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The End of Privacy: The Dangers of the Newest Amendment to New Jersey's DNA Database and Databank Act

Christopher Buggy*

I: Introduction

On January 21, 2009, a San Francisco Police Officer noticed a fire underneath a parked patrol car.¹ The officer saw a man running from the car, chased him down, and placed him under arrest.² Shortly after arrest, while in a holding cell waiting to appear before a magistrate, the man was asked to provide a DNA sample.³ The man refused to submit a DNA sample, but allowed the police to take thumbprints and a signature.⁴ Afterward, the man was charged with a misdemeanor for failure to submit a DNA sample upon arrest, pursuant to a DNA collection statute.⁵

New Jersey, probably unbeknownst to the majority of its citizens, has had a DNA-collection program for almost twenty years.⁶ New Jersey's DNA-collection statute, as amended in 2003, allows for the compulsory DNA-collection and retention from all convicted felons.⁷ Recently, and with little fanfare, the New Jersey Legislature amended the statute to require DNA-collection from people arrested, but not convicted of certain crimes.⁸ The most startling fact, however, is that while the bill was in committee, it was amended to remove certain provisions that would have protected wrongfully arrested individuals.⁹ As this Comment will explore, this omission of a couple of lines of text may have a drastic impact on the permissible

* J.D. Candidate, 2013, Seton Hall University School of Law, I would also like to thank Professor John Wefing for his invaluable input and direction, and Eric Dante, for his guidance and patience.

¹ *People v. Buza*, 129 Cal.Rptr.3d 753, 755 (Cal. Dist. Ct. App. 2011), *as modified* (Aug. 31, 2011), *rev. granted and opinion superseded*, 262 P.3d 854 (Cal. 2011).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ D.N.A. Database and Databank Act of 1994, ch. 136, 1994 N.J. Laws 1175.

⁷ N.J. STAT. ANN. § 53:1-20.17 to -20.28 (West 2003).

⁸ 2011 N.J. Sess. Law Serv. Ch. 104 (West).

⁹ See N.J. STAT. ANN. § 53:1-20.25 (West 2003); N.J. ADMIN. CODE § 13:81-6.1 (2007).

level of government intrusion into an individual's privacy. Given courts' reticence to change the way they look at DNA testing,¹⁰ the only way to guarantee the protection of a person's expectation of privacy in his or her own genetic information is to ensure that adequate safeguards are in place to prevent the abuse of DNA testing, while still respecting the needs of law enforcement. New Jersey should have a more streamlined expungement procedure to make it easier for those people who are never convicted of a crime to have their genetic information taken out of the database. New Jersey should also clarify the legislative findings of the law and more clearly explain the timing of the process in which the sample is taken.

Part II will give a background of the science of DNA testing and an explanation of the type of genetic material a person is required to submit under New Jersey's DNA-testing statute. This part will also look at advances in genetic science and the difference between the use of fingerprints and DNA for identification.

Next, Part III will provide an overview of New Jersey's DNA-collection statute and its evolution over time, becoming more expansive in scope with each revision. This section will also examine the regulations that implement New Jersey's DNA-collection statute. New Jersey's statutes and regulations make it easy for law enforcement to obtain a person's DNA, but onerous to get an innocent person's DNA out of the system.¹¹

In Part IV, this Comment will look at how other jurisdictions have justified mandatory DNA testing of arrestees and will provide an overview of the special needs test¹² and the balancing test.¹³

¹⁰ See *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011).

¹¹ *State v. O'Hagen*, 914 A.2d 267, 272–73 (N.J. 2007).

¹² *Id.*

¹³ See *Mitchell*, 652 F.3d at 409.

Part V will examine where the Legislature acted appropriately and where it erred in drafting New Jersey's DNA testing statute. Part VI will explore what could be changed or how the New Jersey law should be implemented to alleviate the privacy concerns triggered by the law in its current form. Part VII concludes that New Jersey's DNA-collection statute has potential as a useful law-enforcement tool, but certain safeguards should be taken in its implementation.

II: Background of the Science

A: DNA Profiles and DNA Samples

The nomenclature used by courts, legislatures, and law regarding DNA is somewhat confusing to the average person. DNA profiles, DNA samples, buccal swaps and single tandem repeats; the science and procedure of DNA testing is admittedly complex. Understanding the science and procedure behind DNA testing is critical when attempting to identify the implications of mandatory DNA testing.

The first part of the procedure is the taking of a "DNA sample," in which biological material is taken from a person.¹⁴ This is typically in the form of either a blood sample or a buccal swap, where a sample of a person's epithelial cells is taken from the inside of the cheek.¹⁵ This sample is used to create a "DNA profile."¹⁶ The FBI established a method to analyze DNA samples by measuring the single tandem repeats, or STR's, at thirteen locations on the human genome.¹⁷ These STR's are used for identification because they produce very unique sequences.¹⁸ Each stretch of these markers has a different number of STR's measuring different lengths, providing for a unique set of measurements and marker repeats.¹⁹ Due to the substantial

¹⁴ A.A. ex rel. B.A. v. Attorney Gen. of N.J., 894 A.2d 31, 40 (N.J. Super. Ct. App. Div. 2006).

¹⁵ *Id.*

¹⁶ *Id.* at 40–41.

¹⁷ *Mitchell*, 652 F.3d at 400–01.

¹⁸ *Id.* at 401.

¹⁹ *Id.*

number of genetic markers and the widespread variations among humans, this method is extremely accurate.²⁰ This process generates a series of numbers, which in turn becomes the DNA profile.²¹ This DNA profile is then sent to the FBI and entered into the Combined DNA Index System (“CODIS”), but the physical DNA sample is retained by whatever agency performs the testing.²² In New Jersey, the state police keep the DNA sample.²³

There were two main reasons the FBI originally chose the STR method of DNA analysis: (1) this method of identification is extremely accurate—the chances of two people having the same DNA profile using the STR method is a virtual impossibility—and (2) the genetic material contained at these locations on the human genome was thought to contain “junk DNA.”²⁴ This term was adopted because this material was unique to an individual, but did not contain “personal” or “useful” genetic information.²⁵

B: The Truth About Junk DNA

The state of genetic science has advanced greatly since the inception of DNA testing programs in the mid 1990’s. In recent years, various studies have uncovered evidence that “junk DNA,” which was previously selected because it was not thought to contain coding information, does in fact contain personal genetic information that can be predictive of physical traits.²⁶ If this is the case, the DNA sample the government compels a person to give is a unique identifier, containing the genetic information of what a person is, not merely who a person is.²⁷

²⁰ United States v. Pool, 621 F.3d 1213, 1216 (9th Cir. 2010), *vacated*, 2011 WL 4359899 (9th Cir. 2011) citing United States v. Kincade, 379 F.3d 813 (9th Cir. 2004) (en banc).

