at arrestees, and to include the entire

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<sup>324</sup> See NDIS Operating Manual, Jan. 2017, at 45.

<sup>325</sup> *Id.* at 48.

<sup>326</sup> See, e.g., PCAST Report (2016); NAS Report (2009).

<sup>327</sup> Indeed, the *Daubert* Revolution rested on the premise that the “austere” *Frye* standard was inappropriately risk averse to new, potentially reliable methodologies. See *Dauber v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

<sup>328</sup> Interview with defense attorney 204, Jan. 11, 2017.

<sup>329</sup> Statement of Karen Finn, OC Board of Supervisors Meeting, Jan. 27, 2009.

<sup>330</sup> Cf. Farber, *supra* note , at 932 (comparing constitutional rights to default rules in contract theory for purposes of making sense of the “unconstitutional conditions” doctrine, and noting that a default rule against restricting employee speech would make little sense “if most agencies and their employees would prefer another arrangement”).

<sup>331</sup> Roth (2013) at 308.



population in the database, given the disproportionately high number of falsely arrested minority suspects and the fact that minorities and poor people are disproportionately subject to police surveillance to begin with, and are thus more likely to be arrested in larger numbers, even if they do not commit criminal conduct in larger numbers.<sup>332</sup> The (typically whiter and wealthier) people whose criminal conduct goes unseen, and who are therefore not in the database, have a “privilege of criminality”<sup>333</sup> that a universal database could help to eliminate.<sup>334</sup>

*B. The Perils of Consent-Based Prosecutorial Policymaking*

1. The “Rube Goldberg” Problem with Bargain-Based Workarounds

Given these potential advantages, might Spit and Acquit be a better way of expanding databases to low-level offenders than a legislatively created, offense-based expansion? Unfortunately, consent-based databasing has political and practical limits that hinder the rational prioritizing of higher-risk offenders. Far from being an elegant solution to the database expansion dilemma, Spit and Acquit in some ways seems like one more “ugly child” of what Robert Kagan has called American’s “adversarial legalism” – the tendency toward policymaking and dispute resolution through lawyer-dominated litigation.<sup>335</sup>

As detailed in Part I, Spit and Acquit was born of prosecutorial frustration with legislatively imposed CODIS limits, limits that in part reflect legislative concerns over the cost and constitutionality of expansion. For example, while a bill is currently pending in the California legislature that would require a DNA sample upon conviction of certain nonviolent offenses that were reduced from felonies to misdemeanors under Proposition 47 in 2014,<sup>336</sup> a similar bill was unsuccessful last session and, in any event, would not require sampling for misdemeanor arrests.<sup>337</sup> Legislatures are simply not ready to impose forced DNA sampling on large numbers of misdemeanants.

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<sup>332</sup> *Id.* at 308-09.

<sup>333</sup> See Christopher Kutz, *The Privilege of Criminality and the Pale Criminal*, Oct. 12, 2016 (draft on file with author).

<sup>334</sup> As Erin Murphy points out, a universal database would not end racial discrimination in criminal investigations; for example, the police would still have discretion to decide where, and when, to collect DNA. MURPHY, *INSIDE THE CELL*, *supra* note , at 261.

<sup>335</sup> ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 83 (2001).

<sup>336</sup> See Safe Neighborhoods and Schools Act, Nov. 4, 2014, § 3(3).

<sup>337</sup> See A.B. 16, introduced Dec. 5, 2016, available at

[http://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180AB16](http://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB16).

But prosecutors are certainly ready to do so, and as *Spit and Acquit* makes clear, they are starting to do so through the only avenue available to them to overcome constitutional and cost objections: the plea bargaining process. As Shep Melnick noted in a lecture commemorating the twenty-fifth anniversary of Kagan’s *Adversarial Legalism*, partisan polarization has led to the “collapse of ordinary modes of policymaking” and the rise of executive actions that “oscillate[] between audacious assertions of regulatory authority on the one hand and widespread use of waivers and prosecutorial discretion to *avoid* enforcing the law on the other.”<sup>338</sup> *Spit and Acquit* adds a new twist to executive workarounds: prosecutors in Orange County use waivers and nonenforcement of the criminal law not to avoid enforcement, but to use non-enforcement as an inducement to implement, through the affected population’s consent, policy goals unrelated to the criminal case. Unfortunately, as Melnick puts it, the “backdoor nature” of attempts by the executive to fill legislative voids “often creates convoluted, ineffective Rube Goldberg policies.”<sup>339</sup>

