

# “Spit and Acquit”: Prosecutors as Surveillance Entrepreneurs

Andrea Roth\*

*A high-stakes debate has emerged around the legislative expansion of forensic DNA databases, a move that would assist thousands of criminal investigations but also raise profound privacy issues. In Maryland v. King, where the Court upheld the constitutionality of forced DNA sampling of arrestees, Justice Alito described the Court’s 2013 decision as “perhaps the most important criminal procedure case” in “decades.” But this debate fails to account for a different, less-well-understood practice: DNA collection by prosecutors, with the alleged consent of those giving samples. The Orange County District Attorney’s Office offers certain defendants charged with petty misdemeanors a deal: if you want a dismissal or a plea offer, give us your DNA. This innovative practice has come to be known colloquially as “Spit and Acquit.” So far, over 150,000 people—not otherwise required to give the state their DNA—have agreed. Their samples are then kept permanently in a prosecutorial database maintained with the aid of biotechnology companies and funded largely by federal grants and defendant fees. As the largest “consent”-based law enforcement DNA database in the country, Spit and Acquit is worthy of study in its own right. But it also offers a case study of prosecutorial policymaking in surveillance—an area beyond prosecutors’ typical expertise.*

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*This Article draws upon original field research, including court observations, interviews with prosecutors, defense attorneys, judges, defendants, and public records, to shed light on this understudied phenomenon. It then argues that Spit and Acquit compares unfavorably to existing legislative databases in terms of public safety benefits, privacy, and democratic accountability. The Article concludes by drawing lessons from Spit and Acquit for the future of genetic surveillance and the emerging field of “misdemeanor studies.”*

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## INTRODUCTION

A robust legal and policy debate surrounds government collection of DNA in the United States. Thus far, that debate has focused almost exclusively on legislatively-created state and federal forensic DNA databases, which aggregate DNA samples from people arrested for or convicted of certain crimes. These statutorily created databases are linked together by the Federal Bureau of Investigation (FBI) through the nationwide network of DNA databases known as the Combined DNA Index System (CODIS).<sup>1</sup> CODIS holds over 16 million offender and arrestee forensic DNA profiles and over 860,000 crime scene DNA profiles, and has revolutionized law enforcement.<sup>2</sup> At the same time, courts and civil liberties groups have critiqued any further expansion of CODIS on privacy grounds.<sup>3</sup> As a result, most laws limit permanent DNA collection to those convicted of felonies and certain misdemeanors. Moreover, though several jurisdictions temporarily require samples from those arrested for felonies and sex-related misdemeanors, every such jurisdiction allows arrestees to petition to have their DNA profiles expunged if their cases do not end in conviction.<sup>4</sup> Courts have also recognized the controversy surrounding government DNA collection. Although the Supreme Court (in a 5-4 vote) has upheld the legality of at least one state arrestee database, it did so on narrow grounds related to the need to identify suspects at booking, and noted the many safeguards in the statute, including expungement.<sup>5</sup>

But while debate continues over statutorily authorized DNA collection, a less-scrutinized form of databasing that is more expansive than any existing DNA collection statute has emerged in California: prosecutorial DNA

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1. The information uploaded to CODIS is not the person's DNA "sample," which is the physical sample containing the person's full "genome" or set of genes. Rather, CODIS stores the person's forensic DNA "profile," a profile developed from a physical sample by genetic analysis. A person's forensic DNA profile typically consists of twenty-six or more numbers, each representing a genetic marker or "allele" that the person has at various locations in the so-called junk regions of their DNA. This profile is commonly referred to as one's "DNA fingerprint." See generally 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 (2008) (explaining forensic DNA typing in lay terms).

2. See *CODIS—NDIS Statistics*, FBI, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics> [<https://perma.cc/HNY2-GNBC>].

3. See, e.g., *King v. State*, 42 A.3d 549, 576–77, 595–96 (Md. 2012), *rev'd*, *Maryland v. King*, 569 U.S. 435 (2013) (describing a DNA sample as a "vast genetic treasure map" which contains "unarguably much more than a person's identity" in contrast to a fingerprint which "is related only to physical characteristics and can be used to identify a person, but no more").

4. See discussion *infra* Part I.A.

5. *King*, 569 U.S. at 443–44.

databasing.<sup>6</sup> For over a decade, the Orange County District Attorney (OCDA) has offered defendants accused of misdemeanors and infractions a deal: give the prosecutor’s office your DNA, and the office will offer you leniency in your criminal case. In fact, nearly every misdemeanor plea deal in Orange County is now conditioned on providing DNA.<sup>7</sup>

As a result of this practice, known locally as “Spit and Acquit,”<sup>8</sup> OCDA now permanently<sup>9</sup> owns the DNA of around 150,000 people whose DNA would not otherwise be included in a statutory database or in the government’s possession.<sup>10</sup> And yet, while the OCDA database is larger than some state statutory databases<sup>11</sup> and has existed for over a decade, almost no publicly available data exists about its operation or effects.

This Article is the first to offer a detailed account of this vast, secretive database.<sup>12</sup> It does so using original field research, including courtroom

6. Another emergent category of non-statutory DNA databases is *police-run* databases, filled with a hodgepodge of “volunteered” and “abandoned” samples from suspects and victims. *See, e.g.*, 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, 669 (2014); Jason Kreag, *Going Local: The Fragmentation of Genetic Surveillance*, 95 B.U. L. REV. 1491 (2015). “Spit and Acquit” is different from these databases in that it is run by prosecutors, is vastly bigger in scope, and operates through the plea negotiation or dismissal process. *See discussion infra* Section I.B.2. Also, police have recently worked outside of CODIS by uploading crime scene profiles to commercial and open-source genealogy databases to search for a partial match, who might be a distant relative of the perpetrator. *See, e.g.*, Daniela Hernandez, Zolan Kanno-Youngs & Zusha Elinson, *Use of Genealogy Data to Track Golden State Killer Raises Privacy Questions*, WALL. ST. J. (Apr. 28, 2018), <https://www.wsj.com/articles/use-of-genealogy-data-to-track-golden-state-killer-raises-privacy-questions-1524913201?ns=prod/accounts-wsj> [<https://perma.cc/N68D-KAMX>]. Police use of these sites also raises profound privacy questions, but does not involve routine comparison between crime scene profiles and profiles in mass government-created offender databases. I address the unique issues raised by this practice in future collaborative work.

7. *See discussion infra* Part I.B.

8. “Spit and Acquit” is actually a misnomer: it is an umbrella term for the varying plea deals ending in a DNA sample, but none actually involves acquittal at trial. Also, the sample is a cheek swab.

9. When a person gives DNA to OCDA, the office both stores the person’s physical DNA sample indefinitely and also uploads the person’s DNA profile to the office’s DNA database. *See infra* Part I.B.

10. As of January 3, 2017, the database had 149,812 defendant profiles. *See Letter from Denise Hernandez, Deputy District Attorney, Special Prosecutions Unit, Orange Cty., CA, to author* (Jan. 17, 2017) (on file with author). The office expects to add between 13,000 and 20,000 samples each year. Contract MA-026-14010833 for DNA Testing Services between OCDA and Bode Technology Group, Inc. 18 (on file with author).

11. *See CODIS—NDIS Statistics, supra* note 2 (listing the size of each state offender database, many of which are around or smaller than 150,000 profiles).

12. While this Article is the first to offer a comprehensive, on-the-ground portrait of Spit and Acquit, a handful of commentators have discussed various legal and policy concerns with it. *See Linda Bartusiak, Plea Bargaining for DNA: Implications on the Right to Privacy*, 13 U. PA. J. CONST. L. 1115 (2011) (arguing that Spit and Acquit raises privacy concerns); 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) (arguing that Spit and Acquit’s seventy-five dollar fee might be an “excessive fine” under the Eighth Amendment); Elizabeth N. Jones & Wallace Wade, *“Spit and Acquit”: Legal and Practical Ramifications of the DA’s DNA Gathering Program*, ORANGE COUNTY LAW. MAG., Sept. 2009 (arguing that Spit and Acquit raises privacy issues for defendants and

observations, public record disclosures, recordings of Board of Supervisor meetings, and interviews with defendants, prosecutors, defense attorneys, judges, and legislators. As the largest forensic DNA database in the country never authorized by a legislature, Spit and Acquit is worthy of study in its own right. But it is also a case study of prosecutors as “surveillance entrepreneurs,” who have created their own proprietary surveillance program beyond what any democratically-elected legislature has contemplated. It thus offers a glimpse of how prosecutors use their charging discretion not only to influence a defendant’s conviction and punishment,<sup>13</sup> but also to create a sweeping surveillance practice affecting tens of thousands of people.

In Part I, the Article offers a descriptive account of the phenomenon of prosecutorial DNA databasing and how it differs from legislatively created databases in significant ways that affect its public accountability and efficacy. In Part II, I argue based on available data that Spit and Acquit as a surveillance policy compares unfavorably to legislatively created databases with respect to public safety, genetic privacy, and democratic accountability.

Part III of the Article offers broader lessons from Spit and Acquit. First, Spit and Acquit offers lessons for prosecutorial innovation. To be sure, prosecutorial policymaking may sometimes be more effective than legislative policymaking.<sup>14</sup> But Spit and Acquit reveals the pitfalls of prosecutorial policies that target low-risk populations and rely on funding from grants and fees rather than legislative appropriations. Second, Spit and Acquit offers lessons for the future of DNA databasing, given that it is the closest thing this country has to a universal citizen database, and is the only “consensual” database other than commercial and open-source genealogy databases.<sup>15</sup> Third and finally, Spit and Acquit offers lessons for the future of criminal justice. If, as one Orange County attorney put it, “I do not think it’s an exaggeration to say that a main point of [OCDA’s] misdemeanor practice is to populate their [DNA] database,”<sup>16</sup> then Spit and Acquit raises a broader, and more troubling, question: why are its targets prosecuted in the first place? The prosecution of marginal petty misdemeanor cases has allowed prosecutors to create a vast genetic surveillance system that would otherwise not exist. The use of misdemeanor court in this way lends renewed urgency to the call of Norval Morris and Gordon Hawkins forty years

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ethical issues for prosecutors); ERIN E. MURPHY, *INSIDE THE CELL* 165–66 (2016) (describing Spit and Acquit as a coercive means of obtaining DNA “voluntary[ly]”).

13. See generally Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2145 (1998) (arguing that prosecutors have largely replaced juries and judges in the determination of guilt and punishment).

14. See generally Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 *TEMPLE POL. & C.R. L. REV.* 369 (2010) (arguing that the American system of prosecutorial discretion is a better model than a legislatively driven, largely discretionless prosecution system such as Germany’s).

15. See Hernandez, Kanno-Youngs & Elinson *supra* note 6 (discussing the use of the GEDmatch genealogical database in the Golden State Killer case).

16. Email from Defense Attorney 208 to author (Jan 31, 2017) (on file with author).

ago to develop an “administrative law of crime” to deal with regulatory offenses outside the criminal adjudicative process.<sup>17</sup>

## I.

### PROSECUTORIAL DNA DATABASING AS A NEW AND UNDER-SCRUTINIZED FORM OF GENETIC SURVEILLANCE

This Section first describes the controversy over government DNA collection in the United States, explaining how the debate has focused nearly exclusively on statutory offender databases.<sup>18</sup> It then introduces the reader to “Spit and Acquit,” a DNA databasing practice in Orange County created by prosecutors which expands DNA collection well beyond existing databases. Finally, it offers a detailed comparison of Spit and Acquit and legislatively created DNA collection regimes.

#### A. *The Existing Debate’s Focus on Statutory DNA Database Expansion*

To see why the lack of scrutiny of Spit and Acquit is so notable, it is helpful to understand the extent and focus of the controversy over existing statutory databases. Although statutory databases are far more limited in scope than Spit and Acquit, their expansion has been controversial. As discussed in greater detail below, critics have argued that database expansion offers diminishing returns in terms of law enforcement or exoneration benefit; includes opportunity costs in public safety; threatens genetic privacy; ensnares the innocent in criminal investigations; and exacerbates racial inequities in policing.

Statutory databases together constitute a nationally linked network of offender databases known as “CODIS.”<sup>19</sup> As of October 2018, CODIS contains over thirteen million offender profiles and three million arrestee profiles.<sup>20</sup> But back in the 1990s, most databases included only those convicted of sex offenses, murder, and assault, with a minority of states adding other serious felonies.<sup>21</sup> In 2004, Congress began requiring a sample from all convicted felons, and offered

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17. See Albert Alschuler et al., *In Memoriam: Norval Morris (1923–2004)*, 72 U. CHI. L. REV. 455, 459 (2005) (attributing the concept of an “administrative law of crime” to Morris and Hawkins in their 1977 “Letter to the President on Crime Control”).

18. The one notable exception has been the handful of scholars and journalists noting the existence of police-run non-CODIS databases filled with victim elimination samples, abandoned DNA, and DNA gratuitously “volunteered” by suspects. See *supra* note 6.

19. CODIS is a software and data sharing system created by the FBI. See Combined DNA Index System (CODIS), FBI, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis> [<https://perma.cc/4BT3-8MMU>]. CODIS links existing local, state, and federal offender DNA databases into one big searchable database. Assuming certain requirements are met, local and state law enforcement can swiftly search this unified database. See Rockne Harmon, *The Power of LDIS*, FORENSIC MAG., Apr. 16, 2013 (explaining the three tiers of CODIS: federal, state, and local).

20. See *CODIS—NDIS Statistics*, *supra* note 2.

21. See David H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413, 417 & n.10. (2003).

states money to collect DNA from those convicted of certain serious felonies.<sup>22</sup> In 2009, Congress went one step further and authorized federal officials to take DNA from those merely arrested for felonies.<sup>23</sup> Thirty-one states followed suit.<sup>24</sup> This expansion of CODIS beyond serious felonies garnered both policy objections and constitutional challenges from civil libertarians.<sup>25</sup>

While numerous jurisdictions have added arrestees or those convicted of lower-level felonies to their databases, legislatures have generally not pursued further expansions. For example, states have thus far excluded petty misdemeanors and created safeguards for those arrested for but not convicted of crimes. Only two states—Wisconsin and New York—authorize collection for all misdemeanor convictions.<sup>26</sup> Many states, such as California, limit qualifying convictions to felonies or violent sex- or death-related misdemeanors.<sup>27</sup> Meanwhile, a significant minority of states have not even expanded their statutes to include arrestees.<sup>28</sup> Those that have require DNA only for felony arrests and sex-related misdemeanor arrests, and allow arrestees to request expungement of their profile from the database if their case is dismissed or if a jury acquits.<sup>29</sup> Indeed, eleven of the twenty-nine states with arrestee sampling offer automatic expungement upon dismissal or acquittal, with no action required by the arrestee.<sup>30</sup>

The objections from civil libertarians and other groups against further CODIS expansion relate to several different issues. A brief summary of the criticisms of existing databases follows:

*Diminishing returns in terms of law-enforcement and exoneration value.* Proponents of offender DNA databases cite their crime-solving and deterrent values, including their power to exonerate the innocent.<sup>31</sup> It is true that state and

22. See Justice for All Act of 2004, Pub. L. No. 108-405, § 203(b) (codified at 42 U.S.C. § 13701) (adding “[a]ny felony” as a qualifying offense requiring DNA collection under federal law).

23. The DNA Fingerprint Act of 2005, Pub. L. No. 109-162, § 1004(a) (codified at 42 U.S.C. § 14135a (a)(1)(A)), went into effect in 2009. See 28 C.F.R. § 28.12(b) (2010).

24. See NAT’L CONFERENCE OF STATE LEGISLATURES, DNA ARRESTEE LAWS (2018), [http://www.ncsl.org/Documents/cj/Arrestee\\_DNA\\_Laws.pdf](http://www.ncsl.org/Documents/cj/Arrestee_DNA_Laws.pdf) [https://perma.cc/LHE4-UTSN] [hereinafter NCSL ARRESTEE (2018)].

25. See, e.g., Kaye & Smith, *supra* note 21, at 414 (noting objections from civil liberties groups and litigants even to DNA collection as it existed in 2003); Petition for Writ of Certiorari at 8, *Maryland v. King*, 569 U.S. 435 (2013) (No. 12-207) 2012 WL 3527847 (noting a circuit split on the constitutionality of arrestee sampling).

26. NCSL ARRESTEE (2018), *supra* note 24, at 2 (stating that eight states require DNA from certain enumerated misdemeanors; all other arrestee-sampling states limit sampling to felonies); NAT’L CONFERENCE OF STATE LEGISLATURES, CONVICTED OFFENDERS REQUIRED TO SUBMIT DNA SAMPLES 1 (2013) [hereinafter NCSL Convicted Offender Laws (2013)].

27. See, e.g., NCSL ARRESTEE (2018), *supra* note 24, at 2; NCSL Convicted Offender Laws (2013), *supra* note 26, at 1; Cal. Penal Code § 296(a)(1)-(4) (listing qualifying misdemeanors).

28. NCSL ARRESTEE (2018), *supra* note 24, at 2.

29. *Id.*

30. *Id.*

31. DNA also can exonerate the innocent. Since 1989, at least 350 people have been publicly exonerated by DNA—often by a match between the evidence sample and someone else in an offender

federal databases have, according to the FBI, led to over 435,887 “hits”—that is, matches between a crime scene DNA profile uploaded to CODIS for comparison with profiles housed in the database. CODIS has thereby “aided” 424,268 investigations.<sup>32</sup> But this sort of hit rate alone is a questionable basis for determining a DNA database’s crime-solving value. For example, hits may not lead to arrest or conviction; even when they do, some might have been alternatively obtained through persuasive non-DNA evidence of guilt in those cases (such as confessions, eye witnesses, or video recordings).<sup>33</sup> Even assuming that each hit holds some value in detecting and prosecuting crimes, hit rate alone is insufficient to conclude that database expansion beyond conviction of serious crimes—say, to petty misdemeanors or arrestees—has a significant public safety benefit, because nearly all hits are to DNA profiles of people with murder or sexual assault convictions.<sup>34</sup>

Finally, studies on deterrent effects of DNA databases are more promising but do not indicate a clear law enforcement return for further expansion to arrestees or misdemeanants.<sup>35</sup> The only existing academic paper exploring the effect of CODIS on crime rates found that (1) a “serious violent” or “serious property” offender’s DNA in the database correlates with a reduced likelihood that that offender will commit a new conviction within five years of release; and (2) between 2000 and 2010, “increasing the size of state databases lowered crime

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database. See *Exonerated by DNA*, INNOCENCE PROJECT, <https://www.innocenceproject.org/all-cases/#exonerated-by-dna> [<http://perma.cc/YPL6-P7HU>]. DNA’s exonerating power, however, is significantly limited by the low number of crime scenes tested for DNA, as well as defendants’ lack access to testing. See Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 116–18 (2008).