²¹ *A.A. ex rel. B.A.*, 894 A.2d at 40.

²² N.J.STAT.ANN. § 53:1-20.21 (West 2003).

²³ *A.A. ex rel. B.A.*, 894 A.2d at 40–41.

²⁴ *Id.*

²⁵ W. Wayt Gibbs, *The Unseen Genome: Gems Among the Junk*, SCIENTIFIC AMERICAN, Nov. 2003, at 47.

²⁶ See Colloquy, *Is the “Junk” DNA Designation Bunk?*, NW.U.L.REV. 54 (2007).

²⁷ See United States v. Mitchell, 652 F.3d 387, 409–10 (3d Cir. 2011).

The primary justification given by law enforcement for the use of STR's is that this method of DNA analysis is minimally intrusive and does not use personal genetic information.²⁸ But if this is no longer true and more meaningful genetic material is contained on these STR's, a person is being forced to give up more personal information than previously thought. For example, forensic STR's, such as those used in CODIS, can be predictive of race.²⁹ These STR's may also be predictive of certain genetic diseases.³⁰ This is most alarming given the fact that one of the primary reasons given by proponents of DNA-collection statutes is that a person is giving up no more information than if they were required to submit to a fingerprint test.³¹ Given the reality that the genetic material used in DNA-testing contains personal, genetic information—not merely a unique random number—saying that STR's are no more intrusive than fingerprints is at best misleading.

C: The Fingerprint Analogy

Many courts, in their analyses of the reasonableness of DNA testing, point to the minimal intrusiveness of DNA testing, specifically how it is no different than taking fingerprints.³² But the differences between the two are obvious. The primary difference between fingerprints and DNA samples is a rudimentary one; no biological sample is removed when a person's fingerprint is taken.

Another difference between fingerprinting and DNA testing is the perception of the general public regarding genetic testing.³³ Fingerprinting is in general use in many areas outside

²⁸ *Id.*

²⁹ *United States v. Kincade*, 379 F.3d 813, 818 (9th Cir. 2004) citing Nat'l Comm. for the Future of DNA Evidence, Nat'l Inst. of Justice, U.S. Dep't of Justice, *The Future of Forensic DNA Testing* (Nov. 2000), available at <http://www.ncjrs.org/pdffiles1/nij/183697.pdf>.

³⁰ See Colloquy, *supra* note 26, at 59.

³¹ See *United States v. Mitchell*, 652 F.3d 387, 410 (3d Cir. 2011).

³² See *Mitchell*, 652 F.3d at 409. See also *Haskell v. Brown*, 677 F.Supp.2d 1187, 1199 (N.D. Cal. 2009).

³³ See *People v. Buza*, 129 Cal.Rptr.3d 753, 769-70 (Cal. Dist. Ct. App. 2011), as modified (Aug. 31, 2011), rev. granted and opinion superseded, 262 P.3d 854 (Cal. 2011).

of law enforcement; many professions require fingerprinting as part of a licensing or registration procedure.³⁴ DNA, on the other hand, is primarily seen as proof in the detection of violent and sexual crimes.³⁵ DNA evidence, due to its prevalence in popular culture, tends to be seen by the general public as evidence of either homicide or rape.³⁶

While fingerprinting has historically been used as a method of identification, it can be slightly misleading to characterize DNA testing as the same. DNA sampling is simply not an efficient method of identifying a person upon arrest.³⁷ DNA cannot be used to immediately identify a person upon arrest, whereas a fingerprint test may be completed quickly.³⁸ A DNA profile must be created from the DNA sample and then sent to CODIS to be filed in the database and compared with other samples.³⁹ This process takes weeks, whereas a determinative fingerprint test may be completed in a matter of minutes.⁴⁰ This is the reason many DNA testing statutes and regulations require that fingerprints be taken along *with* the DNA sample so as to *identify* the sample.⁴¹

Once a person becomes more knowledgeable about the science behind DNA testing, and the pros and cons of DNA testing versus fingerprinting, a clearer picture begins to emerge. Fingerprinting is a useful, efficient, and cheap method of identification, compared to DNA testing. DNA testing requires a technician to draw the blood or take the buccal swab, and a lab technician to process the DNA sample to create a DNA profile.⁴² And with fingerprinting, there

³⁴ *Id.* at 769.

³⁵ *Id.* at 770.

³⁶ *Id.*

³⁷ *Id.* at 771–72.

³⁸ *People v. Buza*, 129 Cal.Rptr.3d 753, 772 (Cal. Dist. Ct. App. 2011), *as modified* (Aug. 31, 2011), *rev. granted and opinion superseded*, 262 P.3d 854 (Cal. 2011).

³⁹ *See* A.A. ex rel. B.A. v. Attorney Gen. of N.J., 894 A.2d 31, 40 (N.J. Super. Ct. App. Div. 2006).

⁴⁰ *Buza*, 129 Cal.Rptr.3d at 772.

⁴¹ *See, e.g.*, N.J. ADMIN. CODE § 13:81 APP. B. (2007); CAL. PENAL CODE § 296(a)(2)(C) (West 2004); N.C. GEN. STAT. ANN. § 15A-266.3A (West 2011).

⁴² *See* N.J. ADMIN. CODE § 13:81-2.2 (2007). *See also* N.J. ADMIN. CODE § 13:81-3.1 (2007).

are no privacy concerns that an individual is being forced to give up more information than just his identity. A fingerprint does not contain any personal genetic information.

III: The Laws and Regulations

New Jersey's DNA-collection program has gradually increased in scope since the New Jersey Database and Databank Act of 1994. Successive amendments have increased the number of people subject to mandatory DNA testing. Initially, New Jersey only collected DNA samples from individuals convicted of sex crimes.⁴³ Several years later, New Jersey added other convictions for which providing a DNA sample was mandatory.⁴⁴ Shortly after that, DNA sampling was required for all convicted felons.⁴⁵

A: The New Jersey Database and Databank Act

In 1994, Congress passed the Violent Crime Control and Law Enforcement Act, granting the FBI authority to create an index of DNA samples, called CODIS.⁴⁶ Then in 2000, Congress enacted the DNA Act, which required the collection of DNA samples from any person who is, or has been, convicted of a "qualifying Federal offense."⁴⁷ In response to the creation of a federal DNA index system, New Jersey created its DNA collection program with the enactment of the DNA Database & Databank Act of 1994.⁴⁸

In the original Act, the Legislature instituted the DNA testing program to aid in criminal investigations, specifically to aid all law enforcement agencies, state and federal, in the identification of individuals involved in criminal investigations.⁴⁹ This version of the Act only

⁴³ 1994 N.J. Laws 1175.