*Spit and Acquit* does have a Rube Goldberg quality to it. Rather than directly targeting high-risk misdemeanants for the database, OCDA targets quite the opposite – those who are low-risk enough to be politically acceptable beneficiaries of leniency, and who choose DNA over prosecution – to populate its database. The office has had to modify offers to account for judicial resistance in ways unrelated to offender risk, such as creating a special “DA Continuance” program that offers dismissal in exchange for DNA but does not require an initial judge-approved guilty plea, like DEJ. OCDA then sends offender samples 2000 miles away to be tested, and splits and analyzes crime scene samples in its basement, on Rapid Hit machines, resulting in profiles that are duplicative of profiles already developed by the county laboratory. And it compares its offender profiles only to crime scene profiles from Orange County crimes, failing to maximize the database’s usefulness for other jurisdictions. If one were crafting the ideal *nonconsensual* DNA collection regime for low-level offenders, it would bear little resemblance to *Spit and Acquit*.

Some of *Spit and Acquit*’s method-goal mismatch would inhere in any consent-based process where one is beholden to those who must agree to the deal. But consent-based policymaking by an elected prosecutor, like Tony Rackauckas in Orange County, might pose particular agency-principal problems that further hinder efficacy. For example, imagine that the DA’s primary purpose is to have the largest database possible and highest reported hit rate to local OC crimes possible, because those metrics are particularly

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<sup>338</sup> See R. Shep Melnick, *Adversarial Legalism Meets Partisan Polarization*, Kagan Lecture in Law & Regulation, U.C. Berkeley School of Law, Mar. 10, 2016, at 1.

<sup>339</sup> *Id.* at 10.

visible to the OC public.<sup>340</sup> The DA might then choose search criteria – or upload samples only peripherally related to a crime – that maximize hit rate, rather than criteria that maximize actual crime solving. And the DA might pursue duplicative efforts, such as splitting crime scene samples, or deprioritize database access to law enforcement agencies outside the county. Notably, these efforts increase hit rates through methods that are largely invisible to the public. The office still might have an incentive to eschew – as it currently purports to do – controversial techniques that would increase hit rate but might raise public ire, like familial searching or adding juveniles.

Of course, legislators are also not always effective policymakers in the DNA context. Consider, for example, the recent legislation to require DNA samples from only those misdemeanors that used to be felonies under Prop 47. As the L.A. Times editorial board pointed out, “Domestic violence, child endangerment, drunk driving – all are more dangerous than the six crimes that voters downgraded.”<sup>341</sup> But legislators have no particular incentive to spare these higher risk groups unaffected by Prop 47; the bill might be ill-conceived and underinclusive, but it is likely the product of political compromise on low-hanging fruit, and not of a strategy to target the lowest-risk offenders.<sup>342</sup>

## 2. How “Managerial Justice” Differs from Consent-Based Policymaking

Consent-based policymaking, by nature, involves offering some benefit in return for the offeree’s relinquishing of a right. Prosecutorial policymaking thus raises not only coercion and efficacy concerns, but also the possibility of negative externalities associated with the benefit offered the defendant: non-prosecution in a criminal case. As discussed in Part II, non-prosecution carries potential costs in terms of deterrence of future criminal behavior, retributive justice and victim vindication, offender rehabilitation, and deterrence of police misconduct that would otherwise be the subject of a suppression hearing.

In this light, it is tempting to view Spit and Acquit as just another iteration of what legal scholars have termed “managerial justice,” the trend in misdemeanor court away from a focus on adjudicating guilt and toward a focus on social control. Issa Kohler-Hausmann and others have argued that in

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<sup>340</sup> See generally Gordon & Huber, *supra* note 48, at 147 (noting that prosecutor’s behavior in high profile cases may be contrary to voter interests for this reason).

<sup>341</sup> *DNA Should Not Be Collected in Misdemeanor Cases*, Mar. 2, 2015, available at <http://www.latimes.com/opinion/editorials/la-ed-0302-dna-20150228-story.html>.

<sup>342</sup> Nor do all executive actions that stray from legislative limits suffer from an incentive-goal mismatch. Executive orders promulgated through the President’s enforcement power rather than through consent, for example, might “dramatically reshape” an area of law, but might well be designed to ensure accountability and rational decision-making. See, e.g., Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 *YALE L.J.* 104 (2015).