32. See *CODIS—NDIS Statistics*, *supra* note 2.

33. See SHELDON KRIMSKY & TANIA SIMONCELLI, *The Efficacy of DNA Databanks, in* GENETIC JUSTICE: DNA DATA BANKS, CRIMINAL INVESTIGATIONS, AND CIVIL LIBERTIES 305, 307 (2010). Hit rate alone is also a problematic metric, without further context, because any given “hit” might also be the result of coincidence, innocent presence, justifiable or consensual noncriminal conduct, DNA transfer, contamination, or malfeasance. See discussion *infra* notes 49–53. Hit rate should also be judged in light of the size and age of the database and the number of total crime investigations in the jurisdiction. KRIMSKY & SIMONCELLI, *supra* note 33, at 308.

34. A 2013 Urban Institute study concluded that existing data do not reveal how many hits have occurred uniquely as a result of adding felony arrestees. JULIE E. SAMUELS ET AL., URBAN INSTITUTE, *COLLECTING DNA AT ARREST: POLICIES, PRACTICES, AND IMPLICATIONS* 79–80 (May 2013). Some argue that inclusion of arrestees whose cases are dismissed or end in acquittals makes little sense, given that such arrestees are more likely to be factually innocent. See, e.g., *id.*; *Maryland v. King*, 569 U.S. 435, 482 (2013) (Scalia, J., dissenting) (arguing that Maryland’s arrestee database “manages to burden uniquely the sole group for whom the Fourth Amendment’s protections ought to be most jealously guarded: people who are innocent of the State’s accusations”). Meanwhile, few studies exist on low-level offenders’ rate of committing serious crimes, and those that do lend little support for database expansion to petty misdemeanors. See, e.g., ISSA KOHLER-HAUSMANN, HUMAN RIGHTS WATCH, *A RED HERRING: MARIJUANA OFFENDERS DO NOT BECOME VIOLENT FELONS* 1, 26 (2012) (finding that the rate of felony conviction among 30,000 New York marijuana possession arrestees “appears to be lower than the rate of felony conviction for the national population, taking into account age, gender, and race”).

35. Jennifer L. Doleac, *The Effects of DNA Databases on Crime 2* (Stanford Institute for Economic Policy Research, Discussion Paper No. 12-002, Aug. 2016) (on file with author).



rates.”<sup>36</sup> But this study on its terms says little about the benefit of expanding databases to arrestees or misdemeanants. It may be that those convicted of serious offenses are the primary ones who need to be deterred from committing future offenses that are serious enough to be solved by DNA. Petty offenders or arrestees whose cases have been dismissed might be so unlikely to commit future non-petty crimes that any theoretical deterrent effect has little added public safety benefit.

*Opportunity costs affecting public safety.* Critics also argue that CODIS expansion to arrestees might actually hinder, rather than support, crime control. First, some critics have argued that forcible DNA collection of more and more offenders exacerbates existing testing backlogs in laboratories. Without a new wave of offender samples to test, laboratories might be able to make better progress toward eliminating backlogs in testing crime scene samples. In turn, these critics argue, the law enforcement benefit in testing more crime scene samples for comparison to those offenders currently in the database is likely much higher than the law enforcement benefit in adding even more offenders in the database.<sup>37</sup> Others have argued that DNA database expansion expends resources better used to “place officers on the streets.”<sup>38</sup>

*Genetic privacy.* Critics of database expansion also invoke concerns about genetic privacy. The first concern is that when one gives a mandatory DNA sample, the state retains the full physical DNA sample,<sup>39</sup> containing the defendant’s full “genome,” or set of genes.<sup>40</sup> That full genome contains a treasure trove of information about one’s familial relationships, genetic traits, propensity for diseases, and the like. In turn, the state could misuse this sensitive data for intrusive purposes, such as blackmail or invidious research.<sup>41</sup>

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36. *Id.*

37. *See, e.g.,* KRIMSKY & SIMONCELLI, *supra* note 33, at 318–19; MURPHY, *INSIDE THE CELL*, *supra* note 12, at 271 (“The number of hits per year seems to more closely track the addition of forensic, crime-scene samples than known individual samples.”); Brief of 14 Scholars of Forensic Evidence as Amici Curiae Supporting Respondent at 3, *Maryland v. King*, 569 U.S. 435 (No. 12-207), 2013 WL 476046.

38. KRIMSKY & SIMONCELLI, *supra* note 33, at 319–20 (describing Alameda County District Attorney Rockne Harmon’s complaint that Proposition 69 took away resources needed to “place officers on the streets”).

39. *See, e.g.,* Brief for the Respondent at 8, *Maryland v. King*, 569 U.S. 435 (2013) (No. 12-207), 2013 WL 315233 (explaining that the Maryland statute authorizes both upload of DNA profiles and the indefinite retention of DNA samples of those arrestees eventually convicted).

40. *See* Murphy, *The Art in the Science of DNA*, *supra* note 1, at 494 (describing the difference between a DNA forensic profile and the full, “incredibly long” genome).

41. *See, e.g.,* Brief for Public Defender Service for the District of Columbia as Amicus Curiae Supporting Respondent at 11, *Maryland v. King*, 569 U.S. 435 (No. 12-207), 2013 WL 417726 (explaining that by allowing use of the database for “research,” the Maryland statute left the door open for abuse). For 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. *See* Amy Harmon, *Indian Tribe Wins Fight to Limit Research of Its DNA*, N.Y. TIMES (Apr. 21, 2010),

Second, even the much more limited DNA “profile” uploaded to the DNA database itself could reveal sensitive genetic data. As explained previously, a forensic DNA profile is not one’s full genetic code.<sup>42</sup> Rather, it is a list of numbers corresponding to the genetic markers one has at certain locations in regions of so-called junk DNA.<sup>43</sup> At the time of *Maryland v. King*, where the Supreme Court upheld the constitutionality of Maryland’s felony arrestee database against a Fourth Amendment challenge, the Court assumed that this list of “junk” was akin to a fingerprint, and could not reveal anything sensitive about one’s genetic traits.<sup>44</sup> Recently, however, research has cast doubt on that premise.<sup>45</sup> In October 2018, a groundbreaking study revealed the ability to match forensic DNA profiles in offender databases to relatives’ DNA information in commercial genealogy websites, based on genetic markers previously unknown to overlap between the two entirely different types of testing employed.<sup>46</sup>

*Ensnaring the innocent.* Researchers have also argued that database expansion increases the chance of an innocent person being wrongfully accused. The chance that an innocent person might coincidentally match a crime-scene DNA profile is generally exceedingly low,<sup>47</sup> although higher in cases with degraded or low-quantity crime scene samples.<sup>48</sup> But an innocent person might also be falsely implicated through an erroneous or misleading match resulting

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<https://www.nytimes.com/2010/04/22/us/22dna.html> [<https://perma.cc/5L93-3RW6>]. Such data could also be subject to hacking or other security breaches, exposing genetic data to third parties.

42. *See supra* note 1.

43. *King*, 569 U.S. at 442, 451.

44. *Id.* at 444–45.

45. *See* Michael D. Edge et al., *Linkage Disequilibrium Matches Forensic Genetic Records to Disjoint Genomic Marker Sets*, 114 PROC. NAT’L ACAD. SCI. 5671, 5674 (2017), <http://www.pnas.org/content/early/2017/05/09/1619944114.full> [<https://perma.cc/C85J-RBNH>] (noting that STR profiles can be matched to SNP data).

46. Jaehee Kim et al., *Statistical Detection of Relatives Typed with Disjoint Forensic and Biomedical Loci*, 175 CELL 848, 848 (Oct. 18, 2018) (noting that “phenotypes,” or identifiable genetic traits, “that are possible to predict from a [genealogy website] profile” created with SNP testing “could potentially be predicted from a CODIS profile” created with STR testing). This new understanding of the link between STR junk profiles and SNP data goes beyond the new investigative techniques used to arrest the suspect in the Golden State Killer case in April 2018. In that case, law enforcement developed a SNP profile from crime scene evidence and directly compared it to SNP data in the open source genealogy website GEDMatch. *See* Justin Jouvenal, *To Find Alleged Golden State Killer, Investigators First Found His Great-Great-Great Grandparents*, WASH. POST (Apr. 30, 2018), [https://www.washingtonpost.com/local/public-safety/to-find-alleged-golden-state-killer-investigators-first-found-his-great-great-great-grandparents/2018/04/30/3c865fe7-dfcc-4a0e-b6b2-0bec548d501f\\_story.html?utm\\_term=.b229fce99969](https://www.washingtonpost.com/local/public-safety/to-find-alleged-golden-state-killer-investigators-first-found-his-great-great-great-grandparents/2018/04/30/3c865fe7-dfcc-4a0e-b6b2-0bec548d501f_story.html?utm_term=.b229fce99969) [<https://perma.cc/UGW7-M9TD>] (explaining that police sent crime scene samples to a lab that “converted the sample into a format that could be read by GEDmatch”).

47. *See, e.g.*, *People v. Cordova*, 358 P.3d 518, 535 (2015) (reporting results of “Identifiler” DNA testing, which tests 16 genetic locations, and showing that only 1 in every 134 billion Caucasians would likely share the matching profile).

48. *See, e.g.*, Andrea Roth, *Safety in Numbers? Deciding When DNA Alone Is Enough to Convict*, 85 N.Y.U. L. REV. 1130, 1131, 1134 n. 15 (2010) (discussing a California case with a degraded sample and a random match probability of 1 in 1.1 million, and noting that in a database of 2 million men, one would expect to find at least 2 profiles that match the crime scene profile purely by chance).

from malfeasance,<sup>49</sup> interpretive error,<sup>50</sup> presence of one's DNA because of "transfer" to another person,<sup>51</sup> innocent presence at the scene, or contamination of the sample.<sup>52</sup> Indeed, there have already been at least sixteen documented cases of innocent people falsely accused of crimes due to "cold hits" from laboratory cross-contamination, mislabeling of samples, or interpretive errors.<sup>53</sup>

*Exacerbated racial inequities in crime investigation.* CODIS expansion has also been criticized on grounds that no more people of color should be placed under genetic surveillance.<sup>54</sup> A more difficult empirical question is whether the expansion of state and federal offender databases to include arrestees has increased racial disparities—that is, the percentage of those in the database who are people of color. Some data from California, though not complete, suggests that such disparities might not have risen with the inclusion of arrestees.<sup>55</sup>

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49. See, e.g., 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, 626 (2009) (describing the potential for malicious planting of DNA evidence).

50. See, e.g., Murphy, *The Art in the Science of DNA*, *supra* note 1, at 503–08 (discussing various sources of interpretive error).

51. See, e.g., Osagie K. Obasogie, Opinion, *High-Tech, High-Risk Forensics*, N.Y. TIMES (July 24, 2013), <https://www.nytimes.com/2013/07/25/opinion/high-tech-high-risk-forensics.html> [<https://perma.cc/C4RJ-5SQ3>]. (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). Transfer of one's DNA onto certain surfaces such as cotton or glass might occur with a simple touch between people. See V.J. Lehmann et al., *Following the Transfer of DNA: How Far Can It Go?*, 4 FORENSIC SCI. INT'L: GENETIC SUPPLEMENT SERIES e53, e53–54 (2013).

52. See, e.g., Erin E. Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CALIF. L. REV. 721, 755 n.151 (2007) (discussing an example of a cold hit due to contamination); William C. Thompson, *Tarnish on the "Gold Standard."* *Understanding Recent Problems in Forensic DNA Testing*, 30 CHAMPION 10, 10, 13–14 (2006) (discussing two cold hits caused by contamination).

53. William C. Thompson, *Forensic DNA Evidence: The Myth of Infallibility*, in GENETIC EXPLANATIONS: SENSE AND NONSENSE 227, 229–32 (Sheldon Krinsky & Jeremy Gruber eds., 2013).

54. See, e.g., Michael T. Risher, *Racial Disparities in Databanking of DNA Profiles*, in RACE AND THE GENETIC REVOLUTION: SCIENCE, MYTH, AND CULTURE 47, 50–51 (Sheldon Krinsky & Kathleen Sloan eds., 2011) (arguing that any further expansion that increases the number of minorities in the database is not desirable, for that reason).

55. Although there is no direct data on whether California's inclusion of arrestees in its DNA databasing programs has affected racial disparities, an inference can be drawn from racial disparities in the number of total convictions and arrests. For example, in 2016 and 2017, about 16% of arrestees in California were black. See CAL. DEP'T OF JUSTICE, CRIME IN CALIFORNIA 33 (2017), <https://openjustice.doj.ca.gov/resources/publications> [<https://perma.cc/SNY5-FRGT>] [hereinafter CRIME IN CALIFORNIA] (180,289 arrests of black individuals out of 1,113,428 arrests in 2016; 177,357 arrests of black individuals out of 1,090,253 arrests in 2017). Among those actually charged with a felony in 2016, 20.2% were black. JUDICIAL COUNCIL OF CAL., DISPOSITION OF CRIMINAL CASES ACCORDING TO THE RACE AND ETHNICITY OF THE DEFENDANT: 2017 REPORT TO THE CALIFORNIA LEGISLATURE AS REQUIRED BY PENAL CODE SECTION 1170.45 14 (2017), <http://www.courts.ca.gov/documents/lr-2017-PC1170-report.pdf> [<https://perma.cc/MXH5-TQ34>] [hereinafter 2017 DISPOSITION REPORT]. In contrast, whites accounted for 36.9% of arrests in 2016, CRIME IN CALIFORNIA, *supra* note 55, while only 32.6% of felony defendants. 2017 DISPOSITION REPORT, *supra* note 55. To be sure, these data do not differentiate between felony and misdemeanor arrests, do not make clear what level of charge defendants face in relation to the offense of arrest, and

*Conclusion.* In sum, legislative expansion of DNA collection beyond those convicted of serious crimes has been controversial, both as a legal matter and as a policy matter. Ironically, while the public and judicial debate about legislative databases rages on, prosecutors in Orange County, California, have without much fanfare assembled a proprietary DNA database and storage facility to permanently house the DNA of 150,000 people accused or convicted only of nonviolent misdemeanors. The remainder of this Section describes how the Orange County practice of Spit and Acquit has expanded DNA databasing well beyond the limits of existing statutory databases.

*B. “Spit and Acquit”: Orange County’s Prosecutor-Run DNA Database*

The following description of Spit and Acquit draws on original data collected from courthouse observations,<sup>56</sup> public records requests,<sup>57</sup> transcriptions of public Board of Supervisors hearings, legislative histories, and interviews with twenty-six defense attorneys, judges, prosecutors, legislators,

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do not include ethnicity data on convictions, which the state apparently does not report. *See* CRIME IN CALIFORNIA, *supra* note 55, at 53. But the data do suggest that whites might actually make up a higher percentage of arrestees whose cases are dismissed than of those eventually charged, which in turn suggests that expansion to arrestees might decrease, rather than increase, certain racial disparities.

56. In February 2016, I observed two days of misdemeanor out-of-custody arraignment court and prosecutor-defendant interactions at Orange County’s largest courthouse in downtown Santa Ana.

57. OCDA disclosed contracts with biotechnology company Bode Cellmark Forensics, Inc.; the current size of the database (149,812 individual profiles and 9,088 crime scene profiles, 243 of which are from outside Orange County); the fact that OCDA’s case management system does not record the age of defendants or whether they had counsel; and the fact that OCDA keeps no misdemeanor disposition data. Letter from Denise Hernandez to author, *supra* note 10. OCDA also sent me the DNA waiver form and felony disposition data in response to an informal request. OCDA denied all other requests—including for information on ethnic makeup of the database and on disposition of hits—on grounds of privilege or exemption. *Id.* I also received, in response to requests from Orange County Superior Court, a spreadsheet of felony and misdemeanor filing data and felony disposition data for each of the county’s four courthouses for the years 2005–2017. The Court reported that misdemeanor disposition data is unavailable before 2010. Letter from Jeff Wertheimer, General Counsel, Orange Cty. Super. Ct., to author (May 19, 2017) (on file with author). *See also* E-mail from Gwen Vieau, Public Information Office, Orange Cty. Super. Ct., to Jeremy Isard (Mar. 16, 2017) (on file with author) (explaining that there is no misdemeanor disposition data from before 2010).

defendants, and other sources,<sup>58</sup> primarily recruited through “snowball sampling.”<sup>59</sup>

In April 2007, OCDA began the discretionary practice of Spit and Acquit, where prosecutors offer dismissals and pleas to certain defendants in misdemeanor court in exchange for a DNA cheek swab.<sup>60</sup> At first, OCDA contracted with the United Kingdom’s Forensic Science Service (FSS) to test the collected swabs, and bought software from FSS to house all the resulting DNA profiles in a proprietary database.<sup>61</sup> Since 2009, OCDA has contracted with Bode Cellmark Forensics, a Virginia biotechnology company, to test samples.<sup>62</sup> Once Bode tests a sample and develops and reports the resulting DNA profile, OCDA uploads the profile to its proprietary database. Where a defendant gives a swab as part of a plea negotiation rather than a straight-out dismissal, OCDA not only uploads the profile to its own database, but also forwards the profile to the California Department of Justice for inclusion in the state database (and, eventually, CODIS).<sup>63</sup>

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58. I received approval from the UC Berkeley human subjects research committee for these interviews, as did my collaborators at UC Irvine. Sampling was circumscribed by jurisdiction. I conducted 24 interviews between January 2016 and May 2017, either on the phone or in person in Orange County. Collaborators at UC Irvine conducted 2 in-person interviews of defendants. I interviewed 10 defense attorneys and public defenders; 2 Superior Court judges; 2 defendants; 1 state legislator; 4 prosecutors; and 5 confidential sources. No interviews were recorded. All informants were white, with the exception of two Latino men and one Latina woman. Many informants did not speak on condition of anonymity, but I generally do not refer to their names. I also conducted archival research of publicly available arrest, filing, and disposition data from California’s Department of Justice and Judicial Council, legislative histories, the report of a 2010 investigation by the Orange County grand jury into the potentially duplicative nature of OCDA’s DNA program, media and scholarly accounts, and OCDA’s annual reports.