⁴⁴ 1997 N.J. Laws 1970.

⁴⁵ 2000 N.J. Laws 834.

⁴⁶ 42 U.S.C. §§ 13701, 14223 (1994).

⁴⁷ 42 U.S.C. §14135a(a)(1), (2) (1994).

⁴⁸ D.N.A. Database and Databank Act of 1994, ch. 136, 1994 N.J. Laws 1175.

⁴⁹ *Id.*

required individuals convicted of certain sexual offenses to provide DNA samples for testing.⁵⁰ Absent from the original statute was language limiting how long a DNA sample or profile would be retained.⁵¹

In 1997, the Act was amended to require juveniles adjudicated delinquent of certain sexual offenses, as well as those individuals found not guilty of these sexual offenses by reason of insanity to provide DNA samples for testing.⁵² The Legislature found that it would be in the best interest of the State of New Jersey to include such samples in the DNA database and databank.⁵³ The physical DNA sample is stored in the DNA databank, while the DNA profile created from the sample is stored in the DNA database.⁵⁴

In 2000, the Act was amended again to allow for the use of buccal swabs, in addition to the blood samples previously used, and to expand the number of crimes for which a DNA sample must be provided.⁵⁵ These new crimes included murder, manslaughter, aggravated assault, kidnapping, luring or enticing a child, and engaging in sexual conduct which would impair or debauch the morals of a minor, or any attempt of the above listed offenses.⁵⁶ Due to technological advances in DNA science and technology, the Legislature found that the use of other biological samples would permit a more efficient and effective method of DNA collection.⁵⁷ The use of samples that did not require blood testing was found to be less intrusive

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 1997 N.J.Laws 1970.

⁵³ *Id.*

⁵⁴ *See* N.J.ADMIN.CODE §13:81-3.2 (2007).

⁵⁵ 2000 N.J.Laws 834.

⁵⁶ *Id.*

⁵⁷ *Id.*

to the person being tested and less costly to administer.⁵⁸ At the time of the amendment, blood tests cost the State of New Jersey \$1.60 to draw and \$40 to test.⁵⁹

New Jersey's DNA Database and Databank Act was amended again in 2003 to require all adults or juveniles convicted of any crime, and all persons found not guilty by reason of insanity to provide DNA samples for testing.⁶⁰ The impetus for this expansion was the success of DNA-testing programs in other states that required testing from broader groups of people.⁶¹

As DNA-testing technology has evolved—making larger-scale testing more cost effective—and due to the overwhelming approval of law enforcement, further expansion of New Jersey's DNA testing program was inevitable. The previous DNA-testing regimes only affected convicted felons, not ordinary people. On August 18, 2011, the Legislature's newest amendment to the Act was approved by Governor Chris Christie.⁶² This amendment requires compulsory DNA testing of individuals arrested of certain enumerated violent felonies: murder, manslaughter, aggravated assault, kidnapping, luring or enticing a child, engaging in sexual conduct that would impair or debauch the morals of a child and any attempts to commit these offenses.⁶³ Every person arrested for any of these offenses is required to provide a DNA sample prior to release from custody.⁶⁴ A person who is arrested is only suspected of a crime and has yet to be proven guilty, as opposed to a convicted felon.⁶⁵

⁵⁸ *Id.*

⁵⁹ Assemb. 209-779, 1st Sess., Appropriations Comm. (N.J. 2000).

⁶⁰ 2003 N.J.Laws 1312.

⁶¹ Assemb. 210-2016, 1st Sess., Law & Pub. Safety Comm. (N.J. 2002).

⁶² 2011 N.J.Sess.Law Serv. Ch. 104 (West).

⁶³ See BLACK'S LAW DICTIONARY (9th ed. 2009) (defining debauch as to lead a person astray; to corrupt a person with lewdness; to seduce; to mar or spoil).

⁶⁴ 2011 N.J.Sess.Law Serv. Ch. 104 (West).

⁶⁵ Compare BLACK'S LAW DICTIONARY (9th ed. 2009) (defining felon as a person who has been convicted of a felony), with BLACK'S LAW DICTIONARY (9th ed. 2009) (defining arrestee as a person who has been taken into custody by legal authority).

A few noteworthy things stand out about the law, as enacted. First, the Legislature put the rationales that courts in New Jersey and around the country have used in justifying compulsory DNA testing into the law as legislative findings: (1) the intrusion on an individual's privacy interest is minimal; (2) the compelling government interest advanced by DNA analysis of those arrested of violent crimes; and (3) it further enhances the State's ability to identify offenders.⁶⁶ The Legislature also inserted language finding a "compelling parallel between the taking of DNA and fingerprinting, and that the purposes of DNA testing demonstrate 'special needs' beyond ordinary law enforcement."⁶⁷ In view of the flaws of this reasoning,⁶⁸ it is troubling that the Legislature placed this language into the text of the statute.⁶⁹ This language could perhaps present an easy way out of analyzing the dangers of DNA testing, allowing a court to rest its laurels on "legislative findings."

Most troubling of all, however, is the language that was omitted from the enacted version of the bill. As originally drafted and introduced by Senator Nicholas J. Sacco, the sponsor of the previous versions of the DNA statute, and Senator John A. Girgenti, the amendment contained language stating that "Every person arrested for an offense enumerated in this subsection shall provide a DNA sample prior to the person's release from custody. If the charge for which the sample was taken is dismissed or the person is acquitted at trial, the sample and all related records are destroyed."⁷⁰ This language was taken out of the bill by the Senate Law and Public Safety Committee and was not contained in the version of the bill approved by the Legislature

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *See supra* Part II, C.

⁶⁹ *Id.*

⁷⁰ S.B. 737, 214th Leg. (1st reprint) (N.J. 2010).

and signed by the Governor.⁷¹ Instead, the language in effect today provides for a procedure where an individual may apply for the expungement of his or her DNA profile.⁷²

As amended, the Act provides that any person whose DNA profile has been included in the State DNA database and whose DNA sample is stored in the State DNA databank may apply for expungement.⁷³ The application for expungement is made to the court and must also be given to the prosecutor in the county where the charges were brought, twenty days prior to the expungement hearing.⁷⁴ This means a person arrested but never charged, a person whose charges were dismissed, or a person adjudicated not guilty must go to the court and ask to have their DNA record removed. In addition, the prosecutor has a chance to protest the expungement, which, in any case, the court is not required to grant.⁷⁵ If a person has not been convicted, or charges have been dismissed, the courts and prosecutors should not be vested with so much discretion. Where discretion is given, an opportunity for abuse of discretion exists.