American misdemeanor courts, the adjudication of guilt or innocence is not even the primary function of the law.<sup>343</sup> Rather, it is to “mark” individuals – that is, to stigmatize them and flag them as a risk when they next make contact with the system – or to put them through so much procedural “hassle” or so many “performance” requirements that the goals of punishment – whether retributive or utilitarian – are achieved regardless of, and in fact irrelevant of, any adjudication of guilt.<sup>344</sup> As one scholar put it, “[i]nstead of asking whether the person” is guilty of the conduct, the court or prosecutor has “the defendant ‘jump through hoops’ to determine whether they are worthy of a conviction.”<sup>345</sup> And yet, hassle and performance are still conventionally related to the *goals* of adjudication in the sense that they concern themselves with effecting – albeit in a crude way – a proper response to what the offender is presumed, through proxies like offense of arrest and prior record, to have done. As the title of Malcolm Feeley’s seminal work on misdemeanor court declares, “The Process is the Punishment.”<sup>346</sup> Even marking advances conventional adjudicative goals by stigmatizing the offender and enhancing punishment if he reoffends.

In contrast, Spit and Acquit harnesses the power of pleas and dismissals in misdemeanor court to serve a *nonadjudicative* purpose. Its goal is not to stigmatize, because one’s presence in the database is confidential. Its goal also does not seem to be primarily to punish, shame or even deter the offender.<sup>347</sup> Rather, its primary goal seems to be to expand the database and generate hits. A former OCDA prosecutor suggested that because the DA’s office itself is in charge of the database, the office might have “more of an ownership and political interest” in “making the database succeed”<sup>348</sup> than does a legislator with respect to CODIS. As one defense attorney put it to me, “I do not think it’s an exaggeration to say that a main point of [OCDA’s] misdemeanor practice is to populate their database.”<sup>349</sup>

Prosecutorial policymaking toward a non-adjudicative goal is thus also different from traditional plea bargaining, which ostensibly advances the same

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<sup>343</sup> See, e.g., Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012). Cf. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015) (describing how noncriminal justice actors use arrests as a proxy for criminality in imposing collateral consequences).

<sup>344</sup> See generally Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351 (2013) (arguing that misdemeanor dispositions, often dismissals, regulate individuals through marking, hassle, and performance requirements, rather than adjudications of guilt).

<sup>345</sup> Sopen B. Shah, *Marked: Do Prior Convictions Cause New Ones?*, 51 GONZAGA L. REV. 1, 18 (2016).

<sup>346</sup> MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979).

<sup>347</sup> While deterrence is a potential benefit of the database, it is not the benefit typically touted by the office in its statements to the Board or biennial reports.

<sup>348</sup> Telephone interview with former prosecutor 205, Mar. 23, 2016.

<sup>349</sup> Email from defense attorney 208, Feb. 1, 2017.

penological goals as punishment by a judge, albeit in a systematically harsher way, determined unilaterally by the prosecution.<sup>350</sup> The fact that a traditional guilty plea simply trades one means of adjudicating guilt for another is precisely the reason some scholars view it as different from other sorts of unconstitutional conditions.<sup>351</sup> But that logic does not justify the use of plea conditions to advance non-adjudicative goals that would be unconstitutional if attempted directly by the legislature. One former judge has even suggested that plea conditions be struck as violative of separation of powers when the sanction is not authorized by statute.<sup>352</sup>

### 3. Policymaking in the Shadows: The Pull of Profiteers

If Spit and Acquit is any indication, consent-based prosecutorial policymaking is also likely to be underscrutinized by courts and lawmakers. First of all, lawmakers might defer to prosecutors with respect to policies based on consent. As Supervisor Chris Norby said to DA Rackauckas, right before voting “yes” on a request for money for the DNA program, “I can understand too a concern about a blanket approach in terms of gathering DNA from everybody. . . . But in this case, plea bargaining is part of the system.”<sup>353</sup> Second, the most natural constituency to complain about abuses – defendants – is likely not to, given that their pleas and dismissals rest on accepting the deal. Third, consent-based policymaking is likely to escape scrutiny precisely because it attempts to evade, and must work outside of, existing legal apparatuses funded and run by the state.<sup>354</sup> As Melnick has put it, executive workarounds are often “novel, opaque control mechanism[s] that short-circuit judicial review and public participation,” in part by relying on fees rather than appropriations.<sup>355</sup>

A reliance on federal funding and private partnerships is precisely what has allowed Spit and Acquit to exist, and has fueled its growth. Catherine Crump and others have documented the role that federal grants play in allowing local

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<sup>350</sup> See, e.g., Lynch, *supra* note , at 2124 (noting that prosecutorial adjudication serves same goals as trial and sentence by jury and judge); Donald Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining* (2015), at 10 (draft on file with author) (opining that prosecutorial adjudication has led to overpunishment).