59. “Snowball sampling” is a research method that begins with a group of known informants who go on to identify further interviewees. Although snowball sampling has drawbacks, it allowed me to speak with people in multiple roles who are familiar with Spit and Acquit. To reduce bias, and to triangulate my account of how Spit and Acquit operates, I included informants with differing perspectives and competing roles, such as defense attorneys, prosecutors, former prosecutors, and judges. The only exceptions to snowball sampling were prosecutors interviewed because of their roles in the DNA and Research Units at OCDA, and judges whom I identified as relevant because they had presided over arraignments for several years of the program. All those I approached agreed to be interviewed, with a few exceptions: two additional judges whom I contacted but who never responded, and an executive at Bode who confirmed the company’s relationship with OCDA but would not speak further, citing a confidentiality agreement. *See* E-mail from Andrew Singer, Director, Sales and Marketing, Bode Technology Group, Inc., to author (Jan. 26, 2016) (on file with author).

60. *See* OCDA, EFFECTIVELY UTILIZING DNA TECHNOLOGY TO SOLVE CRIME IN ORANGE COUNTY: 2009–2010 ANNUAL REPORT 14, [https://projects.nfstc.org/fse/pdfs/ocda\\_dna\\_report\\_2010.pdf](https://projects.nfstc.org/fse/pdfs/ocda_dna_report_2010.pdf) [<https://perma.cc/4HLE-R4SV>] [hereinafter OCDA 2009–2010 ANNUAL REPORT].

61. *Id.* at 12.

62. *See* Interview with Prosecutors 1 and 2 (Feb. 23, 2016); *see also* Contracts between OCDA and Bode Technology Group, Inc. 2011–2013 (on file with author).

63. *See* Interview with Prosecutors 1 and 2, *supra* note 62. Profiles uploaded to the state database will also be uploaded to CODIS, the national network of linked local, state, and federal offender databases. *See id.*; *supra* note 19 (explaining CODIS). CODIS requires states to comply with certain safeguards before uploading state offender profiles, such as testing a minimum number of genetic

*How OCDA approaches defendants to offer the DNA deal.* OCDA charges around 60,000 to 80,000 people a year with misdemeanors.<sup>64</sup> Nearly all are out of custody and arraigned in a large public courtroom. The few in custody (typically on a bench warrant, probation, or parole violation) are arraigned in a small room at a jail facility in Santa Ana, with the public watching on closed circuit television.<sup>65</sup> Defendants offered a DNA deal are generally not represented by counsel,<sup>66</sup> although they can request a postponement of arraignment to retain counsel or be interviewed for eligibility for a public defender. Most do not request a lawyer; according to one judge, 75 to 80 percent of misdemeanors in Orange County resolve on the first appearance through a plea or dismissal without an attorney.<sup>67</sup> In any event, most defendants, around 15,000 per year, accept the deal when offered.<sup>68</sup>

Prosecutors offer the deal by calling out the names of certain defendants and briefly meeting with them as a group in the hallway to explain the terms of the offer.<sup>69</sup> The prosecutor addresses each defendant in turn and offers a deal: either a flat-out dismissal or plea to lesser charges, on the condition that they submit a DNA sample down the hall at the District Attorney DNA Collection Office.<sup>70</sup> For example, I saw a prosecutor tell one defendant, “if you’re willing

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locations and using accredited laboratories. See *Frequently Asked Questions on CODIS and NDIS*, FBI, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet> [<https://perma.cc/HSQ9-Y72F>] (answer to question 18). The samples taken by OCDA pursuant to plea negotiations and tested by Bode meet CODIS requirements. See Interview with Prosecutors 1 and 2, *supra* note 62. See also Cal. Penal Code § 296 (2004) (allowing profiles of those giving samples pursuant to plea negotiations to be included in the state database).

64. Spreadsheet of Orange Cty. Misdemeanor Data provided by Orange Cty. Super. Ct. (May 19, 2017) (on file with author).

65. Interview with Public Defender 2 (Feb. 2, 2017).

66. *Id.* One public defender reported that some defendants in custody at the time of arraignment have no lawyer when they decide to take a DNA deal and are released. *Id.* Presumably, any defendant facing further detention would have a lawyer at arraignment.

67. Interview with Orange Cty. Super. Ct. Judge 1 (Mar. 15, 2016). Courts are constitutionally required to appoint counsel in misdemeanor cases only if the defendant is actually sentenced (including a suspended sentence) to a period of incarceration. See *Scott v. Illinois*, 440 U.S. 367, 383–84 (1979).

68. The database has existed for ten years and has around 150,000 profiles listed.

69. The line prosecutors I observed all made clear they were not the defendants’ attorneys and that the defendants could ask to speak with an attorney if they wanted to. Of the several defendants I witnessed, none asked for a lawyer.

70. The prosecutor offers some defendants the “DNA Dismissal Program,” a flat-out dismissal of their case, with no community service or treatment requirements. Response to 2009–2010 Grand Jury Report from Tony Rackauckas, OCDA, to Judge Kim Dunning, Orange Cty. Super. Ct. app. A, 21–22 (July 27, 2010), <http://www.ocgrandjury.org/pdfs/DNA/ocda-response.pdf> [<https://perma.cc/Q3V3-PV3F>] [hereinafter OCDA Response to 2009–2010 Grand Jury Report]. On February 9, 2016, the day I observed arraignment court, I witnessed one man receive a no-conditions DNA dismissal on a public intoxication charge. OCDA represented to me that there are now only specialized situations where a line District Attorney will offer a no-conditions dismissal. Interview with Prosecutors 1 and 2, *supra* note 62. The prosecutor offers others a “Deferred Entry of Judgment” (DEJ) option: the defendant pleads guilty and, if they give their DNA and fulfill certain conditions over a ninety-day period such as community service or life skills classes their plea is vacated and case dismissed. *Id.* Still others are

to give a DNA sample, we would dismiss this case. It costs seventy-five dollars to give a sample.” The District Attorney explained that the defendant would put a “cotton swab” in his mouth and the sample would be “put into a database.”<sup>71</sup> The District Attorney then told him, “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>72</sup> The defendant responded, “OK, that’s fine,”<sup>73</sup> and walked down the hall.<sup>74</sup>

*Defendant acceptance of the deal.* If a defendant agrees to the deal, the prosecutor hands them a one-page waiver form (attached as Appendix A), affirming that the defendant understands they are providing DNA “for permanent retention”; that their DNA can be “checked and/or searched against other DNA”; that they waive the right to challenge whether the sample was obtained or used illegally; and that they must pay a seventy-five dollar fee.<sup>75</sup>

*Judicial acceptance of the deal.* Once the defendant gives a sample, they come back to arraignment court for the judge to accept the plea or dismiss the case. I only saw one defendant ask a judge a question about the deal upon coming back to court. After they asked about what rights they were giving up by signing 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 after the dismissal.<sup>76</sup>

Notably, some judges refuse to approve certain plea deals conditioned on giving DNA, presumably out of concern that the deal is coercive or oversteps the bounds of prosecutorial power.<sup>77</sup> In response to these occasional judicial refusals, OCDA began offering yet another option to some defendants: “DA Continuances.”<sup>78</sup> In a DA Continuance, the District Attorney requests a

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offered a more traditional plea deal, in which the state dismisses certain counts on the condition that the defendant pleads guilty to the remaining count(s) and submits a DNA sample. *Id.*

71. See Notes of Author, Feb. 9, 2016 (from observation of Santa Ana arraignment court and hallway conversations).

72. *Id.* 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, both of which were substantially similar.

73. 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.

74. Many defendants represented by counsel (including all those charged with a felony, or misdemeanor defendants who retain counsel) also receive a DNA offer. The prosecutor offers the deal through the attorney, either in arraignment court or, if the defendant pleads not guilty at the first appearance, at a later hearing date. All defense attorneys with whom I spoke confirmed this practice.

75. OCDA DNA Collection Waiver Form, Version 1.05 R12-10, *infra* App. A.

76. Interview with Judge Jeannie Joseph, C-54, Orange Cty. Super. Ct. Central Justice Center (Feb. 9, 2016).

77. Interview with Orange Cty. Super. Ct. Judge 1, *supra* note 67.

78. See Offender Treatment Program / District Attorney Continuance Form (Nov. 19, 2015) (on file with author). See also Interview with Prosecutors 1 and 2, *supra* note 62.

continuance for six months and, if the charged individual fulfills certain conditions and gives DNA, the District Attorney dismisses the case, without the judge ever having to approve a guilty plea.<sup>79</sup>

*Who is offered the deal.* While OCDA has not disclosed how many defendants are offered leniency conditioned on giving a DNA sample,<sup>80</sup> the office has apparently made DNA a standard condition on every plea deal in Orange County.<sup>81</sup> With respect to offers of dismissal, OCDA allows prosecutors considerable discretion but generally directs them to target people who pose no public safety issue.<sup>82</sup> Defendants are not eligible for DNA dismissals or plea bargains if charged with a “serious or violent type of crime,” including domestic violence.<sup>83</sup> Although the office declined to disclose the charged offenses of those in the database or the details of any deals (whether dismissals or pleas),<sup>84</sup> Spit and Acquit deals are most frequently offered to defendants charged with first-time DUI alcohol and possession of marijuana, petty theft, public intoxication, driving without a license or on a suspended license, shoplifting, vandalism, receipt of stolen property, or drug offenses.<sup>85</sup> Although sometimes prosecutors give a dismissal deal to someone who is not an obvious candidate, they do so based on a personal assessment that the defendant is low risk.<sup>86</sup>

*Collection, testing, and uploading of DNA.* When a defendant walks down the public courthouse hallway to OCDA’s DNA Collection Office, an investigative assistant at what looks like a bank teller window photographs the defendant,<sup>87</sup> has them sign a number of forms, and takes a cheek swab.<sup>88</sup> The defendant stands in front of a webcam, states their name and that they have read the waiver form, and then gives over the swab.<sup>89</sup> OCDA assistants then prepare

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79. The office prefers DEJ to DA continuances because the addition of the guilty plea “adds more weight” to the other program requirements. Interview with Prosecutor 4 (July 12, 2016).

80. See Letter from Denise Hernandez to author, *supra* note 10.

81. See, e.g., Statement of Tony Rackauckas, Board of Supervisors Meeting (Apr. 21, 2015) (on file with author) (“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.”). Every defense attorney whom I asked also confirmed that this was the case.

82. Interview with Prosecutors 1 and 2, *supra* note 62.

83. *Id.* While the occasional bar fight was included in the early days of the database, assaults are typically off-limits. Interview with Defense Attorney 207 (Jan. 21, 2016).

84. See Letter from Denise Hernandez to author, *supra* note 10.

85. Before 2009, felony drug arrests did not trigger forced sampling under Proposition 69. Between 2009 and 2014, such arrestees were required to give a CODIS sample, but could get their profile expunged upon dismissal or acquittal. After passage of Proposition 47 in 2014, drug possession offenses were reclassified as misdemeanors. The office used to routinely seek a DNA sample for misdemeanor marijuana possession, but has not done so since 2011. Interview with Prosecutors 1 and 2, *supra* note 62. In addition, repeat drug offenders ineligible for “drug diversion” might be willing to give DNA for another guaranteed dismissal. Interview with Prosecutor 4, *supra* note 79.

86. Interview with Former OCDA Prosecutor (Mar. 23, 2016).

87. Interview with Defense Attorney 204 (Jan 11, 2017).

88. Contract MA-026-14010833 between OCDA and Bode, *supra* note 10, at 19 (\$4.70 for kit without information card; \$5.95 for kit that also includes gloves, fingerprint strip, and field consent form).

89. Interview with Defense Attorney 204, *supra* note 87.



the swab for shipping to Bode.<sup>90</sup> Bode tests the sample, generates a forensic DNA profile, and then sends the forensic report back to OCDA to upload the profile into the database.<sup>91</sup> Two OCDA forensic scientists secure and store the remainder of the sample indefinitely in a secure location.<sup>92</sup>

### C. Comparing “Spit and Acquit” to Legislatively Authorized DNA Collection

This Section highlights four primary differences between Spit and Acquit and existing legislatively authorized DNA collection. Compared to legislatively authorized collection and database practices, Spit and Acquit (1) does not rely on public funding or support; (2) contains few of the privacy safeguards and quality control measures imposed on CODIS database searches; (3) targets petty offenders deemed “low risk” rather than more serious offenders; and (4) has little data to show that there are any public safety benefits of surveilling these particular populations.

#### 1. Funding and Public Debate

First, Spit and Acquit can operate more secretly than other DNA collection practices because it is largely free from reliance on public funding or existing legal apparatuses like state crime laboratories and databases. Legislative DNA collection statutes usually acknowledge that the cost of DNA testing, collection, and database maintenance will be borne by the state itself.<sup>93</sup> Such laws typically must survive review by an appropriations committee<sup>94</sup> and are subject to public debate.<sup>95</sup> In contrast, Spit and Acquit arose largely outside existing legal apparatuses, with little reliance on public funding or public debate.

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90. OCDA 2009–2010 ANNUAL REPORT, *supra* note 60, at 13.

91. *Id.* 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. BD. OF SUPERVISORS/CTY. EXEC. OFFICER/INTERNAL AUDIT, RESPONSES TO FINDINGS AND RECOMMENDATIONS 1–2 (2010).

92. E-mail from Prosecutor 1 to author (Dec. 15, 2016) (on file with author).

93. For example, a pending bill in California, SB-781, would add those convicted of certain misdemeanors (those that were felonies before California’s Proposition 47 passed in 2014) to the state DNA database. The legislature recognized that “the bill would impose a state-mandated local program,” and provided that the state would reimburse these expenses. *See* S.B. 781, 2017–2018 Sess. (Cal. Feb. 17, 2017), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180SB781](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB781) [<https://perma.cc/4GCB-AW77>].

94. *See, e.g., Legislative Process*, CAL. STATE SENATE, <http://senate.ca.gov/legislativeprocess> [<http://perma.cc/78C9-D2NE>] (explaining that any bill with a “state cost” must go through Senate or Assembly appropriations).

95. For example, the Senate Public Safety Committee issued a policy report about SB-781, with input from organizations and state agencies for and against the bill. *SEE CAL. SEN. COMM. ON PUB. SAFETY, REP. ON S.B. 781, AT 2* (Apr. 18, 2017), [https://spsf.senate.ca.gov/sites/spsf.senate.ca.gov/files/sb\\_781\\_analysis.pdf](https://spsf.senate.ca.gov/sites/spsf.senate.ca.gov/files/sb_781_analysis.pdf) [<https://perma.cc/PC9P-A4HU>].

Instead, it appears that the program arose from OCDA's own determination that such a misdemeanor-focused database was justified.<sup>96</sup>

The only legal authorization for OCDA's DNA exchanges appears to be language (that largely escaped public notice) in a 2004 referendum. Attorneys at OCDA were some of the primary architects of California's Proposition 69, which asked voters in 2004 to add felony arrestees to the state database. But Proposition 69 also allowed samples taken pursuant to plea negotiations to be uploaded to the state database.<sup>97</sup> This language never made it into public summaries of the initiative<sup>98</sup> and escaped the notice of civil liberties groups for many years,<sup>99</sup> but nonetheless became law in 2004. OCDA also wrote and submitted a local ordinance to the Orange County Board of Supervisors to allow the office to store samples in its own local database.<sup>100</sup> The public had three weeks' notice of the language and of the upcoming vote, but only two members of the public—repeat players who frequent board meetings—spoke during the public comment period.<sup>101</sup> The Board unanimously approved the ordinance without discussing

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96. OCDA reports that its DNA program was inspired by the UK's DNA database, which allows the taking of samples from arrestees for any offense punishable by imprisonment. OCDA Response to 2009–2010 Grand Jury Report, *supra* note 70, at 15. Similarly, attorneys from OCDA's DNA Unit described Proposition 47, which took many low-level felony offenses out of the scope of CODIS by downgrading them to misdemeanors, as inflicting damage to CODIS's effectiveness. Interview with Prosecutors 1 and 2, *supra* note 62. A former prosecutor suggested that former District Attorney Tony Rackauckas's beliefs inspired the database. Mr. Rackauckas believed that locals were most likely to commit violent crimes, and that perpetrators of violent crimes often had a misdemeanor arrest record but nothing else. Interview with Former OCDA Prosecutor, *supra* note 86. Prosecutors and police chiefs in other jurisdictions have similarly advocated expanding DNA collection to low-level offenders. See, e.g., Harmon, *supra* note 19 (applauding local database innovation as a way of improving on the 30 percent success rate of CODIS). See also Kreg, *supra* note 6, at 1503 (quoting Bensalem Township Police Chief) (“America is plagued with small crime [that CODIS doesn't address.]”) (alteration in original).

97. See News Release, OCDA, OCDA Honors Pioneer and DNA Evidence Expert Assistant District Attorney Camille Hill Who Passed Away Suddenly Last Friday (May 27, 2016) <http://orangecountyda.org/civica/press/display.asp?layout=2&Entry=4819> [<https://perma.cc/ED38-LMB4>] (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.

98. See, e.g., *Proposition 69, California Online Voter Guide*, CAL. VOTER FOUND. <http://www.calvoter.org/voter/elections/2004/props/prop69.html> [<https://perma.cc/54M4-AUFA>] (last updated Feb. 10, 2006); *Proposition 69*, LEGISLATIVE ANALYST'S OFFICE (July 2004), [http://lao.ca.gov/ballot/2004/69\\_11\\_2004.htm](http://lao.ca.gov/ballot/2004/69_11_2004.htm) [<https://perma.cc/9SXS-2MUP>]; *Proposition 69*, LEAGUE OF WOMEN VOTERS OF CAL. EDUC. FUND (Dec. 15, 2005), <http://www.smartvoter.org/2004/11/02/ca/state/prop/69/#sources> [<https://perma.cc/XG7T-TKU9>].

99. See, e.g., Tania Simoncelli & Barry Steinhardt, *California's Proposition 69: A Dangerous Precedent for Criminal DNA Databases*, 34 J. L. MED. & ETHICS 199 (2006) (not mentioning pleas to non-qualifying offenses).

100. ORANGE CTY. BD. OF SUPERVISORS, AGENDA STAFF REPORT, Item S25A 2 (Mar. 6, 2007) [hereinafter Mar. 6, 2007 Staff Report] (directing clerk to publish notice of ordinance and March 27 public hearing).