The statute, as opposed to the regulations currently in place, contains no language as to what is deleted from the record upon expungement.⁷⁶ Nothing is said as to whether the DNA sample is deleted, or just the DNA profile. Neither does any language state how long the DNA samples or profiles are maintained. The regulations implementing the amendments should be as clear as the current regulations, the DNA sample and profile are destroyed.⁷⁷

B: The Regulations

⁷¹ 2011 N.J.Sess.Law Serv. Ch. 104 (West).

⁷² N.J.STAT.ANN. § 53:1-20.25 (West 2007).

⁷³ 2011 N.J.Sess.Law Serv. Ch. 104 (West).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ N.J.ADMIN.CODE § 13:81-6.1 (2007).

New Jersey's Act is enforced by a set of regulations promulgated by the Attorney General of New Jersey.⁷⁸ These regulations set forth how the Act is implemented, and can be drafted in such a way so as to be more or less intrusive.⁷⁹ The regulations set forth rules to establish procedures in the submission, identification, analysis and storage of DNA submitted under the Act.⁸⁰ Fingerprints are required to be taken along with the sample and a DNA specimen will not be accepted without these fingerprints.⁸¹ The regulations state further, "the offender providing a DNA sample shall be positively identified, using photograph identification or other identification, by the agency responsible for collecting the sample prior to taking the sample."⁸²

The regulations also provide safeguards to protect not only the quality of the DNA samples and records, but the privacy of those persons from whom DNA has been obtained.⁸³ All DNA samples are stored in a storage repository, within a secure storage area, at room temperature.⁸⁴ All DNA profiles are stored in a secure computer database, and all personal identification has been redacted.⁸⁵ The DNA profiles are only allowed to be used for certain enumerated purposes and access is only to be given to the database and databank under certain circumstances.⁸⁶ For further protection, it is a crime for any person to disclose any individually identifiable DNA information.⁸⁷

⁷⁸ N.J.ADMIN.CODE § 13:81-1.1 (2007), *et. seq.*

⁷⁹ For example, this can be done by providing for the destruction of DNA samples and profiles upon expungement.

⁸⁰ N.J.ADMIN.CODE § 13:81-1.1 (2007).

⁸¹ *Id.* § 13:81 App. B.

⁸² *Id.* § 13:81-2.1.

⁸³ *Id.* § 13:81-2.2.

⁸⁴ *Id.* § 13:81-3.2.

⁸⁵ N.J.ADMIN.CODE § 13:81-3.2 (2007).

⁸⁶ *Id.* § 13:81-4.2. For example, the DNA profiles are only to be used for law enforcement, development of a population database, research, assist in the identification of human remains and for criminal defense purposes. Access to the DNA profiles is only given to the CODIS manager and personnel authorized by the CODIS manager or a law enforcement agency with permission of the CODIS manager.

⁸⁷ *Id.* § 13:81-6.2.

The expungement regulations, like the statute, permit a person to petition the court for the expungement of his or her DNA records.⁸⁸ The regulations provide for the deletion of all DNA profiles, records, and identifiable information in CODIS and the destruction of all samples obtained in reference to the charge that was dismissed.⁸⁹ The regulations also provide for the deletion of all electronic records containing any identification information.⁹⁰ The expungement procedure provides for discretion in deciding whether or not to remove an individual's DNA records.⁹¹ The regulations should provide for automatic expungement where a conviction is not obtained; if law enforcement wants to retain the sample, the onus should be on them to show why the sample should be retained.

Part IV: Judicial Justifications of DNA Testing Statutes

New Jersey courts have yet to analyze a case involving mandatory DNA testing of an arrestee, so this Part begins with an analysis of cases dealing with the older versions of the statute. Since other jurisdictions have had mandatory DNA testing statutes in place longer than New Jersey, this Part will then examine how the federal judiciary and other states have analyzed the subject. Lastly, because of the similarity between the New Jersey and Federal Constitutions, it is instructive to look at federal cases interpreting federal DNA testing statutes.⁹²

A: New Jersey Courts Decisions on Previous Versions of the Act

A couple of recent cases flesh out how New Jersey courts treated compulsory DNA testing of all convicted felons under the 2003 version of the Act.⁹³ While the new law involves persons not yet convicted of any crime, these cases provide insight into how New Jersey courts

⁸⁸ *Id.* § 13:81-6.1.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* The request for expungement is made to the Superior Court, Law Division, and a copy of the petition for expungement is sent to the prosecutor in the county of conviction and the Division of Criminal Justice, to afford the government an opportunity to contest the expungement.

⁹² Compare U.S.CONST. amend. IV, with N.J.CONST. art. I, ¶ 7.

⁹³ *A.A. ex rel. B.A.*, 892 A.2d 31; *O'Hagen*, 914 A.2d 267.

will likely interpret the new Act. These cases also characterize the dangers the new law poses if courts continue to rely upon the same faulty logic as they have in the past.

First, in *State v. O'Hagen*, the New Jersey Supreme Court upheld the 2003 version of the Act as constitutional under both the Federal and New Jersey Constitutions.⁹⁴ In *O'Hagen*, the defendant had pleaded guilty to possession of a controlled dangerous substance and was sentenced to three years in prison.⁹⁵ At sentencing, the trial court required the man to provide a DNA sample for testing, pursuant to the Act.⁹⁶ O'Hagen argued that the testing violated the United States and New Jersey Constitutions as an unreasonable search and seizure as well as a violation of equal protection.⁹⁷

Looking at other courts' treatments of similar acts, the court determined that either a "special-needs" test or "totality of the circumstances" balancing test could apply.⁹⁸ In applying the special-needs test, the court balances the government's interest in a special need, beyond that of ordinary law enforcement, with an individual's privacy.⁹⁹ The balancing test, in comparison, focuses on the individual's expectation of privacy.¹⁰⁰ A convicted felon, out of jail on probation, has a diminished expectation of privacy compared to members of the general public.¹⁰¹ The test balances two factors: (1) the intrusion into a person's reasonable expectation of privacy; and (2) the degree to which the intrusion is necessary for the promotion of legitimate government interests.¹⁰²

⁹⁴ *State v. O'Hagen*, 914 A.2d 267 (N.J. 2007).

⁹⁵ *Id.* at 270.

⁹⁶ *Id.*

⁹⁷ *Id.* at 149.

⁹⁸ *Id.* at 272–77.

⁹⁹ *Id.* at 277.

¹⁰⁰ *O'Hagen*, 964 A.2d at 274.