<sup>351</sup> See, e.g., McCoy & Mirra, *supra* note 227, at \*.

<sup>352</sup> Colquitt, *supra* note 16, at 756-57 (giving example of agreements that evade constitutional limits on Son-of-Sam laws).

<sup>353</sup> Statement of Supervisor Chris Norby, OC Board of Supervisors Meeting, Jan. 27, 2009.

<sup>354</sup> In a sense, the OC’s database has been subject to even more scrutiny than it otherwise would because of what appears to be a personal conflict between Mr. Rackauckas and Todd Spitzer, a former deputy DA who now sits on the Board of Supervisors. See, e.g., Thy Vo & Tracy Wood, *The Rackauckas/Spitzer Feud Takes Another Weird Turn*, VOICE OF OC, May 31, 2016. But this scrutiny has largely focused on OCDA’s influence over the county laboratory, and not the DNA database’s efficacy or effect on privacy.

<sup>355</sup> Melnick, *supra* note , at 2.

law enforcement to avoid democratic accountability by funding surveillance programs without having to go through city councils.<sup>356</sup> While the OC Board of Supervisors did pass an ordinance requiring confidentiality of the database, the ordinance was conceived of and drafted by OCDA, was passed with little debate or notice to the public, and does not speak to other areas of concern, such as retention of samples, testing or search protocols, accreditation of testing procedures, or maintenance of calibration records. At least one Supervisor who voted in favor of the ordinance seemed not to grasp the vast differences between Prop 69, which authorizes expungement for arrestees whose case is later dismissed, and OCDA database, which allows permanent retention of full samples: “I think we’ve modeled this ordinance after what the state has already imposed for Prop 69, and I think it’s the appropriate kinds of protections to have.”<sup>357</sup>

The rise of consent-based DNA databasing might also be viewed, then, as an example of private entrepreneurs facilitating, and encouraging, the expansion of social control mechanisms. Scholars have documented how profiteers helped fuel the growth of so-called incarceration “alternatives”<sup>358</sup> like transportation to the colonies in the 1700s and electronic monitoring today,<sup>359</sup> and have developed and marketed surveillance technologies “custom-made” for law enforcement.<sup>360</sup> Malcolm Feeley argues that these “alternatives” did not actually reduce executions or incarceration rates, but rather were “add ons” that “expanded the reach and severity of the criminal justice system.”<sup>361</sup> In the same respect, Spit and Acquit relies on Bode for its testing. In turn, Bode has an incentive to encourage OCDA to adopt controversial searching and testing techniques, precisely because such techniques necessitate a local database or another layer of expensive testing. While OCDA has not yet adopted familial searching, it pays Bode extra for Y-STR typing and has bought expensive Rapid Hit machines to test samples that the county laboratory also tests.

A consent-based program that works outside existing legal regimes need not give in to the pull of profiteers toward gratuitous net-widening. Prosecutors are

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<sup>356</sup> See Catherine Crump, *Surveillance Policy Making by Procurement*, 91 WASH. L. REV. 1595 (2016); Kregg, *supra* note , at \*.

<sup>357</sup> Statement of Bill Campbell, Board of Supervisor Meeting, Mar. 27, 2007, Item 64, 2:37.

<sup>358</sup> Feeley, *supra* note 19, at 1. It appears that, at least in plea negotiations, Spit and Acquit is also an “add-on” rather than an alternative, a fact potentially relevant to its legality under the unconstitutional conditions doctrine. See discussion *infra* at II.A.

<sup>359</sup> See, e.g., Feeley, *supra* note 19, at 1, 5, 12 (transportation and electronic monitoring); Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297, 333 (2015) (arguing that the rise of electronic monitoring “raises ethical concerns about profit motives driving an expansion of the criminal justice system”).