101. Minutes of the Meeting of the Orange Cty. Bd. of Supervisors 8 (Mar. 6, 2007), [http://ocgov.granicus.com/DocumentViewer.php?file=ocgov\\_b2483b92e7b20d2f300b6ee2bfb387d7.pdf&view=1](http://ocgov.granicus.com/DocumentViewer.php?file=ocgov_b2483b92e7b20d2f300b6ee2bfb387d7.pdf&view=1) [<https://perma.cc/Z3JM-8MRT>].

the unprecedented nature of permanently retaining DNA samples of people accused of misdemeanors and infractions.<sup>102</sup>

Once authorized, the database was paid for primarily through federal grants and defendant fees rather than public funding. OCDA did secure \$875,000 from the Board of Supervisors for startup costs,<sup>103</sup> but it has also relied on federal grant money from agencies such as the National Institute of Justice.<sup>104</sup> OCDA also charges a seventy-five dollar fee to each defendant participating in the DNA exchange, meaning that the office may have collected \$11,250,000 so far from fees alone.<sup>105</sup> While no evidence suggests OCDA charges fees for the sole purpose of raising revenue,<sup>106</sup> fees appear to be the primary means of sustaining Spit and Acquit long term.

OCDA also has largely relied on private industry rather than existing law enforcement apparatuses to create the infrastructure for Spit and Acquit. Bode tests all Spit and Acquit samples and provides collection kits.<sup>107</sup> Similarly, OCDA uses the services of private company eDNA LIMS for its database software and maintenance.<sup>108</sup> In fact, OCDA must partner with private industry

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102. *Id.*

103. See 2009–2010 ORANGE COUNTY GRAND JURY, DNA: WHOSE IS IT, ORANGE COUNTY CRIME LAB'S OR THE DISTRICT ATTORNEY'S? 3 (May 24, 2010), <http://www.ocgrandjury.org/pdfs/DNA/DNA-Report.pdf> [<https://perma.cc/2S5L-6G2M>] (listing \$875,000 for database startup costs); OCDA Response to 2009–2010 Grand Jury Report, *supra* note 70, at 12, 14. See also Mar. 6, 2007 Staff Report, *supra* note 100, at 2. In 2009, the office changed its database contract to pay for “single-incident repairs” rather than an “all-inclusive maintenance fee,” but has not disclosed the annual cost of the new system. See OCDA Response to 2009–2010 Grand Jury Report, *supra* note 70, at 14.

104. 2009–2010 ANNUAL REPORT, *supra* note 60, at 9, 19.

105. This statistic assumes that no defendant waived the seventy-five dollar fee. The line District Attorney has discretion to determine a defendant’s ability to pay. Interview with Prosecutors 1 and 2, *supra* note 62. Although the District Attorney’s office told me the seventy-five dollar fee is waivable, I saw no prosecutor mention the possibility of waiving the seventy-five dollar fee during two days of observing conversations with defendants.

106. St. Louis County, Missouri has been criticized for using its criminal justice system as a revenue-generating mechanism. See, e.g., Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 WM. & MARY L. REV. 1171, 1175 (2017).

107. In 2009, the Board of Supervisors approved a \$425,000 payment to Bode. Contract MA-026-14010833 between OCDA and Bode, *supra* note 10, at 1, amend. 5. In 2010, the contract allowed a maximum payment of \$984,500, and in 2011, the amount grew to a maximum \$1.37 million. Tracy Wood, *Supervisors Approve DA’s “Spit and Acquit” Program*, VOICE OF OC, Dec. 14, 2010; Letter from Denise Hernandez, Deputy District Attorney, Special Prosecutions Unit, Orange Cty., CA, to author, attachments 011, 015 (Jan. 24, 2017) (on file with author) (PRA response from OCDA appending contract between Bode and OCDA for 2012 and 2013, showing authorized yearly figure of \$1.37 million). I submitted a records request to OCDA seeking documentation of how Bode came to be its testing partner. OCDA disclosed only materials dated 2013 or after, when it sent out a request for proposals and received bids from Bode and one other competitor. Bode won the bidding war. See RFP Scoring Sheet, RFP No. 026-543355, OCDA, [http://cams.ocgov.com/Web\\_Publisher\\_Sam/Agenda12\\_10\\_2013\\_files/images/O00113-001537A.PDF](http://cams.ocgov.com/Web_Publisher_Sam/Agenda12_10_2013_files/images/O00113-001537A.PDF) [<https://perma.cc/H3ZT-HFUD>].

108. See E-mail from Prosecutor 1 (Mar. 15, 2016) (on file with author) (noting reliance on eDNA LIMS). See also EDNA LIMS, <http://ednalims.com> [<http://perma.cc/VC6M-CBZ3>] (describing

to maintain its database. This is because many of the profiles in the OCDA database—such as personal samples taken pursuant to its DNA dismissal program and crime scene samples developed using Rapid Hit DNA machines—are not eligible for inclusion in CODIS. In contrast, expanding a statutory offender database to a new subset of the population would not require states to lean as heavily on private industry. Certain offenders must already submit samples by law, and state and county laboratories are authorized to test these samples. OCDA’s reliance on private industry to conduct DNA databasing beyond statutorily authorized mandatory sampling is part of a national trend that Jason Kreag has termed a “nascent genetic surveillance-industrial complex.”<sup>109</sup>

## 2. *Privacy and Quality Control Safeguards*

The second major difference between Spit and Acquit and statutory DNA practices is that the former has significantly fewer safeguards for privacy and quality control, both in terms of the requirements for conducting searches and the availability of expungement. Safeguards for statutory databases include the following:

*Accreditation.* CODIS requires crime scene samples be tested at an accredited laboratory before upload to CODIS for comparison with offender profiles.<sup>110</sup> In particular, crime scene samples cannot be uploaded to CODIS if they are tested on newly emerging Rapid Hit DNA machines,<sup>111</sup> mobile devices that can develop a forensic DNA profile from a sample in less than two hours.<sup>112</sup> These safeguards presumably intend to reduce the likelihood of malfeasance, contamination, and interpretive error.<sup>113</sup> In contrast, OCDA itself tests crime scene samples with Rapid Hit DNA machines it has purchased and houses in its basement.<sup>114</sup> In turn, OCDA can search its own database for hits to crime scene profiles created with Rapid Hit machines.

*Relationship of sample to crime.* CODIS also requires that the sample be of unknown origin and attributable to the putative perpetrator.<sup>115</sup> Thus, for example, a local police department should not be uploading a DNA profile that they already know comes from an identified suspect, or a profile from a sample that

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the eDNA Laboratory Information Management System, which offers “Database CODIS style searching” as well as other “DNA databasing” and search services).

109. Kreag, *supra* note 6, at 1500.

110. See FBI LAB., NATIONAL DNA INDEX SYSTEM (NDIS) OPERATIONAL PROCEDURES MANUAL 48 (version 7, Jun. 1, 2018), <https://www.fbi.gov/file-repository/ndis-operational-procedures-manual.pdf/view> [<https://perma.cc/K62K-8C4B>].

111. *Id.* at 45.

112. See *RapidHIT System*, INTEGENX, <https://integenx.com/rapidhit-system> [<https://perma.cc/HL94-FP2C>] (describing capabilities of the IntegenX company’s Rapid Hit machine).

113. See generally Anna K. Tsotsias, *Stop, Frisk . . . Swab?*, at 32 (manuscript on file with author) (arguing that Rapid DNA analysis should be regulated).

114. Statement of Tony Rackauckas, *supra* note 81. See also discussion *supra* Section II.A.2.

115. See *Frequently Asked Questions on CODIS and NDIS*, *supra* note 63 (samples must be “unknown” and “attribut[able] to the putative perpetrator”).

likely has nothing to do with the crime being investigated. Recently, one local California crime laboratory was caught improperly uploading samples unlikely to be probative, including DNA from a cigarette butt found across the street from a homicide that did not involve a smoking suspect.<sup>116</sup> These rules serve at least two purposes. First, they reduce the chance that an innocent person whose DNA might have been on an object might be unnecessarily ensnared in a criminal investigation. Second, they ensure that police are using CODIS only to investigate unsolved offenses, and not to identify people at, say, a protest meeting. Nonetheless, OCDA apparently has no such requirements, and the county ordinance authorizing Spit and Acquit contains none.

*Prohibition on low copy number (LCN) samples.* CODIS prohibits the uploading of profiles from low copy number (LCN) samples—samples with very low amounts of DNA—except in conformance with strict quality control standards.<sup>117</sup> LCN testing is highly controversial because it is prone to contamination and interpretive error.<sup>118</sup> The OCDA ordinance has no such restriction, and OCDA has not discussed (and has not been asked, to my knowledge) whether it uploads such samples.

*Prohibition on samples with low discriminating power.* CODIS also prohibits law enforcement from searching for matches based on crime scene samples of insufficient discriminating power—meaning the samples have insufficient ability to whittle the number of matches down to a reasonably small group of people. A sample that is degraded or otherwise of low quality might not be able to be typed at all of the typical genetic locations used in forensic testing. If so, the profile might only consist of a handful of genetic markers, rather than a full slate of genetic markers, thus increasing the number of matches to the profile in CODIS. CODIS requires that at least eight loci be present in any submitted crime scene profile, combined with a “match rarity” of at least one in ten million.<sup>119</sup> The point of the requirement is to reduce the chance of a coincidental hit to an innocent person. Nonetheless, the ODCA ordinance imposes no such restriction limits in the OCDA database.<sup>120</sup>

*Familial searching.* Some states have outlawed a controversial search practice known as “familial searching,” in which police look through a database not merely for matches between an evidence profile and offender profiles, but

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116. See Dan Noyes, *Audit Critical of Santa Clara County Crime Lab*, ABC7 NEWS (Oct. 21, 2012), <https://abc7news.com/archive/8856509> [<https://perma.cc/VNZ9-9NJS>].

117. See NDIS OPERATIONAL PROCEDURES MANUAL, *supra* note 110, at 38.

118. See generally MURPHY, *INSIDE THE CELL*, *supra* note 12, at 74–84.

119. *Frequently Asked Questions on CODIS and NDIS*, *supra* note 63 (answer to question 20).

120. One prosecutor felt that even results with lower discriminating power than CODIS allows—say, a profile shared by 1 in every 10 million people—is still more discriminating than the probable cause standard, making them fair game for investigative leads. This, they explained, justifies OCDA not following the CODIS restrictions even if an innocent person might coincidentally match. Interview with Prosecutors 1 and 3 (Aug. 2, 2016).

also for partial matches or “near misses.”<sup>121</sup> If an offender is a near miss, the logic goes, perhaps one of the offender’s close relatives is the perpetrator. The practice is popular because it has led to the capture of at least one purported serial killer.<sup>122</sup> But it is contentious because it focuses police attention on people who are not in the database and who have done nothing to attract suspicion, other than being related to someone who has been arrested or convicted.<sup>123</sup> Although the FBI does not regulate participating states’ use of familial searching in their own state or local databases, the FBI does not allow familial searches in the national database.<sup>124</sup> While OCDA reported in 2017 that it did not engage in familial searching, it made clear it might do so in the future,<sup>125</sup> and has contracted with Bode to perform a special type of testing (Y-STR) needed to facilitate familial searching.<sup>126</sup>

*Availability of expungement for dismissals and acquittals.* Every state or federal DNA collection statute that extends to arrestees allows them to request profile expungement if their cases end in acquittal or dismissal.<sup>127</sup> Indeed, a state database must contain an expungement provision to be eligible to link to CODIS.<sup>128</sup> Thirteen states place the expungement burden on the state, requiring no action on the part of the arrestee.<sup>129</sup> In one of these states (Maryland), over 30 percent of arrestee profiles have been expunged.<sup>130</sup> Spit and Acquit, on the other hand, offers no possibility of expungement under any circumstances. In fact, the

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121. See Eli Rosenberg, *Family DNA Searches Seen as Crime-Solving Tool, and Intrusion on Rights*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/nyregion/familial-dna-searching-karina-vefrano.html> [<https://perma.cc/DX99-2UJH>] (noting that Maryland prohibits familial searching).

122. See, e.g., *id.*; Marisa Gerber, *The Controversial DNA Search That Helped Nab the “Grim Sleeper” Is Winning Over Skeptics*, L.A. TIMES (Oct. 25, 2016), <https://www.latimes.com/local/lanow/la-me-familial-dna-20161023-snap-story.html#> [<https://perma.cc/N4G6-VJ9T>].

123. See generally Erin E. Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291 (2010) (describing and criticizing the practice, including in California).

124. See *Combined DNA Index System (CODIS)*, FBI, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis#CODIS--NDIS-Statistics> [<https://perma.cc/2WBM-N5KB>] (noting that the FBI does not allow such searching in the national database and that “routine familial searching at the national level is not recommended at this time”).

125. Interview with Prosecutors 1 and 2, *supra* note 62. District Attorney Tony Rackauckas told 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 might also look for partial matches. Statement of Tony Rackauckas, *supra* note 81.

126. See Contract MA-026-14010833 between OCDA and Bode, *supra* note 10, at 19 (as of 2014, charging \$19.45 per sample for autosomal and \$21.45 per sample for Y-STR typing); see also Bruce Budowle, *Familial Searching: Extending the Investigative Lead Potential of DNA Typing*, PROMEGA (2010), <https://www.promega.com/resources/profiles-in-dna/familial-searching-extending-the-investigative-lead-potential-of-dna-typing> [<https://perma.cc/7X2Z-XKZV>] (noting that Y-STR typing should ideally be done in each familial searching case).

127. Elizabeth E. Joh, *The Myth of Arrestee DNA Expungement*, 164 U. PENN. L. REV. ONLINE 51, 51 (2015).

128. *Id.* at 52.

129. See NCSL ARRESTEE (2018), *supra* note 24, at 2.

130. Joh, *supra* note 127, at 57.

waiver form requires defendants whose cases are dismissed to certify they will never challenge retention of their sample.<sup>131</sup>

*OCDA's safeguards.* Despite OCDA's relative lack of privacy safeguards like expungement, the Orange County ordinance governing the OCDA database still provides some protections. For example, just as state statutes criminalize the misuse of samples,<sup>132</sup> the Orange County ordinance punishes unlawful disclosure of confidential DNA data.<sup>133</sup> Moreover, OCDA reported that it has "developed and tested IT security procedures and regulations to protect the database."<sup>134</sup> The prosecutors I interviewed also stated that the database is audited annually,<sup>135</sup> the office's two forensic scientists are the only people with access to the profiles,<sup>136</sup> and the office takes seriously the need to protect metadata.<sup>137</sup> The office has also stated that it has "detailed protocols" governing the use of samples,<sup>138</sup> but has declined to disclose those protocols in response to Public Records Act requests.<sup>139</sup>

Spit and Acquit remains a relatively underregulated DNA regime compared to legislatively created databases. Notably, at least one Orange County Supervisor who voted for the local OCDA database ordinance in 2007 seemed not to grasp these vast differences between the safeguards inherent in CODIS and those in Spit and Acquit. The Supervisor stated, "I think we've modeled this ordinance after what the state has already imposed for Proposition 69, and I think it's the appropriate kinds of protections to have."<sup>140</sup> In some ways, the ordinance was modeled after Proposition 69; indeed, OCDA wrote both laws. But important protections that Proposition 69 imposes on the state database do not apply to Spit and Acquit.

### 3. Which Populations Are Targeted

Spit and Acquit and legislative databases include DNA samples from entirely different groups of people. The population of Spit and Acquit is different from that of legislative databases in terms of charged offense, demographics, and whether the collection is mandatory and categorical or consensual and discretionary.

*Charged offenses of those targeted.* Unlike prosecutors, who must bargain to secure DNA from defendants with non-qualifying offenses, legislatures can

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131. *Infra* Appendix A.

132. *See, e.g.*, CAL. PENAL CODE § 299.5(a), (i)(1)(A) (2011).

133. ORANGE COUNTY, CAL. CODE OF ORDINANCES §§ 3-17-2(a), 3-17-3(a) (providing for a punishment of six months jail or \$1000 fine).

134. 2009–2010 ANNUAL REPORT, *supra* note 60, at 15.

135. Interview with Prosecutors 1 and 3, *supra* note 120.

136. Interview with Prosecutors 1 and 2, *supra* note 62.

137. Interview with Prosecutors 1 and 2 (May 6, 2016).

138. Interview with Prosecutors 1 and 2, *supra* note 62.

139. *See* Letter from Denise Hernandez to author, *supra* note 10.

140. Statement of Bill Campbell, Board of Supervisors Meeting (Mar. 27, 2007, 2:37).

require DNA from whomever they choose, within constitutional limits.<sup>141</sup> Although some states have been more willing than others to expand DNA databases, state offender databases generally target defendants based on risk level. And, in general, states have declined to require DNA samples from petty offenders in non-sex-related cases.<sup>142</sup>

The OCDA database, by contrast, contains DNA from people who have consented as (1) part of a misdemeanor plea deal or (2) a condition of having their cases dismissed. In terms of the former, the people offered misdemeanor plea deals might be a mix of felony defendants whose cases are sympathetic or difficult to prove, and misdemeanor defendants who agree to give DNA in exchange for fewer charges or a lighter sentence. In terms of the latter, OCDA reports that it targets people deemed to pose no public safety risk. In both circumstances, the populations do not appear to be targeted because of their increased relative risk of committing a future DNA-solvable offense. Indeed, even from OCDA's perspective, focusing on high-risk offenders in particular for offers of dismissal or comparatively lenient pleas in exchange for their DNA should make little sense. High-risk offenders are not ideal candidates for diversionary alternatives to prosecution, and many groups deemed high risk, such as those convicted of serious offenses, are already subject to mandatory DNA sampling under state law. Notably, Spit and Acquit's reliance on informed consent, rather than forcible sampling, renders it less expansive than CODIS in at least one sense. Likewise, while at least thirty states include juveniles in their offender databases, OCDA does not.<sup>143</sup>

*Demographics.* The demographic composition of state offender databases can largely be gleaned from state crime data related to arrests and convictions for offenses that require mandatory sampling. OCDA's database, on the other hand, is largely secretive and discretionary. Other than the fact that it is about 70

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141. The growing number of non-CODIS *police-run* DNA databases, mentioned in the Introduction, include an entirely different population from those who give a DNA sample as part of a criminal case. Police populate these "rogue" databases with suspects who shed their DNA inadvertently, crime victims who give "elimination" samples, suspects who have somehow been convinced by police to give over their DNA, and even autopsy subjects. See Kreag, *supra* note 6, at 1499, 1550. See also Kelly Davis, *SDPD Finds a Way Around State Law Limiting DNA Collection from Juveniles*, VOICE OF SAN DIEGO (Feb. 15, 2017), <https://www.voiceofsandiego.org/topics/public-safety/sdpd-has-found-a-way-around-state-law-forbidding-dna-collections-from-juveniles> [<https://perma.cc/MZ4L-FG22>].