¹⁰¹ *Id.*

¹⁰² *Id.* at 274 (citing *Samson v. California*, 547 U.S. 843, 848 (2006)).

The court chose to apply the special-needs test, relying upon prior practice and other instances of warrantless, suspicionless searches.¹⁰³ The court felt that the special-needs test, which was more stringent, is a more appropriate standard.¹⁰⁴ In this case, O'Hagen's main argument was that the sample required by the Act was not a valid special-needs search because it did not further a "special need," but rather furthered an ordinary law-enforcement interest.¹⁰⁵ The court concluded that the DNA tests did not serve an ordinary law-enforcement interest, but rather the program existed for the purpose of identification.¹⁰⁶

After deciding that DNA testing served a "special need" beyond that of ordinary law enforcement, the court moved on to balancing the special need against the privacy interests of an individual.¹⁰⁷ The court relied upon the minimal physical intrusion of a blood test or buccal swab and the analogy between DNA and fingerprints and held that the government's interests outweighed the defendants.¹⁰⁸ The court's reasoning in *O'Hagen* followed the status quo in DNA testing.¹⁰⁹

A number of problems exist with the court's reasoning in this case. First, the special need of identification is already filled by a widely-used, efficient, and cost effective method: fingerprinting. Second, the court's statement that a DNA test is no more intrusive than fingerprinting or photographing and that DNA is just a means of identification¹¹⁰ is an oversimplification of a complicated issue. Third, fingerprints are required to be taken as per the regulations implementing the Act. To say that identification is the "special need" served by such

¹⁰³ *Id.* at 277, citing *Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ.*, 826 A.2d 624 (N.J. 2003).

¹⁰⁴ *Id.* at 277–79 (stating the special-needs test is more stringent because if no special need beyond that of ordinary law enforcement is shown, the court does not even move on to the balancing of private and public interests).

¹⁰⁵ *Id.* at 277–79.

¹⁰⁶ *Id.* at 279 (holding that DNA testing of a convicted person "extends beyond ordinary law enforcement and presents a special need that may justify the privacy intrusions at issue.") (internal quotations omitted).

¹⁰⁷ *State v. O'Hagen*, 964 A.2d 267, 279 (N.J. 2007).

¹⁰⁸ *Id.* at 279–80.

¹⁰⁹ *Id.* at 279.

¹¹⁰ *Id.* at 280.

tests is hardly realistic, when that identification is already fulfilled by some other method. The court's dismissal of O'Hagen's privacy concerns regarding DNA testing seems to run contrary to reality as well. The court addressed O'Hagen's concerns in two lines of text: "defendant's concerns are unfounded because those future privacy interests may be protected by the courts."¹¹¹ The fact that safeguards are in place to protect an individual's genetic information once a DNA sample is taken is of little comfort to a person who should not have been compelled to provide a sample in the first place.

Next, in *A.A. ex rel. B.A.*, the court analyzed a situation where a juvenile was adjudicated delinquent for aggravated assault.¹¹² On the date the 2003 amendments went into effect, A.A. was required to provide a DNA sample for analysis.¹¹³ The juvenile's parents, along with another man convicted of possession of a controlled substance, filed a complaint against the Attorney General of the State of New Jersey, alleging that the amendments violated both the federal and state constitutions.¹¹⁴ Specifically, the plaintiffs argued that without a post-sentence expungement, the Act would deprive them of due process.¹¹⁵ The trial judge held that the Act did deprive plaintiffs of due process unless it was modified to include a right of expungement upon completion of sentence, and the State appealed the ruling.¹¹⁶

The Appellate Division in *A.A. ex rel. B.A.* relied upon previous cases and decisions in other courts to uphold mandatory DNA testing of convicted felons as a valid search within the special-needs exception to the warrant requirement.¹¹⁷ Plaintiffs argued that the special-needs

¹¹¹ *Id.* at 279–80.

¹¹² *A.A. ex rel. B.A. v. Attorney Gen. of N.J.*, 894 A.2d 31 (N.J.Super.Ct.App.Div. 2006).

¹¹³ *Id.* at 38.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *A.A. ex rel. B.A. v. Attorney Gen. of N.J.*, 894 A.2d 31, 44–47 (N.J.Super.Ct.App.Div. 2006) (citing *Treasury Employees v. Von Raab*, 489 U.S. 656, 674–75 (1989)); *United States v. Kincade*, 379 F.3d 813, 854–59 (9th Cir. 2004); *Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ.*, 826 A.2d 624, 642 (N.J. 2003).

exception did not apply because the Act is designed as a tool for law enforcement.¹¹⁸ The Appellate Division side-stepped this argument, however, and focused on the Legislature's goals in deterring recidivism and concluded that this alone was a "special need" beyond ordinary law enforcement.¹¹⁹ The court then concluded that the state's interest in deterring recidivism was an "undeniably compelling" interest.¹²⁰ The court principally relied upon the fact that DNA is an extremely reliable method of identification and that "accuracy in investigation and prosecution serves the ends of justice."¹²¹

In the second part of its analysis, the court concluded that intrusions into offenders' reasonable expectations of privacy were minor because the physical intrusion is minimal and the analysis of DNA is not overly intrusive.¹²² The court gauged its analysis of DNA testing on the "fact" that the STR method of analysis focuses on genetic markers and does not reveal any information other than a person's identity; in essence it was a DNA fingerprint.¹²³ The Appellate Division was unmoved by plaintiffs' claims that advances in DNA technology may make these invasions more intrusive.¹²⁴

The court's decision in *A.A. ex rel. B.A.* is troubling in a couple of respects. First, the special needs analysis conducted by the court follows flawed reasoning. The principal use of compelled DNA testing is to have DNA profiles on file to solve crimes, not the immediate identification of a person to ensure the apprehension of the correct individual; that is what fingerprints are used for. The DNA profiles are compared to evidence in cold cases or compared to evidence obtained in future crimes. For the court to state that the purpose is identification is

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 51–52.

¹²³ *A.A. ex rel. B.A. v. Attorney Gen. of N.J.*, 894 A.2d 31, 52 (N.J.Super.Ct.App.Div. 2006).

¹²⁴ *Id.*

contrary to reality. Solving crimes is the quintessential police function, and any search that is conducted with the primary purpose of solving crimes is not a “special-needs” search.¹²⁵ The presence of other “special-needs” incident to the primary need of normal law enforcement cannot elevate a standard search to one of special-needs.¹²⁶ Yet, the court did not question the government’s justification of the search.