<sup>360</sup> See, e.g., Chris Hoofnagle, *Big Brother’s Little Helpers: How ChoicePoint and Other Commercial Data Brokers Collect and Package Your Data for Law Enforcement*, 29 N.C. J. INT’L L. & COM. REG. 595, 596 (2004) (noting that ChoicePoint’s website “was custom-tailored for law enforcement”).

<sup>361</sup> Feeley, *supra* note 19, at 1.

obviously able, with the right incentives and monitoring, to be effective agents for their principal, the public. Nonetheless, the inexorable link between consent-based policymaking and private partnerships is critical to acknowledge and scrutinize.

## CONCLUSION

In exposing the American criminal justice system as one of “administered” rather than adversarial justice, Gerard Lynch took pains to clarify that, in his view, a system administered by prosecutors was not inherently undesirable; indeed, to him, it was “largely acceptable.”<sup>362</sup> The primary point of his groundbreaking article was not that “prosecutorial adjudication” was “beyond the pale of civilization,”<sup>363</sup> but that we should be honest about the adversarial model’s decline and work toward making “administered justice” as good as it can be through formal administrative safeguards.<sup>364</sup>

Similarly, the goal of this Article is not to condemn Spit and Acquit, nor consent-based prosecutorial policymaking more broadly. Rather, it is to acknowledge that such prosecutorial collective action exists, and has the potential to render moot existing legislative limits on state action in sensitive contexts like genetic surveillance. Prosecutorial innovations might, if they mirror true public preferences, be a way of pushing legislative limits to where they should naturally be. But they might also be a means of coercively and opaquely implementing intrusive and ineffective practices that the public would not abide if attempted directly by the legislature.

While I have criticized certain aspects of consent-based prosecutorial policymaking, one can imagine reforms that could help minimize abuses. One way would be for courts to force legislatures to regulate local prosecutorial innovations in contexts where the legislature has already spoken, by invoking the intrastate preemption doctrine.<sup>365</sup> Another would be to minimize wrongful coercion in the process through legislation requiring the presence of defense counsel to speak with defendants about the strength of their case and the true privacy stakes in database inclusion. Judges could also coherently apply the “unconstitutional conditions” doctrine to plea negotiations and dismissal exchanges, to ensure that pleas in exchange for relinquishing a constitutional right are true discounts. Another would be for legislatures to force prosecutors to collect better data on how innovations affect crime solving and deterrence and how target defendants are identified, and to require prosecutors to develop

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<sup>362</sup> See Lynch, *supra* note , at 2145.

<sup>363</sup> *Id.* at 2124.

<sup>364</sup> *Id.* at 2150-51.

<sup>365</sup> See Jaros, *supra* note , at 1166 (suggesting intrastate preemption as a way of forcing legislatures to explicitly approve or further regulate local police-run DNA databases).

impact assessments as a condition of requesting federal funding.<sup>366</sup> Such safeguards would help ensure that policymaking by prosecutors is fair, effective, and reflective of the legitimate goals underlying the prosecutors' public role.

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<sup>366</sup> See Crump, *supra* note , at 1660.



## Appendix A – Waiver Form



### Orange County District Attorney's Office Public Safety, Crime Prevention and Deterrence DNA Program DNA Collection Waiver Form

Defendant \_\_\_\_\_ Court Case # \_\_\_\_\_

For Court Use Only

I understand that I am eligible to participate in the District Attorney's Public Safety, Crime Prevention and Deterrence DNA Program (hereinafter, "OCDA DNA Program"). I understand that the purpose of the OCDA DNA Program is to permit state and local law enforcement agencies to collect, permanently retain, search and use the DNA samples, fingerprints, palm prints and photographs I am providing to help solve crime accurately and expeditiously; enhance public safety; identify missing and unidentified persons; and deter, solve and prevent criminal conduct. I understand that my case will be dismissed and not re-filed if I agree to and complete the following:

- Provide my OCDA DNA sample, fingerprints, palm prints, and photograph to the District Attorney for permanent retention with the understanding that my OCDA DNA sample is a distinct and separate sample from the Department of Justice DNA samples ("DOJ DNA samples") collected for the State Database and Data Bank Program pursuant to Penal Code sections 295-300.2;
- Felony Only:** Provide my DOJ DNA samples, fingerprints and palm prints to the California Department of Justice with the understanding that my DOJ DNA samples will be permanently included within the Department of Justice DNA Database and Data Bank Program, pursuant to Penal Code sections 295-300.2;
- Voluntarily agree that my OCDA DNA and/or DOJ DNA samples and fingerprints and palm prints may be checked and/or searched against other DNA, fingerprint and/or palm print samples in any local, state, national or international law enforcement database(s) for law enforcement purposes;
- Waive and give up my right to request to have my OCDA DNA sample removed from the OCDA DNA Database and/or my DOJ DNA samples removed from the Department of Justice DNA Database and Data Bank Program (Penal Code section 299);
- Waive the right to challenge in court whether the OCDA DNA and/or the DOJ DNA samples, fingerprints, palm prints, and photographs were obtained in violation of the U.S. Constitution, the Constitution of the State of California, or of any federal, state or local law or regulation;
- Waive the right to challenge, for any reason, in any subsequent legal, administrative or other proceeding(s), the collection, retention and use for forensic identification purposes of my OCDA DNA and/or DOJ DNA samples, fingerprints, palm prints and photographs;
- Pay a \$75 administrative fee at the time of collection of my OCDA DNA sample or within 72 hours of my release from custody. I also agree that if I fail to pay the \$75.00 administrative fee to the Orange County District Attorney's Office, the District Attorney's Office will be entitled to bring an action against me in the Orange County Superior Court, State of California, for breach of contract. I understand that my failure to pay may result in a court order requiring me to pay reasonable attorney fees and costs, and statutory interest from the due date of my payment to Orange County District Attorney's Office; and
- Complete Restitution and/or other conditions. \_\_\_\_\_

I understand, acknowledge, and waive, where appropriate, the following rights:

- The right to a jury/court trial which includes the right to call and/or cross-examine witnesses, to use the subpoena process of the court free of charge, to be represented by an attorney at all stages of a criminal proceeding and to exercise my right to testify or remain silent;
- That no one has made any threats or used any force against me, my family, or anyone else I know and that no promises other than those contained on this form have been made to me in order to convince me to participate in this OCDA DNA Program; and
- PC 1000 only:** I have been advised that I am eligible for the Penal Code section 1000 drug diversion program. I understand that if I had entered and successfully completed this drug diversion program, my arrest for this drug offense would have been deemed never to have occurred (Penal Code section 1000.4). I understand and give up any rights I may have had pursuant to PC section 1000.4.
- PC 1210 only:** I have been advised that I am eligible for the Penal Code section 1210 Substance Abuse and Crime Prevention Act of 2000 (Prop. 36). I understand that if I had entered and successfully completed the Prop. 36 program, my arrest and conviction would have been deemed never to have occurred (Penal Code section 1210.1(e)(1)). I understand and give up any rights I may have had pursuant to PC section 1210.1(e)(1).

**Defendant:** I understand each and every one of the above rights and conditions and, if applicable, have discussed them with my attorney. I declare, under penalty of perjury, that I have read, understood, and personally initialed each of the above items, and that the foregoing is true and correct.

Executed at \_\_\_\_\_ California Dated: \_\_\_\_\_ Signed: \_\_\_\_\_ (Defendant)

**Defendant's Attorney:** I am attorney of record. I have explained each of the above rights to the defendant after exploring the facts and issues with him/her and studied his/her possible defenses. I have discussed the advantages and disadvantages of providing DNA sample(s), fingerprints, palm prints and photographs to law enforcement databases. I have advised him/her of each of the above rights and conditions and agree that this document is evidence of the defendant's advisement and his/her voluntary, knowing, and intelligent waiver of each of the above rights.

Dated: \_\_\_\_\_ Signed: \_\_\_\_\_ (Defense Attorney)

**Deputy DA:** (For pro per defendants, I confirm that I have reviewed this document with each pro per defendant by asking whether he/she has read, understood, and entered into this agreement voluntarily.)

Dated: \_\_\_\_\_ Signed: \_\_\_\_\_ (Deputy District Attorney)

**Interpreter's Statement:** I, \_\_\_\_\_, having been duly sworn as a court certified interpreter, state that I am fluent in the \_\_\_\_\_ language. I translated the contents of this form to defendant in that language. The defendant told me he/she understood the contents of this form and initialed and signed it in my presence.

Dated: \_\_\_\_\_ Signed: \_\_\_\_\_ (Interpreter) (1.05 R12-10)