142. Only two states mandate DNA collection for all individuals convicted of low-level misdemeanors. See discussion of Wisconsin and New York, *supra* Part I.A. No state requires sampling, even temporarily, from arrestees beyond those arrested for felonies and a handful of violent or sex-related misdemeanors. Only a few arrestee statutes include those who have only been subject to a summons rather than a custodial arrest. Compare S.C. CODE 19760 § 23-3-620 (2012) (requiring samples from those subject to "a lawful custodial arrest, the service of a courtesy summons, or a direct indictment" for enumerated offenses), with S.D. CODE § 23-5A-5.2 (2008) (requiring samples from all arrestees at time of booking).

143. See JULIE SAMUELS ET AL., URBAN INSTITUTE, COLLECTING DNA FROM JUVENILES 6 (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/237193.pdf> [<https://perma.cc/EZH6-PLWR>]; Interview with Prosecutors 1 and 2, *supra* note 137.



percent male,<sup>144</sup> and thus skews more female than some state databases,<sup>145</sup> the demographic composition of the OCDA database is unknown.<sup>146</sup>

Anecdotal reports also do not support a clear inference about the racial makeup of Spit and Acquit. When I began this project, I had a hunch that the Spit and Acquit database might contain a larger percentage of racially or socioeconomically privileged people than CODIS arrestee databases, given that some of the included offenses, such as walking a dog off leash, might be offenses that wealthy people would be prosecuted for. One public defender confirmed this by reporting that a significant portion of DNA dismissals are offered in the southern, whiter parts of the county, speculating that a District Attorney might be more willing to dismiss such cases.<sup>147</sup> On the other hand, traffic offenses or minor infractions—especially for failure to pay fees—can be a primary entry point into the criminal justice system for minorities in particular.<sup>148</sup> Therefore, people of color might be overrepresented in Spit and Acquit.

#### 4. Availability of Data on Public Safety Effects

Because DNA databasing is costly, data on the public safety benefits of any given DNA database expansion is important to a meaningful determination of the desirability of that expansion. Unfortunately, neither legislative databases nor the OCDA database makes available much data that can be used to assess either the crime-solving or deterrent effect of the databases.<sup>149</sup> In this Section, I

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144. Telephone Interview with Prosecutor 1 (Feb. 23, 2016). *See also* Contract MA-026-14010833 between OCDA and Bode, *supra* note 10 at 18 (alerting Bode that approximately 70 percent of submitted samples will require “Y-STR” testing, which works by testing portions of the Y-chromosome).

145. For example, the Texas state offender database is 87 percent male, Jianye Ge et al., *Future Directions of Forensic DNA Databases*, 55 CROAT. MED. J. 163, 164 (2014); the California, Illinois, and Virginia databases are between 78 and 84 percent male, *id.*; and the United Kingdom’s national database, which includes all people arrested for or convicted of recordable (imprisonable) offenses, is over 80 percent male, *National DNA Database Statistics*, GOV.UK (Nov. 28, 2016), <https://www.gov.uk/government/statistics/national-dna-database-statistics> [<https://perma.cc/4L37-U49J>].

146. OCDA reports that it has not analyzed its database composition in terms of ethnicity or age, and has refused to disclose the demographic information (other than gender) on database participants contained in its Case Management System. Letter from Denise Hernandez to author, *supra* note 10.

147. Interview with Defense Attorney 207, *supra* note 83. Anecdotally, one Latino college student who gave a sample said a lot of “white people” were in the group that received the offer with him. Interview with Participant 102 (July 12, 2016). On the other hand, one white woman told me in arraignment court, there were “hardly any white faces” in her group when she was offered a deal. Telephone Interview with Participant 103 (Jan. 22, 2017).

148. For example, poor people and undocumented immigrants may be more likely to have their driver’s licenses suspended for failure to pay fees. *See generally* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012). *Cf.* Colgan, *supra* note 106, at 1179 (discussing the Department of Justice’s findings of the racially disparate nature of infraction prosecutions in Ferguson, Missouri).

149. Some jurisdictions have implemented CODIS Hit Outcome Projects (CHOPs) to track outcomes of hits and better determine the value-add of database expansion. But they offer no data on actual case outcomes to the public. *See, e.g.*, LOUISIANA CHOP, <https://spcl-chop.dps.louisiana.gov> [<http://perma.cc/FY3X-S6S8>] (restricted access). Some California counties have a CHOP, although a

assess the relative effectiveness of CODIS and the OCDA database based on the limited publicly available data.

*Solving crimes.* The most that is publicly known about the effectiveness of state offender databases is the hit rate.<sup>150</sup> As discussed earlier, hit rate alone may be a poor measure of a database's crime-solving value.<sup>151</sup> But as a point of comparison for Spit and Acquit, consider the following hit rates: Connecticut's database has 114,921 profiles—all from convictions—and has "[a]ided" 4,159 investigations; Arkansas's database has 166,494 profiles—primarily from convictions—and has aided 5,262 investigations; and Kentucky's database has 178,932 profiles—all from convictions—and has aided 2,472 hits.<sup>152</sup>

In contrast, OCDA's latest biennial report states that since the program's inception, in the 150,000-person database, "there have been 776 crime scene DNA profiles matched to individual and/or other crime scene profiles in various types of crimes, including murders and sexual assaults."<sup>153</sup> If these hits resulted in actual prosecutions that would not have otherwise occurred, the database would seem pretty successful. After all, one would expect a local database unconnected to any other database to have a lower number of "hits" than state databases that are nationally searchable through CODIS.

But anecdotally, there is reason to question whether a significant number of these 776 hits actually led to the prosecution of a crime that otherwise would not have been prosecuted based on DNA information already available through other database networks such as CODIS. In response to both informal requests and formal public records requests for information showing how many of these hits led to prosecution of a crime, OCDA has thus far declined to answer other than referring me to five cases that have been publicly touted by OCDA as Spit and Acquit success stories.<sup>154</sup> In turn, only three of these five publicly touted

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recent bill requiring all counties to have a CHOP died in committee in the State Senate. *See* SB-1079, DNA Evidence: CODIS Hit Outcome Project, 2015–2016 Sess. (Cal. Mar. 28 2016), [http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill\\_id=201520160SB1079](http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201520160SB1079)

[<https://perma.cc/7X2Z-XKZV>]. While OCDA told me that it has also established a CHOP, Interview with Prosecutors 1 and 3, *supra* note 120, the office refused to disclose any CHOP information in response to my public records requests. *See* Letter from Denise Hernandez to author, *supra* note 10.

150. A database's hit rate is the number of database searches resulting in a match between the uploaded profile and a profile housed in that database. *See supra* Part I.A.

151. *See supra* notes 33–34.

152. *See CODIS—NDIS Statistics, supra* note 2.

153. OCDA, 2017 BIENNIAL REPORT 20 (2017), <http://orangecountyda.org/office/biennialreport.asp> [<https://perma.cc/D5VL-H4M3>] [*hereinafter* 2017 BIENNIAL REPORT]. All 776 hits were offered the Spit and Acquit deal. Around 44 percent of those hits are attributable to people whose cases were dismissed; the remaining majority of the hits are attributable to participants who gave a sample as part of a plea negotiation. *See* Interview with Prosecutor 1 (Aug. 2, 2016) (noting that of 758 hits as of July 2016, 336 were attributable to those whose cases were dismissed and 422 to those who pleaded guilty).

154. In response to my formal request, OCDA declined to disclose any information related to the disposition of these hits. *See* Letter from Denise Hernandez to author, *supra* note 10. In response to informal requests through phone calls and emails to prosecutors for further information on the

cases reflect any added value of the database.<sup>155</sup> The first was a 2008 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 Fernando Ruiz, who gave a DNA sample in an unrelated misdemeanor case in 2010 as part of Spit and Acquit. Ruiz pleaded guilty and was sentenced to seven years in prison.<sup>156</sup> The second involved a man, Aaron Silva, who was involved in two alleged sexual assaults of sex workers at knifepoint in 2003, two weeks apart. Silva was arrested in 2003 for one of the incidents and pleaded guilty to misdemeanor charges, but police never viewed the two incidents as potentially linked. In 2011, Silva pleaded guilty to a misdemeanor DUI and gave a DNA sample to OCDA. When his DNA profile matched evidence from the second 2003 incident, he was arrested and successfully prosecuted for that sexual assault as well.<sup>157</sup>

Though the third case was solved because of the OCDA database, this outcome was attributable to the database primarily because of a ministerial error related to CODIS. OCDA reported 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 the couple's car window and a sample Rodriguez gave after pleading guilty six months earlier to felony drug possession.<sup>158</sup> The case ended in a conviction in March 2017.<sup>159</sup> But by 2009, felony arrestees were already required by statute in California to give a sample. OCDA's case management list explains that law enforcement only resorted to the Spit and Acquit database because Rodriguez's profile was *erroneously* never uploaded to the state offender database.<sup>160</sup> Thus, it is questionable whether this case should be viewed as showing a clear added value of the Spit and Acquit model, or simply as revealing an easily correctable failure or absence of quality control measures in the state database model.

While the Ruiz, Silva, and Rodriguez prosecutions appear to be Spit and Acquit successes, the other two stories OCDA has publicly discussed offer little support for the OCDA database's added value. First, OCDA highlighted in one

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disposition of the 776 hits, I have as yet not been given further information beyond the five cases discussed in this section.

155. OCDA stated in emails to me on November 10, 2016 and December 16, 2016 that they were working with their crime analyst on sending me other examples of "success stories" from the database, but I have not received any additional information since then.

156. OCDA, 2015 BIENNIAL REPORT 18 (2015), <http://orangecountyda.org/civicax/filebank/blobdload.aspx?BlobID=22656> [<https://perma.cc/G8TR-M7PU>].

157. OCDA, 2013 BIENNIAL REPORT 18 (2013), <http://orangecountyda.org/reports/biennialreport.asp> [<https://perma.cc/36U6-9NS5>] [hereinafter 2013 BIENNIAL REPORT].

158. See 2009–2010 ANNUAL REPORT, *supra* note 60, at 11–12.

159. OCDA, Case Management List 20 (May 10, 2017) (on file with author).

160. See *id.* (Rodriguez "was ordered to submit his DNA" in 2009 but the system erroneously listed his DNA as already in CODIS).

of its reports the case of Jose Mejia, who raped three sex workers in 2009 and 2010.<sup>161</sup> He was arrested in September 2010 for the felony of evading a peace officer but pleaded to a misdemeanor in Orange County. Soon thereafter, the DNA from rape kits matched Mejia's felony arrestee CODIS profile. Thus, it was a CODIS hit, not a hit to the OCDA database, that led to Mejia's prosecution. It thus appears to be a case for which Spit and Acquit cannot take full credit, although it might have been if the comparison had been done months later, assuming his profile had been expunged after dismissal of the felony count.<sup>162</sup>

Finally, OCDA in its 2017 biennial report highlighted the case of Lee Castellano, who was arrested for and convicted of murder.<sup>163</sup> The Castellano case, however, provides no support for Spit and Acquit, because the genetic profile that led to arrest, and later conviction, was never in the OCDA database. In 2015, OCDA took samples from the scene of an unsolved stabbing murder and a nearby brick wall where "suspicious transients" had been seen. OCDA tested both crime scene samples on its own Rapid Hit DNA machines.<sup>164</sup> The devices, which OCDA bought from a biotechnology company, can each test a crime scene sample in about two hours.<sup>165</sup> Police then persuaded two suspects to give "consensual samples," one of which (Castellano's) matched the DNA from the brick wall and led to Castellano's arrest. The case, at most, suggests an added value from developing crime scene profiles quickly using Rapid Hit, rather than waiting for a state crime laboratory to test the profiles.<sup>166</sup> In any event, the case offers no support for Spit and Acquit because Castellano's genetic profile was never in the OCDA database (although the report did mention that the stabbing victim was himself in the OCDA database).<sup>167</sup>

To be sure, three successful prosecutions of perpetrators of serious crimes are not insignificant—to the victims and the community. But if Spit and Acquit truly has only a handful of success stories in ten years, that data would be helpful for determining whether the costs of expanding DNA databasing to petty misdemeanors—or to the entire population, for that matter—are worth it. On the other hand, if a significant number of the other 771 or so hits ended in successful prosecutions that can fairly be attributed to the program's existence, then that data should be made available. To be sure, the disposition of CODIS hits is also

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161. OCDA DNA Analysis, <http://orangecountyda.org/civicax/filebank/blobdload.aspx?BlobID=23410> [<https://perma.cc/SVU4-78XL>].

162. If the comparison between CODIS and the rape kits had been done much later, perhaps Mejia's felony arrestee profile might already have been expunged from CODIS because it did not result in a qualifying conviction. But Mejia's profile would still have been in the OCDA database because of the misdemeanor plea. Still, the example as it actually occurred is not a prosecution that can fairly be attributed to Spit and Acquit rather than CODIS.

163. 2017 BIENNIAL REPORT, *supra* note 153, at 20.

164. *Id.*

165. See discussion *infra* Section II.A.2; *RapidHIT System*, *supra* note 112.

166. OCDA tests crime scene samples on several Rapid Hit DNA machines it purchased and houses in its basement. See *supra* note 112 and accompanying text.

167. 2017 BIENNIAL REPORT, *supra* note 153.

less than transparent. But CODIS is at least highly regulated and includes only the most serious offenders. Given that Spit and Acquit is unregulated, intrusive, and counterintuitively focused on low-level offenses, the program's creators should demonstrate its public safety benefits beyond three cases.

*Crime deterrence.* Likewise, little data exist to shed light on Spit and Acquit's deterrent value in comparison to that of statutorily authorized offender databases. As discussed earlier, one study showed some deterrent effect of state offender databases on crime rates—at least as those databases existed before 2010, when they focused on those convicted of felonies and sex-related misdemeanors.<sup>168</sup> No such study has been conducted with respect to database expansion to felony arrestees, however, much less to offenders charged only with low-level petty crimes.

The researcher for the OCDA DNA Unit reported that she has followed the progress of the individuals in the database and has found a lower recidivism rate than in the defendant population as a whole.<sup>169</sup> She acknowledged that it is difficult to know the extent to which the database explains this trend because other conditions often placed on the dismissal or plea deal, such as community service or life skills classes, may contribute to the trend as well.<sup>170</sup> Because DNA samples are required for nearly all dismissals and pleas in Orange County, there is no control group of offenders who take the classes but do not give DNA samples. She also acknowledged that the group willing to give DNA samples is self-selecting and might be less prone to reoffending for reasons independent of the sample.<sup>171</sup> In sum, Spit and Acquit differs from state offender databases in four significant aspects: (1) its reliance on private industry and fees, (2) its relative lack of privacy safeguards, (3) its targeting of low-risk populations, and (4) its relatively lower hit rate. The next Section argues that these characteristics of Spit and Acquit are neither surprising nor desirable.

## II.

### ASSESSING “SPIT AND ACQUIT” AS SURVEILLANCE POLICY

This Section draws upon the descriptive account of Spit and Acquit offered in Part I to assess the policy impact of OCDA's database, as compared to legislative databases. It argues that a consent-based prosecutorial surveillance program like Spit and Acquit fares poorly as a policy model. To be sure, prosecutorial policymaking through discretionary practices has important advantages over state legislation, given that it is more nimble, individualized,

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168. *See supra* Part I.A.

169. Interview with Prosecutor 4, *supra* note 79. Prosecutor 4 is also the researcher for the OCDA DNA Unit.

170. *Id.*

171. *Id.*

and proximate to realities on the ground.<sup>172</sup> Still, in the surveillance context, Spit and Acquit appears to be a poor model compared to legislatively authorized databasing—with respect to public safety, genetic privacy, and accountability. As problematic as statutorily created DNA databases may be, they may be the least worst model for DNA databasing.

### A. *Protecting Public Safety*

#### 1. *The Paradox of Prosecutorial Predictions of Dangerousness*

Spit and Acquit, like other forms of diversion from prosecution, faces a natural limit on its impact as a crime control strategy because it targets defendants who are the least likely to commit dangerous offenses in the future. Instead of targeting defendants based on their likelihood of committing a DNA-solvable offense, Spit and Acquit targets precisely the opposite end of the spectrum: the lowest-risk subpopulation of defendants in OCDA's misdemeanor caseload. These are the defendants whose cases are relatively costless for the office to dismiss or plead down to lesser charges, and who are willing to accept the exchange, and are thus good candidates for leniency. But they are not the next group of candidates one would choose for permanent genetic surveillance if one were focused on maximizing the public safety benefit of database expansion.

Even if there were a significant public safety benefit to requiring DNA from certain low-level offenders, a rational policy would presumably start with the highest-risk group not yet included in CODIS: for example, those convicted of domestic violence misdemeanors. One would not first target people issued a citation for low-level non-violent regulatory offenses. Indeed, the California state legislature has not yet seen fit to require even a temporary sample from those convicted of misdemeanors, much less a permanent sample from people issued minor citations. Frank Zimring has highlighted this paradox in the context of diversion programs, which offer only marginal crime control benefits precisely because the subpopulation of defendants who are sympathetic and willing enough to qualify are those least likely to benefit from its therapeutic programming.<sup>173</sup> Similarly, Spit and Acquit's public safety benefits are limited because the database targets the genetic material of offenders who are relatively low-risk.

In creating Spit and Acquit, the office appears to have relied heavily on the assumption that crime is local and that low-level offenders may later commit

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172. See generally Bibas, *supra* note 14 (arguing in favor of prosecutorial discretion over legislatively created, discretionless criminal laws and punishments).

173. See, e.g., Franklin E. Zimring, *Measuring the Impact of Pretrial Diversion from the Criminal Justice System*, 41 U. CHI. L. REV. 224, 239 (1974) (arguing 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).

serious or violent crimes.<sup>174</sup> But to determine the added value of Spit and Acquit, one must consider another question: how many perpetrators of DNA-solvable offenses—primarily homicide, rape, gun, and property crimes—had *only* a misdemeanor arrest or conviction on their past records (or had faced a felony charge that ended in dismissal or acquittal, and ultimately expungement)? This inquiry is significant because the presence of a more serious offense would mean that the offender’s DNA would already be present in the statutorily authorized database. Put differently, OCDA cannot “take credit” for DNA matches based on samples that already existed in the state database. Moreover, the few studies that exist on low-level offenders do not appear to indicate higher recidivism rates for later felonies than the population as a whole.<sup>175</sup> The question is ripe for further research.