The Appellate Division principally relied upon the DNA/fingerprint analogy in its justification of the search in *A.A. ex rel. B.A.*¹²⁷ When the case was decided in 2006, when DNA technology was not as advanced as it is today, the court gave short shrift to plaintiffs’ concerns that the information being provided was not as benign as the government contended.¹²⁸ The dangers which the court was so quick to dismiss as science fiction are not so far-fetched.¹²⁹ It is becoming increasingly likely that the DNA used in the STR process is not just a “DNA fingerprint,” but contains personal genetic information.¹³⁰ Scientific studies and evidence of this were available in 2007, so it is curious that the Appellate Division ignored the possibility that the DNA-testing process took more than a “fingerprint.”¹³¹

Beyond the concerns with the courts’ reasoning in these cases, there is a more fundamental problem. If the courts’ conclusions in these two cases show anything, it is that society and the judiciary have little regard for the privacy of convicted felons. This may be justified. But what happens when it is not the privacy of a convicted felon that is at stake, but the

¹²⁵ *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–42 (2000) (holding that searches conducted to further the purpose of detection of general criminal wrongdoing do not qualify as special needs searches).

¹²⁶ *Id.* at 46–47. In a special needs analysis, the court is to determine the primary purpose of the search. If the primary purpose of the search is that of general law enforcement, the search does not qualify as a special needs search. In *Edmonds*, the court struck down the warrantless, suspicionless searches conducted at checkpoints searching for narcotics. The government argued that the secondary goal of keeping impaired motorists off the street qualified the searches as special needs searches, regardless of their primary objective. The Court declined to follow this view. *Id.*

¹²⁷ *A.A. ex rel. B.A. v. Attorney Gen. of N.J.*, 894 A.2d 31, 47 (N.J.Super.Ct.App.Div. 2006).

¹²⁸ *Id.* at 52–53.

¹²⁹ See Gibbs, *supra* note 25.

¹³⁰ See Colloquy, *supra* note 26, at 59.

¹³¹ See Gibbs, *supra* note 25.

privacy of a person who has not been found guilty of any crime? The fact that the persons involved in *O'Hagen* and *A.A. ex rel. B.A.* had been convicted of crimes must have colored the courts' analyses. Courts should not so easily justify the subordination of the rights of an individual to the government's interest in identification, particularly if that individual has not been convicted of any crime.

B: Other Jurisdictions Justifying Compulsory DNA Testing of Arrestees

Since New Jersey's newest amendments are not yet in effect¹³², and therefore have not been interpreted by any court, it is useful to see how other jurisdictions have analyzed statutes that compel the production of a DNA sample from arrestees. The majority of cases have upheld mandatory DNA testing of arrestees for fundamentally the same reasons that New Jersey courts used to uphold compulsory DNA testing for convicted felons.¹³³ But a further analysis into the courts' reasoning in these cases, as well as the cases where mandatory DNA testing of arrestees was not upheld, provides a more thorough understanding of a court's analysis of the interests involved in mandatory DNA testing. Such an analysis can also suggest ways to modify a statute so as to best preserve an individual's right to privacy while recognizing and respecting the needs of law enforcement.

In a recent decision, the Third Circuit analyzed a federal law requiring the collection of DNA samples from individuals who are arrested.¹³⁴ A man was arrested for possession of cocaine with intent to distribute.¹³⁵ Following indictment, the government required the man to provide a DNA sample.¹³⁶ The man refused to provide a sample, on the ground that the statute

¹³² See 2011 N.J.Sess.Law Serv. ch. 136 ("This act shall take effect on the first day of the 18th month following enactment").

¹³³ See *O'Hagen*, 914 A.2d 267. See also, *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010), *opinion vacated*, 659 F.3d 761 (9th Cir. 2011).

¹³⁴ 42 U.S.C. § 14135a(a)(1)(A) (2006); *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011).

¹³⁵ *Id.* at 389.

¹³⁶ *Id.* at 390.

violated the Fourth Amendment, and the District Court agreed, holding the statute unconstitutional.¹³⁷ The District Court refused to follow the DNA/fingerprint analogy and determined that the need for identification was not a compelling state interest that outweighed the defendant's privacy interests.¹³⁸ The District Court described comparing fingerprinting and DNA profiling as "pure folly."¹³⁹

The Third Circuit reversed, applying the totality of the circumstances test and relying upon the diminished privacy interests of those arrested and the compelling government interest in properly identifying arrestees.¹⁴⁰ The court dismissed the defendant's two main arguments against DNA testing: (1) that the sampling and creation of a DNA profile was unreasonable under the Fourth Amendment; and (2) that the use of the STR method, revealed more information than identity.¹⁴¹ The court, while acknowledging defendant's fears, concluded that hypothetical concerns about the use or misuse of DNA do not have a "substantial weight in [the] totality of the circumstances analysis."¹⁴² Primarily, the court pointed to the fact that the STR process does not use coding DNA and protections built into the Act to dispel any concerns over privacy.¹⁴³

The defendant also tried to argue that DNA cannot be equated with fingerprinting for the purposes of a privacy analysis.¹⁴⁴ The court disagreed, holding that individuals that are arrested get fingerprinted all of the time as part of the booking process.¹⁴⁵ Fingerprinting is used for the purpose of identifying prisoners and to determine whether an arrestee has been previously been

¹³⁷ *United States v. Mitchell*, 681 F.Supp.2d 597 (W.D.Pa. 2009).

¹³⁸ *Mitchell*, 652 F.3d at 390.

¹³⁹ *Mitchell*, 681 F.Supp.2d at 608 ("Such oversimplification ignores the complex, comprehensive, inherently private information contained in a DNA sample").

¹⁴⁰ *Mitchell*, 652 F.3d at 416.

¹⁴¹ *Id.* at 407.

¹⁴² *Id.*

¹⁴³ *Id.* at 407–08.

¹⁴⁴ *Id.* at 409.

¹⁴⁵ *Id.*

convicted.¹⁴⁶ When a person is arrested, his identity is a matter of government concern and he cannot claim privacy in it.¹⁴⁷ The defendant's final argument concerned the indefinite retention period of his DNA sample.¹⁴⁸

The dissent in this case highlighted the most glaring problems with the reasoning that has been adopted *en masse* by jurisdictions across the country. First is the short shrift given "to an arrestee's expectation of privacy in his DNA, reducing it to an interest in identity only."¹⁴⁹ It is misleading to say that DNA is only used for identification. The real purpose is not to identify, but to use the DNA profile to aid past and future prosecutions.¹⁵⁰ Proponents of DNA-collection statutes argue that the genetic material used in a DNA profile contains "junk-DNA," however, if law enforcement retains the original sample of genetic material, it has a person's full genetic code.¹⁵¹

In *Pool*, the Ninth Circuit upheld the DNA sampling provisions of the Bail Reform Act.¹⁵² The court held that where a court has made a judicial determination of probable cause to believe a person has committed a felony, the government's interest outweigh an individual's privacy interests.¹⁵³ Pool was charged by indictment with possession of child pornography and was arrested and arraigned.¹⁵⁴ As a condition of pre-trial release, Pool was compelled to provide a DNA sample.¹⁵⁵ The court, applying the totality of the circumstances test, found that the

¹⁴⁶ *Mitchell*, 652 F.3d at 409.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 410. No time limit was written into the statute, but the Court held he did not have standing to raise this issue because his sample had not yet been taken.