Ultimately, even if low-level offenders carry a higher risk than the general population of committing a DNA-solvable offense someday, one would expect that certain low-level offenders would be higher risk than other low-level offenders. For example, people arrested for or convicted of domestic violence, simple assault, or sex-related misdemeanors, and low-level offenders with an extensive criminal record or other indicators of violence tendencies, would presumably be higher risk than other offenders. Indeed, that is presumably why the few states that have added certain misdemeanors to their statutory databases have focused on violent and sex-related misdemeanors.<sup>176</sup> But Spit and Acquit does not target these higher risk misdemeanor defendants, except to the extent it requires a DNA sample from every person pleading guilty to a misdemeanor.<sup>177</sup> At least with respect to the half of Spit and Acquit participants whose cases are dismissed, these are not the people a legislature would target if it were identifying the highest risk misdemeanants.

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174. See sources cited, *supra* note 96, 2013 BIENNIAL REPORT, *supra* note 157, at 18 (noting that the impetus for the database was that “most crime is committed locally”); Brief of Orange County District Attorney’s Office as Amici Curiae Supporting Respondent at 43–45, *People v. Buza*, 413 P.3d 1132 (2018) (No. S223698), 2015 WL 7710134 (arguing that many serious and violent offenders began with low-level offenses).

175. See discussion *supra* Part I.A. See also Jonathan Simon, *Positively Punitive: How the Inventor of Scientific Criminology Who Died at the Beginning of the Twentieth Century Continues to Haunt American Crime Control at the Beginning of the Twenty-First*, 84 TEX. L. REV. 2135, 2135–37 (2006) (arguing against the positivist theory that certain people carry the trait of criminality, a theory that if true would support surveillance of low-level offenders).

176. See *supra* notes 26–27 and accompanying text (discussing those states that have added certain misdemeanors).

177. Notably, those taking misdemeanor pleas, with DNA as a new and uniform requirement of all such pleas, are precisely the group whose participation is likely to be wrongfully coerced. See discussion *infra* Part II.B.

2. *The Pull of Privateers: Potential Distortion of Law Enforcement Priorities from the Involvement of Private Industry*

Scholars have documented how the reliance of law enforcement on private industry to implement punishment “alternatives” might skew law enforcement priorities toward increasing the net amount of criminally-supervised individuals rather than offering a true alternative to prosecution. For example, privateers—private industry partnering with state law enforcement for profit—helped fuel the growth of so-called incarceration “alternatives”<sup>178</sup> like transportation to the colonies in the 1700s and electronic monitoring today.<sup>179</sup> Privateers have also developed and marketed surveillance technologies “custom-made” for law enforcement.<sup>180</sup> Malcolm Feeley has argued that these “alternatives” did not actually reduce executions or incarceration rates, but rather functioned as “add-ons” that “expanded the reach and severity of the criminal justice system.”<sup>181</sup> Of course, all diversionary punishment alternatives carry the risk of this “net widening” effect.<sup>182</sup> But when a private company has a profit motive to push the punishment alternative, the risks of net widening—and of motivating prosecutors to use plea bargaining to achieve the punishment alternative as an end in itself—seem especially great.

It is not clear whether OCDA’s interest in Spit and Acquit was partially inspired by private industry itself. But private industry is certainly aware of the benefits of encouraging local databasing in selling its products. For example, the Vice President for Sales and Marketing for Bode, the company that contracts with OCDA to test Spit and Acquit samples, said he had identified nearly one thousand agencies across the country large enough to justify having a local offline DNA database.<sup>183</sup> Given the number of local departments who want their own database but lack a testing laboratory to process the samples they collect,

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178. Malcolm 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 CRIMINOLOGY, CRIM. JUST., L. & SOC’Y 1, 1 (2016).

179. See, e.g., *id.* 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”).

180. 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”).

181. Feeley, *supra* note 178.

182. See STANLEY COHEN, VISIONS OF SOCIAL CONTROL 52 (1985) (explaining how diversionary programs inherently tend to target those who would otherwise be entirely screened out of the system, because of their low risk).

183. Kreag, *supra* note 6, at 1507 (quoting Andrew Singer); see also *id.* (citing an executive from one of Bode’s competitors at the time, Cellmark, as agreeing that “the creation of local databases will drive the demand for Cellmark’s forensic DNA processing services”).



the Bode executive described the company's potential market for selling its testing services to local law enforcement as "enormous."<sup>184</sup>

With respect to Orange County in particular, the involvement of biotechnology companies has at the very least led the District Attorney's office to purchase additional services that further justify a separate non-CODIS database and encourage more intrusive practices. For example, in 2013, OCDA contracted with the firm IntegenX to buy Rapid Hit DNA machines for about \$250,000 each.<sup>185</sup> These machines allow the District Attorney's office itself to test and upload crime scene samples without relying on the county laboratory—and to do so in only ninety minutes, rather than waiting the four to eight weeks it takes the county laboratory to produce a result.<sup>186</sup> But because Rapid Hit machines are relatively new and still being validated, crime scene profiles produced with Rapid Hit are not eligible for upload to CODIS.<sup>187</sup> As a result, as IntegenX's own promotional brochure makes clear, Rapid Hit machines go hand in hand with the creation of a local, non-CODIS database.<sup>188</sup>

In turn, the office's development of Spit and Acquit and purchase of Rapid Hit machines appear to have been used by OCDA to justify further prosecutorial control over DNA testing and processing in the county. One defense attorney with whom I spoke, who described himself as generally supportive of the policies of District Attorney Tony Rackauckas, said he thought Rackauckas wanted to be able to boast the largest local database in the United States (and, so far, he can).<sup>189</sup> Two commentators 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>190</sup> One member of the Board of Supervisors, 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 analysis at all.<sup>191</sup> Spitzer cited testimony from a county crime laboratory DNA analyst, Danielle Wieland,

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184. *Id.* (quoting Andrew Singer).

185. *See, e.g.*, Cty. of Orange Purchase Order No. PO-026-14011103 (Dec. 19, 2013) (on file with author) (\$243,000).

186. Statement of Tony Rackauckas, *supra* note 81.

187. *See FBI's Plans for the Use of Rapid DNA Technology in CODIS*, FBI (June 18, 2015), <https://www.fbi.gov/news/testimony/fbis-plans-for-the-use-of-rapid-dna-technology-in-codis> [<https://perma.cc/ENK8-2GXF>]. The FBI does allow *offender reference* samples typed with Rapid Hit to be uploaded, under certain conditions. *Id.*

188. RapidHIT 200 Promotional Pamphlet 1 (2011), [https://www.slideshare.net/wally1727/rapid-hit-flyer?from\\_action=save](https://www.slideshare.net/wally1727/rapid-hit-flyer?from_action=save) [<https://perma.cc/XQ43-95UK>] (flowchart showing Rapid Hit testing, following by upload into a "local database," with a "hit report" sent to an officer or detective).

189. Interview with Defense Attorney 202 (Feb. 9, 2016). *See* Sanford C. Gordon & Gregory A. Huber, *The Political Economy of Prosecution*, 5 ANN. REV. L. & SOC. SCI. 135, 138 (2009) (noting agency costs when a prosecutor's payoff in pursuing an alternative path exceeds that under the "contract" with constituents).

190. *See* Jones & Wade, *supra* note 12 (describing the "political power struggle" that predated the database).

191. Statement of Todd Spitzer, Board of Supervisors Meeting (Apr. 21, 2015).

stating that an OCDA DNA Unit attorney had pressured her to change the reported results in a carjacking case to include the suspect.<sup>192</sup> The attorney allegedly told Wieland, “I don’t care if it’s 1 in 2 or 1 in 3. I want him not excluded.”<sup>193</sup> The suspect, James Ochoa, was later exonerated after the DNA from the crime scene matched another offender, who confessed.<sup>194</sup> Although the scandal has subsided, the office, since the advent of Spit and Acquit, has succeeded not only in obtaining shared governance of the county crime laboratory, but also in directing the county laboratory to split crime scene samples it receives in half and sending one half to the District Attorney’s office for testing.

To be sure, there is at least one advantage to implementing certain innovations through privateers; namely, quicker adaptation to technological advances that could enhance public safety. For example, it may be that Rapid Hit machines prove a reliable means of developing DNA profiles from at least some crime scene samples, and that their more frequent use—given existing backlogs—would greatly increase hit rates.<sup>195</sup> But where such products are linked to a diversionary program also managed by the same industry partner, the worry remains that law enforcement might pursue unnecessary or undesirable net widening policies without further considering their harmful effects.

### B. Safeguarding Privacy and Fairness

#### 1. The Unprecedented and Underregulated Nature of Spit and Acquit

Spit and Acquit has created the largest non-legislatively-created forensic DNA database in the country.<sup>196</sup> It is dramatically expansive, even beyond the CODIS regime, in its targeting of petty offenders. First, consider the 70,000 or so people who are in the OCDA database because they pleaded guilty to a misdemeanor. Under California state law, a person who pleads guilty to a

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192. See Tony Saavedra, *Trust Issues at Heart of Fight Over Proposed DNA Lab*, OCREG. (Aug. 14, 2008), <https://www.oeregister.com/2008/08/14/trust-issues-at-heart-of-fight-over-proposed-dna-lab> [<https://perma.cc/X7T8-2AML>].

193. Statement of Patricio Marquez, Assistant Attorney General of Washington, Board of Supervisors Meeting (Apr. 21, 2015) (quoting Deposition of Danielle Wieland T 69 (Feb. 5, 2008)). 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, Board of Supervisors Meeting (Apr. 21, 2015).

194. *James Ochoa*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases/james-ochoa> [<https://perma.cc/AA2W-RA2R>].

195. See MURPHY, *INSIDE THE CELL*, *supra* note 12, at 271 (arguing that quicker testing of crime scene samples, not database expansion, is the best means of increasing hit rate).

196. As explained earlier, there are also smaller police-run databases throughout the country that house a mix of victim elimination samples, abandoned DNA, and volunteered suspect samples. Although these databases are also worthy of further scholarly treatment, *see* sources cited *supra* note 6, Spit and Acquit is different in scope and potential for expansion because of the ease with which prosecutors can systematically expand DNA databasing to include anyone with a criminal case or infraction potentially subject to prosecutorial leniency.

misdemeanor is not subject even to temporary, much less permanent, DNA databasing. Even in the few states that require those convicted of some (mostly sex-related) misdemeanors to give DNA, the database participants can rest assured that their profiles will not be compared against evidence profiles that have little connection to the crime scene, nor degraded samples that are likely to generate several coincidental matches because of the few genetic markers they yield for comparison purposes.<sup>197</sup> Additionally, no state databases allow comparison against evidence profiles processed by an unaccredited laboratory, nor those generated through low-copy-number testing.<sup>198</sup>

Next, consider the 80,000 or so people who are in the OCDA database whose low-level misdemeanor and infraction cases have been dismissed.<sup>199</sup> Under California law, a person accused but not convicted of a misdemeanor need not give a DNA sample to the state.<sup>200</sup> Even those few states that require a sample from those arrested for certain (sex-related) misdemeanors only require a sample temporarily, and offer the possibility of expungement.<sup>201</sup> In short, particularly for those with dismissed cases in the OCDA database, permanent inclusion in a DNA database is a dramatic intrusion on privacy compared to state law.

Expansive DNA databases are not obviously undesirable; indeed, many scholars have suggested that a universal citizen database should be considered as a policy option.<sup>202</sup> Nor are expansive search practices obviously undesirable; OCDA might find investigative leads through low-stringency searches that their CODIS brethren never find. But Spit and Acquit is vastly more expansive and less regulated than legislative databases that have survived appropriations, public debate, and judicial review. This stark contrast raises the possibility that the OCDA database is expansive and less regulated precisely because it is not subject to the sort of public debate or budgetary restraints that typically accompany legislative actions.

OCDA's answer to such concerns would presumably be that these exchanges are consensual, and defendants receive significant benefits in exchange for these added burdens on privacy. The next two Sections explore the extent to which Spit and Acquit is actually consensual and beneficial.

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197. See discussion *supra* Section I.C.2 (discussing CODIS prohibitions on samples unrelated to an unsolved crime and samples of insufficient discriminating power).

198. See *id.*

199. See Letter from Denise Hernandez to author, *supra* note 10 (setting out the breakdown of dismissals and pleas among those included in the database).

200. See Cal. Penal Code § 296(a)(1)–(5) (2004) (no arrestees other than felony arrestees need give a sample under state law).

201. See discussion, *supra* notes 27–28; *supra* note 127 (citing Joh for proposition that all arrestee databases offer expungement).

202. See discussion *infra* Part III.B.

## 2. *Issues with Justifying DNA Sampling Through “Consent”*

Spit and Acquit’s reliance on “consent” to justify placing participants in the database who would not otherwise have to give a sample under state law raises two unique concerns. The first is a net widening concern, related to whether participants are actually receiving a benefit in exchange for giving up their DNA. If many participants likely would be, and should be, entitled to the same level of leniency even without giving a DNA sample, then this condition seems less a bargained-for exchange than a piled-on sanction. The second is an informed consent concern, related to whether participants have even a basic grasp of the consequences of giving a DNA sample to the state for permanent retention and use.

*Net Widening.* If there is reason to believe that a program like Spit and Acquit widens the net and brings under state surveillance thousands of individuals whose cases should be dismissed or reduced in degree anyway, it should not be justified on a “consent” theory. Diversionary reforms in general, such as probation or deferred sentencing programs, tend to be net widening because they target low-risk people who might otherwise be screened out of the system entirely:

It is this possibility [of diversion, rather than screening out or formal processing] which allows for net extension and strengthening. For what happens is that diversion is used as an alternative to screening out and not as an alternative to processing. The system thus expands to include those who, if the programme had not been available, would not have been processed at all (genuine new fish).<sup>203</sup>

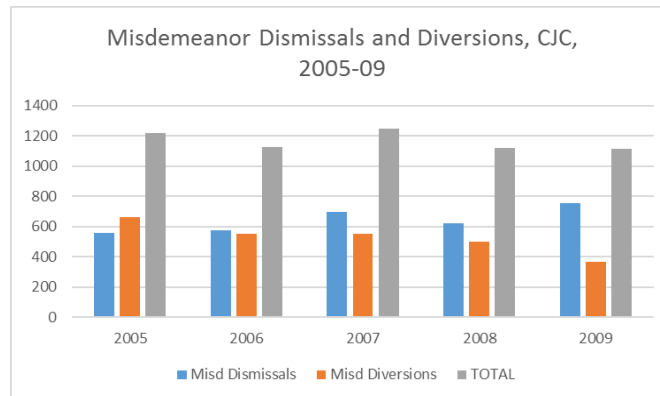
Imagine that a defendant’s ability to participate in a diversionary program rather than something more punitive (e.g. prosecution or more prison term) is conditioned on giving up one’s DNA. If the diversionary program were a true alternative to prison for people who would otherwise be imprisoned, then the diversion in exchange for DNA would be a bargained-for benefit (assuming the defendant understood the relevant considerations on both sides). But if the diversionary program is net widening, and the defendant should have been entitled to dismissal (“screening out”) rather than a diversionary alternative, then the additional requirement of giving a DNA sample to avail himself of the diversionary program and avoid prosecution is no longer a fair exchange.

Because of OCDA’s refusal to disclose more information on Spit and Acquit, and the unavailability of certain court data on misdemeanor dispositions, it is difficult to determine whether Spit and Acquit has widened the net. For example, if the database were net widening, one might expect a similar dismissal rate before and after the program’s debut in 2007, or an increase in filings to correspond with any increase in dismissals. Unfortunately, Orange County

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203. See COHEN, *supra* note 182.

misdemeanor disposition data is not available before 2010,<sup>204</sup> other than Judicial Council data from the Central Justice Center (CJC) in Santa Ana from 2005–2009.<sup>205</sup> While total misdemeanor filings in the CJC remained relatively constant other than a dip in 2009,<sup>206</sup> the total number of dismissals and diversions also remained relatively constant before and after the debut of Spit and Acquit.



a. Source: OCDA Citation of Judicial Council data<sup>207</sup>

Thus, the number of misdemeanors dismissed in the county's main courthouse has not clearly risen with the advent of the OCDA database. But the number of flat-out dismissals, as compared to diversions requiring counseling, restitution, or community service, does appear to have increased. This leaves open the possibility that some defendants might have beneficially avoided diversion conditions by giving their DNA.

204. The OC Superior Court reports that it has no disposition data for misdemeanors before 2010. Letter from Jeff Wertheimer to author, *supra* note 57. OCDA reports that it does not retain misdemeanor disposition data at all. Interview by Jeremy Isard with OC Research Manager (Mar. 10, 2017). The Judicial Council misdemeanor disposition data for Orange County for 2005–2014 are missing, and the Council reports they are unavailable.

205. This information was cited by OCDA in response to a 2010 Orange County grand jury investigation. See OCDA Response to 2009–2010 Grand Jury Report, *supra* note 70, at 17. The investigation was focused on whether OCDA's database was duplicative of existing databases, and not on the other issues explored in this paper.

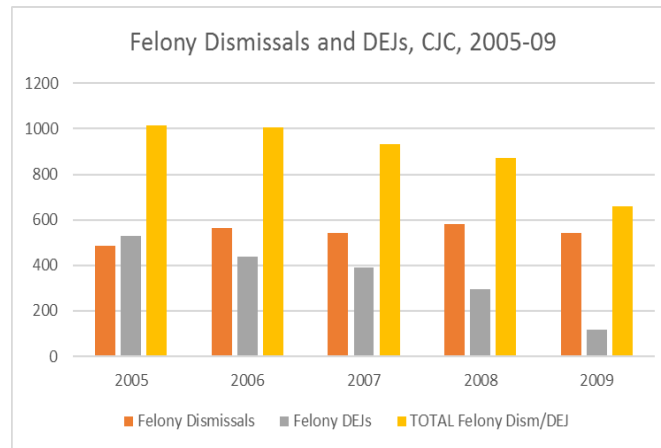
206. Total CJC misdemeanor filings were 11,255 in 2005; 12,078 in 2006; 12,055 in 2007; 13,168 in 2008; and then dropped to 10,837 in 2009. OCDA Response to 2009–2010 Grand Jury Report, *supra* note 70, at 24.

207. *Id.* at 25. The Report includes a chart with diversion and dismissal numbers for 2005–2009 only. I computed and added the totals.

Notably, the number of misdemeanor *pleas and trials* in the CJC significantly increased during the same time period, suggesting that Spit and Acquit might have widened the net by creating an incentive to pursue more misdemeanor prosecutions.<sup>208</sup> But such an increase might be consistent with more overall leniency if it corresponded to, say, an increased number of felony cases being reduced to misdemeanors. And yet, the number of felony dismissals in the CJC for the same time period decreased, rather than increased.

*b. Source: OC Superior Court*<sup>209</sup>

Alternatively, perhaps prosecutors pursued pleas more aggressively after 2007 because of the possibility of getting a DNA sample, resulting in fewer acquittals. Or perhaps defendants who would have been offered a dismissal



before 2007 but who do not want to give DNA have no other option now but to try their cases.

Further complicating any determination about Spit and Acquit's net widening effect are changes in OCDA policies enacted around the time of the program's onset. When I asked the OCDA research manager whether the office was giving the same number of people dismissals and diversions before the DNA program came along, she said "probably not."<sup>210</sup> But when asked whether that was because of the DNA program, she acknowledged that she was not sure, in part because of a timing issue: when the office began the DNA program, it also contracted with a new, more efficient provider of life skills classes, which

208. The number jumped from 5,510 to 8,494 in the year of the database's debut and remained over 8,000 through 2009. *Id.* at 17 (8,337 in 2008; 8,409 in 2009).

209. These dismissal rates were taken from an Excel Spreadsheet sent to me on May 19, 2017, by the Orange County Superior Court in response to a California Rule of Court 10.500 administrative records request. Spreadsheet of Orange Cty. Misdemeanor Data, *supra* note 64. The number of total felony filings also steadily decreased: 4,060 filings in 2005; 4,070 in 2006; 3,990 in 2007; 3,556 in 2008; and 2,993 in 2009. *Id.*

210. Interview with Prosecutor 4, *supra* note 79.

enhanced the office's ability to offer wide-scale diversion.<sup>211</sup> And while the office reported to a grand jury investigating Spit and Acquit that the number of felony preliminary hearings in 2009 "was reduced by 1,000, saving the County hundreds of thousands of dollars,"<sup>212</sup> the office acknowledged that another variable had been the debut of a unit created to combat felony backlogs.<sup>213</sup>

Notwithstanding the ambiguity of dismissal data and the speculative nature of these varying interpretations, Spit and Acquit does appear to be net widening at least with respect to misdemeanor pleas. The DNA condition is a newly imposed requirement on every misdemeanor plea offer, regardless of the circumstances.<sup>214</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 in a world without Spit and Acquit, it does suggest a blanket policy—one more add-on to a contract of adhesion<sup>215</sup>—rather than an offer of conditional leniency to people who would not otherwise receive it.

Some judges and defense attorneys with whom I spoke strongly believed the level of leniency in misdemeanor court had not increased since the Spit and Acquit program's debut. One judge told me that shortly after Spit and Acquit started, judges in Superior Court began to suspect that OCDA was filing some cases knowing they were never going to pursue the case unless they absolutely had to, just to get the DNA.<sup>216</sup> Another judge reported a similar net widening trend between the start of Spit and Acquit and the passage of Proposition 47 in 2014 (which changed several low-level felony offenses into misdemeanors). In this judge's view, OCDA seemed to be filing "wobbler" offenses (those that could be charged, in the prosecutor's discretion, as either a felony or

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211. *Id.*

212. OCDA 2009–2010 ANNUAL REPORT, *supra* note 60, at 18.

213. *See id.* at 18 (noting creation of a "Strike Team"); *Jeff Ferguson to be Sworn in to the O.C. Superior Court on March 6*, OC POL. BLOG (Feb. 9, 2015), <http://ocpoliticsblog.com/2015/02/09/jeff-ferguson-to-be-sworn-in-to-the-o-c-superior-court-on-march-6> [<https://perma.cc/N5UV-KRUS>] (explaining that the strike team's purpose was to combat "the explosion of felony cases clogging the trial courts").

214. By 2015, the District Attorney had all but acknowledged this fact to the Board of Supervisors. Statement of Tony Rackauckas, *supra* note 81 ("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."). Every defense attorney I spoke with also corroborated this point. The only exception I found was in the occasional case in which OCDA realized that a defendant—because they lived out of town and waived their appearance—would suffer a severe hardship if they were to have to return to give a sample. Interview with Defense Attorney 204, *supra* note 87 (noting a client from Australia who recently received a DUI plea with no DNA condition, but stating this was a rare exception).

215. *See* Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA ST. U. L. REV. 913, 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 GEO. L.J. 291, 297 (2016) (arguing that probation conditions are contracts of adhesion and are not justified under a consent theory).

216. Interview with Orange Cty. Super. Ct. Judge 1, *supra* note 67. My research unearthed no evidence that prosecutors are evaluated based on how many DNA samples they acquire.

misdeemeanor) as felonies every time they could, presumably to gain leverage in negotiating a guilty plea to a misdemeanor that would yield DNA.<sup>217</sup> Defense attorneys had mixed experiences. Some reported that their clients would not have received a dismissal but for the database; others thought that most Spit and Acquit participants would have received a dismissal anyway had they held out, and that the District Attorney's entire misdemeanor practice had been skewed by the availability of the exchange.<sup>218</sup>

The relationship between net widening and consent raises other thorny legal issues beyond the scope of this Article, such as when the conditioning of a benefit on the relinquishing of a constitutional right might itself be an "unconstitutional condition."<sup>219</sup> Suffice it to say that other scholars have noted this problem in numerous other legal contexts, and the issue deserves more scholarly attention if consent-based surveillance policies are further deployed by law enforcement.

*Informed consent.* A related but distinct concern is whether defendants understand the consequences of giving a DNA sample for permanent retention by OCDA. While a detailed exploration of potential legal challenges to Spit and Acquit is beyond the scope of this paper, it is worth noting that a bargain might not be legally valid if the defendant did not knowingly and willingly enter into it. A guilty plea 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>220</sup> Presumably, giving DNA in exchange for a dismissal rather than a plea must also be knowing and voluntary.<sup>221</sup>

It seems doubtful that the average Spit and Acquit participant understands the stakes of giving a DNA sample. One participant, in explaining why she was not concerned about giving a sample, said, "I'm not a murderer," meaning she saw no issue with giving up her DNA if she does not plan to commit a DNA-solvable offense.<sup>222</sup> But as discussed in Part I.A, innocent people might also wish to avoid database inclusion. To name a few, concerns include potential misuse of profiles or stored samples; innovations in extracting sensitive genetic

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217. Telephone Interview with OCSC Judge 2 (Mar. 11, 2016).

218. Interview with Defense Attorney 208 (Feb. 1, 2017); Interview with Defense Attorney 202, *supra* note 189; Interview with Defense Attorney 201 (Feb. 10, 2016); Interview with Defense Attorney 204, *supra* note 87.

219. See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (striking down a state's offer of a building permit conditioned on the owner allowing a public easement to the beach). Under this doctrine, a plea offer might be unconstitutional if the prosecutor overcharges the case beyond what the state would and should otherwise have charged, with the purpose of discouraging the defendant from exercising their trial right. See Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 100–02, 107 (2001).

220. *Brady v. United States*, 397 U.S. 742, 748 (1970).

221. See Memorandum from ADA Kevin Haskins on Legality of OCDA's Office DNA Collection and Crime Deterrence Program 2 (Mar. 25, 2009) (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.*, 620 P.2d 628 (1980)).

222. Interview with Participant 104 (Nov. 7, 2016).



information from one's forensic DNA profile; and the possibility of false accusations due to contamination, innocent presence, DNA transfer, or the like. But none of these possibilities appear on the waiver form given to defendants when they take the deal.<sup>223</sup> Not to mention, judges have refused public defenders' requests to give a general speech to unrepresented defendants about the potential risks and benefits of giving DNA.<sup>224</sup> Unless defendants have a fuller understanding of the risks of inclusion in a DNA database, beyond simply the chance of being caught for a serious crime they actually committed, it is hard to say that defendants who accept Spit and Acquit deals are doing so in a knowing and voluntary way.

Informed consent contemplates not just an understanding of the consequences of giving a DNA sample, but also of the risks of refusing the deal. Admittedly, some defendants would surely still take the deal even if they were fully informed of potential risks of inclusion in the DNA database. Perhaps such concerns do not trouble some defendants, or they remain too abstract compared to the urgency of avoiding greater punishment, or in some cases, the urgency of being released or receiving detoxification medication.<sup>225</sup> But that logic only resolves the informed consent issue if the defendant also has an accurate understanding of the consequences of refusing the deal—namely, the chance of greater prosecution or punishment if they say no. As one public defender 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>226</sup> In some DUI and drug cases, for example, unrepresented defendants might not understand that they are likely to receive the same level of leniency without giving up DNA.<sup>227</sup>

A final reason to question whether defendants are truly giving informed consent to Spit and Acquit deals is that at least some defendants appear to regret

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223. One database participant 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. Interview with Participant 103 (Sept. 23, 2016). A college student did not read the waiver form at all before signing it. Interview with Participant 104, *supra* note 222.

224. Interview with Defense Attorney 207, *supra* note 83.

225. One judge related, for example, 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.” Telephone Interview with OCSC Judge 2, *supra* note 217.

226. Interview with Defense Attorney 207, *supra* note 83.

227. As it turns out, multiple DUI charges in California (a “per se” .08 charge and a “subjective impairment” charge) will merge for sentencing purposes, thus negating nearly any advantage to taking a plea offer, conditioned on DNA, to dismiss one count. The four attorneys I spoke with whose caseloads are primarily DUIs all corroborated this. Likewise, a represented defendant with a first-time drug charge might be more likely to choose drug diversion programs like PC 1000 or Proposition 36 that also end in dismissal but do not require DNA. When I asked the OCDA research manager how first-time drug offenders decide whether to take DNA deals, she explained that the two variables seem to be personal preference and whether the defendant has a lawyer. Interview with Prosecutor 4, *supra* note 79.

taking the deal, even if they cannot fully articulate why. One woman, charged with the misdemeanor of walking a dog off leash, was told by a judge that giving her DNA 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 (non-citizen) resident and was concerned about the consequences of a misdemeanor conviction for her citizenship application. In retrospect, she said the deal was a mistake.<sup>228</sup>

In another case, a twenty-five-year-old college student was offered expungement of his expired vehicle 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?” But he also told me during the interview, “Now that I look at it, [giving my DNA was] not a great idea.”<sup>229</sup> Perhaps these participants have since learned more about DNA databases. Alternatively, their regret might be a reaction to being interviewed about their participation in the program. Or, perhaps, these defendants—with the prosecution no longer looming ahead—are now focused more on the costs of giving their DNA, rather than the benefits.

On the other hand, some defendants seemed at peace with their choice. A 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 was “a little nervous” about having his DNA in the hands of the government, but said that it was better than having a misdemeanor conviction on his record, or even having to come back to court.<sup>230</sup>

Another woman who had no regrets in taking the deal was a school employee, charged with petty theft along with her boyfriend; she asserted her innocence through the day of the trial. The District Attorney offered her boyfriend flat-out dismissal, and her dismissal with community service—both in exchange for DNA. She and her boyfriend both refused. By the time of trial, the District Attorney agreed to dismiss her boyfriend’s case without his DNA if he gave a \$200 contribution to a victim’s fund, but continued to insist on getting her DNA. When the District Attorney announced he was ready for trial, the woman finally agreed to give DNA and do ten hours of community service in exchange for dismissal.<sup>231</sup> Although she was upset at having to give her DNA, she did not appear to regret the decision.

While few defendants have attempted to go back on their DNA deals, the District Attorney’s office appears to have contemplated the possibility. Some defense attorneys report that the office now sometimes requires a new DNA sample even from people who have given a sample since 2007, perhaps to

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228. Interview with Participant 104, *supra* note 222.

229. Interview with Participant 102, *supra* note 147.

230. Interview with Participant 101 (Feb. 10, 2016).

231. Interview with Participant 103, *supra* note 223.

preempt any legal argument that the original waiver form is outdated<sup>232</sup> and to ensure that the sample is still physically robust.<sup>233</sup>

### C. Ensuring Accountability

Spit and Acquit also operates with less public accountability than statutory databases. Public accountability matters in terms of promoting the public's belief in the legitimacy of law, which in turn promotes the rule of law.<sup>234</sup> In particular, privacy practices, such as DNA databasing, may be more likely to be viewed as legitimate if created through democratic processes.<sup>235</sup> Of course, accountability also has instrumental value beyond promoting legitimacy. A practice is more likely to reflect community norms if the community has a chance to debate the practice and, if the practice does not meet its ostensible policy goals, to lobby to change or discontinue it.

Legislative databases, however expansive they may become, have at least some minimal level of democratic accountability built into their policy choices because of the public nature of legislative actions, the appropriations process,<sup>236</sup> and the political accountability of legislators to the electorate. If a state legislature were to decide tomorrow to push through mandatory DNA collection from those convicted of or arrested for petty misdemeanors, it would have to on some level publicly justify the monetary cost and privacy intrusions. And it is not obvious that legislatures could, in fact, justify such an expansion to the public through a more transparent policy debate. After all, only two states have expanded legislative databases to those convicted of non-sex misdemeanors, and

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232. Interview with Former OCDA Prosecutor, *supra* note 86.

233. Still others might argue that a Spit and Acquit deal, even if consensual, should be prohibited as unethical. The Declaration of Helsinki states that poor and unemployed people, among others, are vulnerable populations in need of protection when giving over bodily tissue in exchange for a benefit. *See, e.g.*, COUNCIL FOR INT'L ORGS. OF MED. SCI. & WORLD HEALTH ORG., INTERNATIONAL ETHICAL GUIDELINES FOR BIOMEDICAL RESEARCH INVOLVING HUMAN SUBJECTS, at Guideline 13 (2002), [https://cioms.ch/wp-content/uploads/2016/08/International\\_Ethical\\_Guidelines\\_for\\_Biomedical\\_Research\\_Involving\\_Human\\_Subjects.pdf](https://cioms.ch/wp-content/uploads/2016/08/International_Ethical_Guidelines_for_Biomedical_Research_Involving_Human_Subjects.pdf) [<https://perma.cc/YM6N-PPPM>]. While adequate compensation can correct exploitation, *see* Ruth Macklin, *Bioethics, Vulnerability, and Protection*, 17 *BIOETHICS* 472, 475–76 (2003) (defining exploitation in terms of the lack of “adequate compensating benefits”), many countries place limits on the commodification of the human body, *see, e.g.*, Anya Adair & Stephen J. Wigmore, *Paid Organ Donation: The Case Against*, 93 *ANN. R. COLL. SURG. ENGL.* 191 (2011). In any event, such arguments would likely be unsuccessful under current doctrine, given that courts have approved plea deals and probation conditioned on forced sterilization, among other conditions. 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, 72 (2006) (discussing a case where sterilization was a condition of probation).

234. *See generally* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *CRIME & JUST.* 283 (2003) (explaining the link between the rule of law and public trust in the fairness of legal processes).

235. *See, e.g.*, 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).

236. *See* discussion *infra* Section I.C.1.

no state has expanded databases to those merely arrested for non-sex misdemeanors. Of course, there may be a complex set of factors affecting legislative decisions not to further expand state databases, so inferring a legislative aversion to expansion from the absence of more expansive laws would be a mistake. But the fact that no state in the country has chosen to expand their database to include convictions or arrests for petty misdemeanors seems a decent indication that such an expansion might be a hard sell without a clear explanation of how the benefits outweigh the costs. In any event, if such a law does ever pass, it will have gone through some amount of public and budgetary scrutiny.

In contrast, Spit and Acquit has operated largely in the shadows, outside of public debate, legislative wrangling, and cost-benefit analyses, leading to less accountability. It has done so because of its reliance on (ostensible) consent, discretion, fees and federal grants, and the aid of private industry. While this independence could allow prosecutors to innovate more freely than the legislature, it could also allow them to adopt more intrusive, less effective policies with little pushback. In this sense, Spit and Acquit shares features of “patriotic philanthropy,” the private funding of government functions (such as surveillance) that has been critiqued for its tendency to reduce democratic accountability in public policymaking.<sup>237</sup> Of course, the District Attorney in Orange County is elected. But if they need not disclose critical details of Spit and Acquit’s discretionary operation, demographic composition, and public safety outcomes, the public may never know to challenge the policy as ineffective or to hold politically accountable the officials who perpetuate it.

One might argue, in response, that Spit and Acquit is but one more example of prosecutorial discretion, which in turn is a form of delegation by the legislature in the realm of criminal charging and punishment.<sup>238</sup> At least one commentator has called this phenomenon “prosecutorial legislation.”<sup>239</sup> But the fact that the legislature defers to prosecutors in the realm of charging and punishment does not mean they intend (or should intend) to delegate surveillance policy to prosecutors. Indeed, surveillance regulation is one area where legislatures have been particularly willing to fill the vacuum created by courts to

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237. See Margaret H. Lemos & Guy-Uriel Charles, *Patriotic Philanthropy? Financing the State with Gifts to Government*, 106 CALIF. L. REV. 1129, 1178 (2018) (discussing the “benevolent dictator” objection against philanthropic gifts to government, the concern that such gifts “will circumvent or skew the normal processes of democratic decision-making”).

238. See, e.g., Note, *Desuetude*, 119 HARV. L. REV. 2209, 2220–21 (2006) (“[T]he legislative branch delegates a great deal of its criminal law-making authority to agents of the executive branch. . . .”); see also William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEG. ISSUES 1, 24 (1996) (explaining how legislatures give prosecutors the “practical power of crime definition”).