¹⁴⁹ *Id.* at 416 (Rendell, J., dissenting).

¹⁵⁰ *Id.* at 422–23.

¹⁵¹ *Id.* at 424–25.

¹⁵² 18 U.S.C. § 3142(b) (2006); *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010), *opinion vacated*, 659 F.3d 761 (9th Cir. 2011).

¹⁵³ *Pool*, 621 F.3d at 1214–15.

¹⁵⁴ *Id.* at 1215.

¹⁵⁵ *Id.*

intrusion of Pool's privacy was minimal.¹⁵⁶ Pool tried to argue that given the nature of genetic information, the intrusion was greater than the slight physical intrusion would appear.¹⁵⁷ The court dismissed this argument, and focused on the limitations of the CODIS system, particularly the use of "junk-DNA", which the court stated may only be used for identification and does not contain personal information.¹⁵⁸ The court also relied upon the fact that a judicial determination of probable cause had been made, and Pool's expectation of privacy was diminished because of this.

The primary concern with the type of reasoning employed by the court in this case, like others, is the ignorance of the pace of technological increases and the increasing role of new technologies in law enforcement.¹⁵⁹ As technology continues to improve, if society becomes too numb to the point that there is no longer a reasonable expectation of privacy in a person's DNA, such testing will no longer be considered a search for the purposes of the Fourth Amendment and the government will be free to do what it pleases.¹⁶⁰ The progressive justifications for expanding the scope of DNA testing, from certain convicted felons, to all convicted felons, to arrestees, can only lead to one outcome: every person will be included in the database.¹⁶¹ CODIS could easily expand to include more and more people, just like fingerprints.¹⁶²

The endorsement of mandatory DNA testing of arrestees is not unilateral. A case from Nebraska highlights the concerns courts have regarding DNA-testing statutes.¹⁶³ A man was charged with being a felon in possession of a firearm, and a buccal swab was forcibly taken from

¹⁵⁶ *Id.* at 1215.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1214–15.

¹⁵⁹ *United States v. Kincade*, 379 F.3d 813, 871 (9th Cir. 2004).

¹⁶⁰ *Id.* at 873.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *United States v. Purdy*, No. 8:05CR204, 2005 WL 3465721 (D. Neb. 2005).

him by police officers when he was arrested pursuant to Nebraska law.¹⁶⁴ The law allowed law enforcement officers to obtain physical evidence from individual to aid in identification, which included the collection of DNA samples from certain offenders for use in criminal investigations.¹⁶⁵ In addition, defendants are permitted to obtain DNA testing for the purposes of exoneration.¹⁶⁶ The status of offenders is an important part of the analysis of an individual's reasonable expectation of privacy.¹⁶⁷ Convicted felons and persons released from jail on parole have a diminished expectation of privacy compared to the general public. But, while arrestees may not have as great an expectation of privacy as members of the general public, their expectation of privacy not diminished to the level of a convicted felon.¹⁶⁸

While identification of arrestees may be a constitutionally sound and legitimate purpose for obtaining DNA, the court found Nebraska's statute did not have adequate safeguards to prevent population-wide genetic screening.¹⁶⁹ The primary problem was that the statute did not provide a list of crimes for which DNA testing would attach; the police were authorized to test all individuals in police custody.¹⁷⁰ A person arrested for but not convicted of a crime cannot be forced to provide DNA for the purpose of identification without a showing that this DNA would identify him as the person who committed the crime; probable cause to arrest is not necessarily probable cause for a DNA search.¹⁷¹ In addition, a search through compulsory DNA sampling and analysis must be authorized by a neutral magistrate if it is to pass constitutional muster.¹⁷²

¹⁶⁴ *Id.* at *1. The DNA sample was taken pursuant to NEB.REV.STAT. § 29-3304 (West 2000).

¹⁶⁵ NEB.REV.STAT. §§ 29-3301, 29-3302 (West 2000).

¹⁶⁶ NEB.REV.STAT. § 29-4116 to -4125 (West 2001).

¹⁶⁷ *Purdy*, 2005 WL 3465721 at *5.

¹⁶⁸ *Id.* at *6.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* Under the statute as it was written at the time the case was decided, any person arrested of any crime, felony or misdemeanor, was required to submit a DNA sample. NEB.REV.STAT. 29-3304 (West 2000).

¹⁷¹ *Id.*

¹⁷² *Id.*

The Fourth Amendment requires that reasonable inferences from evidence should be made by a neutral and detached magistrate and not an officer in the field.¹⁷³

A recent California case most clearly articulates the problems with DNA testing of arrestees in general, and the specific flaws in a DNA-testing system that is not implemented properly, in one simple sentence: “the effectiveness of a crime-fighting tool does not render it constitutional.”¹⁷⁴ In 1998, California enacted a law that required DNA samples to be obtained by law enforcement from all persons convicted of specific offenses.¹⁷⁵ The purpose of the Act was to assist law enforcement in the identification and prosecution of criminals, the exoneration of the innocent, and the identification of missing persons.¹⁷⁶ In November 2004, akin to the recent amendments made to New Jersey’s law, the Act was greatly expanded in scope to compel the warrantless search and seizure of a DNA sample from any adult arrested or charged with a felony.¹⁷⁷ In this case, Mark Buza was arrested for trying to set a police car on fire, and after arrest, but before being arraigned, he was asked to provide a DNA sample.¹⁷⁸ The man refused and he was charged with an additional crime of refusal to provide a DNA sample.¹⁷⁹ In its analysis, the court pointed out the flaws of this system.¹⁸⁰ First, focusing on the physical intrusion of a DNA test is misleading; the true search is the analysis of the DNA and the creation of a DNA profile.¹⁸¹ Also, while other courts and legislatures may claim that the purpose of a DNA testing program is to identify those who are arrested, the court here did not waste time with

¹⁷³ *Purdy*, 2005 WL 3465721, at *7.

¹⁷⁴ *People v. Buza*, 129 Cal.Rptr.3d 753, 783 (Cal.Dist.Ct.App. 2011), *as modified* (Aug. 31, 2011), *rev. granted and opinion superseded*, 262 P.3d 854 (Cal. 2011).