239. Note, *Desuetude*, *supra* note 238, at 2223. See also Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1155 (2008) (arguing that legislatures pass overbroad criminal laws and overly harsh punishments precisely because they are politically costless and because they offer prosecutors leverage to secure pleas on “warranted charges”).

protect against state power.<sup>240</sup> As a result, at least one legal scholar has suggested that courts should declare that local police-run “rogue” DNA databases are legally preempted by existing state legislation related to DNA databases.<sup>241</sup> If the California state legislature were forced to expressly approve or reject a practice like Spit and Acquit, it might well decide to limit the power of local prosecutors to be surveillance entrepreneurs.<sup>242</sup>

Moreover, Spit and Acquit, as a stand-alone discretionary program, fails to realize the benefits of integrated development with existing laws and legal structures. DNA databasing is typically a coordinated effort among the branches of government: legislative databases work within CODIS limits set by an executive agency, and some DNA collection statutes even attempt to predict and incorporate future judicial decisions.<sup>243</sup> In contrast, Spit and Acquit’s apparently marginal law-enforcement value, expansive scope, and underregulated use of samples and searches seems to be a predictable result of creating a stand-alone discretionary surveillance program without much regard to its ability to fit within existing legal structures and rules. When the executive attempts this sort of anomalous action, it tends to create what Shep Melnick described as “convoluted, ineffective Rube Goldberg policies.”<sup>244</sup>

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240. See generally Christopher Slobogin, *Legislative Regulation of Government Surveillance*, in THE CAMBRIDGE HANDBOOK OF SURVEILLANCE LAW 597 (David Gray & Stephen E. Henderson eds., 2017) (discussing legislatures’ willingness to fill the vacuum left by courts ruling that certain surveillance issues do not implicate the Fourth Amendment); Orin Kerr, *Congress, the Courts, and New Technologies: A Response to Professor Solove*, 74 FORDHAM L. REV. 779, 779 (2005) (“Congress has created what is in effect a parallel Fourth Amendment to regulate many areas of privacy when technology is in flux.”).

241. David Jaros, *Preempting the Police*, 55 B.C. L. REV. 1149, 1166–76 (2014) (citing local police-run DNA databases as one of several potential areas for intrastate preemption).

242. On the other hand, in 2015, California legislators removed certain Proposition 69 amendments that would have prohibited law enforcement agencies in California from attempting to solve certain cold cases through non-CODIS databases. See A.B. 1492, 2015–2016 Sess. (Cal. 2015) as amended June 29, 2015 at 19 (“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), . . . .”) (emphasis added); *id.* as amended Aug. 31, 2015 at 18 (deleting this language). But even if these removals suggest that the legislature would approve of Spit and Acquit, a forced legislative approval of the program would at least bring additional public scrutiny.

243. See, e.g., CAL. PENAL CODE § 299(g) (2011) (stating that the statutory section will become inoperative in the event that the California Supreme Court decides to invalidate parts of the state’s DNA statute in the pending case of *People v. Buza*). See generally Edward L. Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CALIF. L. REV. 1989, 2014–15 (1996) (noting policymaking coordination among branches and rejecting a comparative institutional analysis approach).

244. See R. Shep Melnick, Thomas P. O’Neill, Jr. Professor of American Politics, Boston College, Kagan Lecture in Law & Regulation at U.C. Berkeley School of Law: Adversarial Legalism Meets Partisan Polarization (Mar. 10, 2016). A “Rube Goldberg” machine is a deliberately complex contraption for completing what should be an easy task, popularized in the cartoons of Rube Goldberg. See generally *Who Was Rube Goldberg?*, RUBE GOLDBERG, <https://www.rubegoldberg.com/rube-the-artist> [<https://perma.cc/E8LY-YC6V>].

## III.

## LESSONS FROM SPIT AND ACQUIT

Beyond the policy assessment in Part II, this final Section draws broader lessons from Spit and Acquit for the future of prosecutorial innovations, DNA databasing, and criminal justice. In particular, Spit and Acquit shows the perils of prosecutorial reforms not appropriately treated as “experiments,” tests the political waters for a universal DNA database, and reaffirms the need for an “administrative law of crime” that would stop misdemeanor court from being a barrier to social mobility and racial justice.

A. *Prosecutorial Reforms as Non-Experiments*

One way to learn from Spit and Acquit is as a cautionary tale of “experimenting” prosecutors. Although they are engaged in well-meaning entrepreneurial innovations, they fail to see their ventures as “experiments” that, upon completion, should lead to assessment and change of course if the experiments do not work. In Donald T. Campbell’s words, many social innovators fail to treat their “reforms as experiments.”<sup>245</sup> That is, they sometimes pursue a reform for its own sake, rather than to achieve the underlying goal. They therefore have little incentive to collect and assess evaluative data on the reform’s effectiveness and, if necessary, abandon the reform for something better.

Further, the experimental nature of Spit and Acquit has enabled it to operate in the shadows, outside of public scrutiny. Prosecutors have already functioned as the criminal justice system’s “empire builder[s].”<sup>246</sup> Yet the availability of private industry partnerships, funding sources independent of state budgets, and the use of discretion to extract concessions from defendants in exchange for leniency all come together to allow prosecutors to be entrepreneurs in new ventures, like genetic surveillance, well beyond their typical expertise or adjudicative role. Because Spit and Acquit relies on consent, private industry, fees, and grants, a prosecutor like Tony Rackauckas will never have to fully justify a program like Spit and Acquit in the same way that a legislator would have to justify broad expansion of a state database to include permanent surveillance of misdemeanor arrestees. Because Spit and Acquit operates in the shadows, the natural constituency to scrutinize and counteract the intrusiveness of the practice remains silent.<sup>247</sup> To be sure, some defendants express regret about their choice to give DNA.<sup>248</sup> But no defendant, public defender, private

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245. See generally Donald T. Campbell, *Reforms as Experiments*, 24 AMER. PSYCHOLOGIST 409 (1969).

246. Kay Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1126 (2005).

247. See Schwartz & Treanor, *supra* note 235, at 2184 (noting, with respect to intractability of problematic surveillance of welfare recipients, that it is not possible “to discover communal norms in the bureaucratic world of administered social services”).

248. See discussion *supra* Section II.B.2.

attorney, or civil liberties organization has legally challenged Spit and Acquit, other than to unsuccessfully request that the legislature amend the Penal Code to include nonbinding language suggesting that defendants be given a lawyer when deciding to give up their DNA in exchange for leniency.<sup>249</sup> One interpretation of this silence is that the practice is not particularly offensive. But another interpretation is that the practice cannot meaningfully be challenged because of its reliance on consent and its use of prosecutorial leniency in criminal cases as leverage, even if most defendants should receive that leniency anyway.

In turn, in the absence of any need to justify an innovation, prosecutors who fail to see their reforms as experiments can be expected to continue the program so long as it yields any marginal benefit. In the case of Spit and Acquit, the hit rate is non-zero, suggesting that if the program has no drawbacks, it is clearly worth keeping. But the same could potentially be said for a database of 150,000 people randomly chosen from the population. If a vastly expansive and underregulated permanent DNA collection regime is going to be justified based on 776 hits, we should expect much more scrutiny over the true meaning and outcomes of those hits. Instead, we know little more about Spit and Acquit now than when it began in 2007.

Spit and Acquit's replicability is still unclear. Spit and Acquit is currently an isolated practice, except for the occasional California prosecutor who comes to Orange County to learn of the program.<sup>250</sup> Perhaps other jurisdictions do not see a low-risk offender database as worth the trouble, or perhaps they have sought and failed to secure approval from local politicians. At least two other states, though, now have provisions in their DNA collection statutes similar to the language in Proposition 69. These provisions allow the collection of a sample even from those charged with an otherwise non-qualifying offense where the sample is "voluntary" or plea-negotiated.<sup>251</sup> Meanwhile, police departments across the country continue to join forces with biotechnology companies to create more "shadow" DNA databases that prosecutors could presumably harness to house profiles collected beyond statutorily authorized limits.<sup>252</sup>

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249. See A.B. 1492, 2015–2016 Sess. (Cal. Apr. 23, 2015). See also E-mail from Natasha Minsker, ACLU, to author (Dec. 15, 2016) (on file with author); Letter from California Public Defender Association to Mike Gatto, Cal. State Assembly Member (on file with author). 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. Interview with Assembly Member 101 (Jan. 24, 2017).

250. Interview with Prosecutors 1 and 2, *supra* note 62. One prosecutor 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 Proposition 69. *Id.*

251. See ALASKA STAT. § 44.41.035(b)(3) (2017) (allowing samples of "voluntary donors"); HAW. REV. STAT. ANN. § 844D-31(d) (2009) ("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."). Cf. IDAHO CODE ANN. § 19-5506 (2017) (suggesting that sampling beyond convicted felons is only prohibited "absent consent"); TEX. CODE ANN. § 411.1471 (2017) (allowing a person to "voluntarily provide a specimen for the purpose[] of [creating a DNA record]").

252. See generally Kreag, *supra* note 6; Mercer & Gabel, *supra* note 6.

One also sees glimpses of prosecutorial bargaining practices in other contexts that attempt to reduce or monitor offender dangerousness as an alternative to prosecution, and those alternatives might share some of the flaws of Spit and Acquit. For example, in New York, record sealing laws are relatively protective of defendants compared with other states, allowing not only for mandatory, automatic record sealing after acquittals and dismissals, but also for mandatory, automatic partial sealing of police and prosecutor records related to low-level violations and traffic infractions.<sup>253</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>254</sup> That innovation suffers the same paradox as Spit and Acquit: it appears to offer leniency in exchange for more permanent “marking” as a means of deterring behavior and ensuring more informed future bail decisions. The same might be said about prosecutors’ willingness to offer leniency in exchange for sex offender registration,<sup>255</sup> sterilization,<sup>256</sup> or military service.<sup>257</sup> On the other hand, if such conditions are simply piled on the standard conditions for all pleas, they would seem to be wrongly coercive.

Looking into the future, given the swift advancement of biometric technologies, one could also imagine that the Spit and Acquit dilemma will repeat itself in other surveillance contexts. These might include facial recognition databases, retina scans, cell phone searches, electronic monitoring, telephonic or electronic communications monitoring, GPS tracking of vehicles, video monitoring, or medication with new drugs intended to reduce criminal behavior. So long as misdemeanor caseloads remain high and private companies continue to advertise their technologies as a cheap and reliable means of criminal investigation for low-risk offenders, the seeds will be planted for another program like Spit and Acquit.

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253. See N.Y. CRIM. PROC. LAW §§ 160.50; 160.55 (2015).

254. See Email from Assistant Public Defender, Legal Aid Society–Manhattan, to author (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, 611 (1980) (holding that such waivers are invalid and unenforceable because they are inherently coercive and inconsistent with the thrust of 160.50). I thank Issa Kohler-Hausmann for alerting me to this New York practice.

255. Only certain offenses trigger a sex offender registration requirement by state statute, but some prosecutors have required registration for arguably non-triggering offenses as a plea condition. *Cf. In re Stanley Doe*, 855 A.2d 1100, 1107 n.13 (D.C. 2004) (declining to reach the validity of registration as a plea condition, on grounds that defendant was required to register in any event under the court’s interpretation of statute).

256. See Sam P.K. Collins, *Tennessee Prosecutor Insisted Woman Undergo Sterilization as Part of Plea Deal*, THINKPROGRESS (Mar. 31, 2015), <https://thinkprogress.org/tennessee-prosecutor-insisted-woman-undergo-sterilization-as-part-of-plea-deal-a1ad95a5e045> [<https://perma.cc/F9MD-394N>]. One prosecutor was fired, but the pleas do not appear to have been vacated. *Id.* *Cf. Riley*, *supra* note 233 (discussing sterilization as a condition of probation).

257. See generally Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TULANE L. REV. 695, 698 (2001) (exploring “ad hoc” plea conditions that are beyond statutory authority).



### B. *The Future of DNA Collection*

Another implication of Spit and Acquit is that if targeting petty misdemeanor arrestees is acceptable because of the mere possibility that they might commit a DNA-solvable offense, then the arguments against targeting people with no criminal justice contacts whatsoever become weaker as well. Spit and Acquit is probably the closest thing we have in the United States to a universal citizen DNA database. It eschews—like no database before it—any bright line based on offender risk, the need to identify arrestees at booking, the seriousness of the offense, or the reliability of the adjudication. The 150,000 people in the Spit and Acquit database are there because they were accused of (and possibly pleaded guilty to) some minor offense or infraction, most all of them having received a summons to appear in court rather than having been “booked” at a stationhouse. Therefore, the difference in risk level between the people in Spit and Acquit and the general public may well be minimal. Indeed, 150,000 randomly selected Orange County men ages 18 to 25, whether or not they have criminal records, likely present a higher risk for committing a future DNA-solvable offense than the 150,000 people in the Spit and Acquit database. Put simply, if we are drawing the line at people with weak cases for driving without a license or walking a dog off leash, then there is really no principled line at all. The argument against universality (if we are to have a DNA database at all) becomes much more problematic.<sup>258</sup>

### C. *A Renewed Call for an Administrative Law of Crime*

Spit and Acquit also holds lessons for criminal justice more generally. In particular, it lends renewed urgency to the forty-year-old call of Norval Morris and Gordon Hawkins to develop an “administrative law of crime” to deal with low-level regulatory offenses in a nonpunitive administrative forum rather than through formal criminal adjudicative processes.<sup>259</sup> As Norval Morris proposed:

An administrative law of crime must be developed, for the police and courts today are concerned with matters that they were traditionally not intended to handle . . . It is suggested that police and courts deal with predatory crimes, that business crimes be handled by enforcement agencies, and that victimless crimes be handled from an administrative perspective.<sup>260</sup>

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258. A few scholars, including myself, have suggested that a universal database is worthy of consideration. Kaye & Smith, *supra* note 21, at 459; Michael Seringhaus, *To Stop Crime, Share Your Genes*, N.Y. TIMES, Mar. 14, 2010, at A23; Arnold H. Loewy, *A Proposal for the Universal Collection of DNA*, 48 TEXAS TECH L. REV. 261 (2015); Andrea Roth, *Maryland v. King and the Wonderful, Horrible DNA Revolution in Law Enforcement*, 11 OHIO ST. L. J. 295, 308–09 (2013); cf. Murphy, *Relative Doubt*, *supra* note 123, at 329–30 (acknowledging that a universal database would eliminate familial searching issues but ultimately arguing against it).

259. See Alschuler, *supra* note 17, at 459.

260. Marvin E. Wolfgang & Neil Alan Weiner, *The Violent Offender in the Criminal Justice System: A Selected Bibliography* 99–100 (1981) (quoting abstract from Norval Morris, *Reordering*

In modern jurisdictions, this proposal would mean decriminalizing regulatory offenses such as driving on a suspended license or simple drug possession. The state could handle such offenses through nonpunitive, graduated administrative penalties in the same way that they currently dole out parking tickets, license suspensions after a DUI, or littering fines. Violations would not be ignored, but would also not lead to a formal criminal prosecution, conviction, and sentence.

An administrative law of crime seems even more necessary in light of programs like Spit and Acquit, which are possible only because of prosecutors' ability to extract conditions from people who otherwise face a life-changing criminal record and punitive consequences from a misdemeanor prosecution. Previous research has effectively shown how misdemeanor court is a key means of disenfranchising and marking poor people<sup>261</sup> and has increasingly severe collateral consequences.<sup>262</sup> But Spit and Acquit shows how prosecutors use misdemeanor court in a new, potentially problematic way. In Orange County, misdemeanor court is a testing ground for a risk-reduction alternative to the adjudicative process that involves an intrusive practice like genetic surveillance, beyond prosecutors' typical expertise or delegated powers. 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>263</sup> The more misdemeanor court is used as a back-door means of enacting policies like surveillance programs rather than as a means of adjudicating violations of law worthy of prosecution and punishment, the less misdemeanor court makes sense to begin with.

Of course, administrators in the regulatory state—outside the realm of criminal law—could also condition government benefits on the willingness to be subject to surveillance. In four states, for example, one must give fingerprints to get a new driver's license.<sup>264</sup> But conditions imposed as part of administrative regulations might be more likely to be scrutinized by courts. They might also be less likely to emerge, precisely because administrative penalties are not generally the subject of desperate bargaining by those subjected to them.

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*Priorities Would Free Police and Criminal Courts To Deal with Predatory Crimes*, 10 CTR. MAG. 39, 39 (July/August 1977).

261. See sources cited *supra* note 148. See also 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).

262. See generally John D. King, *Procedural Justice, Collateral Consequences, and the Adjudication of Misdemeanors*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* (Erik Luna & Marianne Wade eds., 2011).

263. Email from defense attorney 208 to author, *supra* note 16.

264. See, e.g., CAL. CODE REG. § 1419 (2014).

## CONCLUSION

Spit and Acquit is a case study of prosecutorial policymaking in arenas beyond traditional prosecutor functions, like surveillance. The program works—or not—in precisely the way one would expect from a risk-reduction reform offered as an alternative to prosecution: paid for largely by defendants themselves and created in partnership with private industry. But Spit and Acquit, like other diversionary programs, gets things precisely backwards by targeting the most sympathetic, lowest-risk defendants. Giving leniency to the lowest risk makes penological sense, but it is not a promising surveillance policy if the goal is to maximize crime-solving value. Hence, while OCDA reports 776 “hits,” the definition of a “hit” remains a secret, and the office has publicly highlighted only two convictions truly owed to Spit and Acquit.

Meanwhile, the OCDA database contains few of the common-sense safeguards attending state and federal offender databases and CODIS searches, such as expungement for arrestees, limits on controversial testing methods, and requirements that the sample come from a likely perpetrator of a crime. And its reliance on “consent” is questionable, given both defendants’ lack of understanding of the consequences of giving DNA, and the lack of benefits to many defendants.

In a world without cost or countervailing concerns like privacy, an inefficient DNA program like Spit and Acquit might still be worth pursuing; any non-zero hit rate would justify the OCDA database. But where the result is the permanent retention and underregulated use of the DNA of 150,000 community members accused of petty offenses and regulatory infractions, the continuing operation and secrecy of such a program becomes problematic. If we are to continue to allow such unprecedented surveillance of low-level offenders, we should do so in a way that is more democratically accountable and better coordinated with the existing regime of administrative, legislative, and constitutional rules for DNA databasing. And, if Spit and Acquit is worthwhile, we should consider whether it is even possible to continue to argue against a universal citizen database.

Finally, OCDA’s vast DNA database is also a cautionary tale of how prosecutors have begun to exercise their discretionary power to make policy in yet another context beyond their usual adjudicatory role: surveillance. And they are doing so in misdemeanor court, suggesting that the “commit any crime, commit every crime” logic is not dead; law enforcement officials might well see misdemeanor court as a means of “rabble management.”<sup>265</sup> Perhaps, then, the most critical lesson of Spit and Acquit is that an overhaul of misdemeanor justice

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265. See generally JOHN IRWIN, *THE JAIL: MANAGING THE UNDERCLASS IN AMERICAN SOCIETY* (1985) (coining the phrase “rabble management” to describe the practice of using prosecution of low-level offenses to exert social control over the poor).

toward an administrative law of crime for regulatory offenses and minor infractions should be a priority for criminal justice reformers.

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)