¹⁷⁵ CAL. PENAL CODE §§ 295–300.3 (West 1998).

¹⁷⁶ *Id.* at 756–57.

¹⁷⁷ *Id.* at 757.

¹⁷⁸ *Id.* at 754.

¹⁷⁹ *Id.*

¹⁸⁰ *Buza*, 129 Cal.Rptr.3d at 753.

¹⁸¹ *Id.* at 760.

semantics.¹⁸² It was obvious that the purpose of DNA testing was to assist law enforcement in solving ongoing criminal investigations.¹⁸³ The court also pointed to the fact that many felony arrestees are never convicted and many are innocent of the crimes for which they have been arrested.¹⁸⁴ Yet, in spite of this fact, arrestees' DNA profiles and samples are retained forever, unless they go through a burdensome expungement process.¹⁸⁵

Courts at the federal and state level have justified DNA-testing of arrestees along three primary rationales: (1) a person who is arrested has a diminished expectation of privacy, and the government has an overwhelming interest in identification; (2) DNA-testing is no more intrusive than fingerprinting; and (3) DNA-testing is effective. While some jurists acknowledge that the ends do not always justify the means and that DNA is not like a fingerprint,¹⁸⁶ these courts appear to be the exception, not the rule. On the other hand, these courts interpreted laws different from the New Jersey statute.

V: Pros and Cons of the New Jersey Law

Given how New Jersey courts have analyzed previous versions of the Act, and how other jurisdictions have justified other statutes compelling the production of DNA samples from arrestees, it is a logical conclusion that New Jersey courts would find that the practice of obtaining compulsory DNA samples from arrestees is constitutional under both the Federal and New Jersey Constitutions. New Jersey courts, as well as most others, have relied, and continue to rely, upon the analogy between DNA testing and fingerprints, as well as the diminished

¹⁸² *Id.* at 768.

¹⁸³ *Id.* at 780.

¹⁸⁴ *Id.* at 782.

¹⁸⁵ *Buza*, Cal.Rptr.3d at 783–84.

¹⁸⁶ See *People v. Buza*, 129 Cal.Rptr.3d 753 (Cal.Dist.Ct.App. 2011) (Kline, P.J.), *as modified* (Aug. 31, 2011), *rev. granted and opinion superseded*, 262 P.3d 854 (Cal. 2011); *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011) (Rendell, J., dissenting).

expectation of privacy that arrestee has as compared the general public.¹⁸⁷ Given these realities, the only way to protect a person's expectation of privacy in their own DNA is to ensure that adequate safeguards are in place to protect a person's genetic information. With the statute the way it is now, there are several problems that should be addressed in the application and execution of the Act.

The first problem with the statute is the way the DNA testing is executed and justified. The statute, mirroring the opinion of many courts, identifies a "compelling analogy" between fingerprints and DNA, and the use of DNA in identifying a person.¹⁸⁸ This is disingenuous for two reasons. First, an increasing amount of research and science show that the type of genetic material used in DNA testing carries far more information than a fingerprint can.¹⁸⁹ Second, it is plain to see that the purpose of DNA testing statutes is to solve past, present, and future crimes. If the courts and Legislature were candid about the primary purpose of a DNA testing program, it could help to legitimize the program. The Legislature was cognizant of the rationales that courts use to uphold statutes, and aimed to make it easier for a court to justify DNA testing of arrestees under the special needs test that New Jersey applies.¹⁹⁰ Third, a person is compelled to provide a DNA sample upon arrest, without any determination of probable cause by a neutral magistrate.¹⁹¹ Under this scenario, a person arrested of one of the enumerated offenses in the statute would be compelled to provide a DNA sample, even if the person is never charged with an offense.

Fourth, the Act does not contain an adequate mechanism for the expungement of an innocent person's genetic information. While most courts discount the expectation of privacy a

¹⁸⁷ See *supra* note 11.

¹⁸⁸ 2011 N.J.SESS.LAW SERV. Ch. 104 (West).

¹⁸⁹ See Colloquy, *supra* note 26.

¹⁹⁰ See *supra* note 45. The Legislature must have been aware of the reasoning used by courts in upholding similar acts. By putting the purpose of identification in the legislative findings of the bill, the Legislature provided a convenience to the courts. 2011 N.J.SESS.LAW.SERV. Ch. 104 (West).

¹⁹¹ 2011 N.J.SESS.LAW SERV. Ch. 104 (West).

felon has in his privacy, what happens if an innocent person is arrested? Most courts dismiss as irrational a scenario in which DNA could be taken from an “innocent” person; if such DNA was taken, there is a simple and efficient process to right the wrong.¹⁹² This may or may not be true. In Tennessee, a man was falsely arrested and charged with two counts of aggravated burglary, and forced to provide a DNA sample to law enforcement.¹⁹³ Tennessee law provides that any person arrested for a violent felony, as described by statute, shall have a biological sample taken for the purposes of DNA analysis after a magistrate or grand jury makes a determination that probable cause existed for the arrest.¹⁹⁴ Although it is impossible to guarantee that no innocent person is ever arrested, it is possible to make sure the system in place does not retain an innocent person’s DNA indefinitely, with only a half-baked plan in place to provide for a citizen to get his or her DNA profile and sample out of the database.

Some claim that these risks are overblown and that the safeguards in place prevent the misuse of a person’s genetic information;¹⁹⁵ however, no system is infallible. The New Jersey statute is reasonably well-drafted, but could easily be improved. New Jersey’s statute is limited in scope to the classes of people from whom a DNA sample may be extracted.¹⁹⁶ The statute identifies specific violent and sexual crimes for which a person may be compelled to submit a DNA sample.¹⁹⁷ However, even with the limiting criteria in the amendment, a large number of people would be subjected to mandatory DNA testing. Between 2007 and 2009, almost 30,000 people were arrested for crimes that would subject them to mandatory DNA testing under the

¹⁹² See, e.g., N.J.ADMIN.CODE § 13:81-6.1 (2007) (providing for a procedure for the expungement of DNA profiles and samples).

¹⁹³ Brown v. City of Franklin, No. 3101146, 2011 WL 2971092, at * 1 (M.D. Tenn. July 20, 2011).

¹⁹⁴ *Id.*

¹⁹⁵ See, e.g., United States v. Mitchell, 652 F.3d 387, 407 (3d Cir. 2011).

¹⁹⁶ See *supra* note 62.

¹⁹⁷ See *supra* note 73.

new Act.¹⁹⁸ If just one percent of these arrests did not lead to a conviction, the State would require DNA samples from 300 people never convicted of a crime. Coupled with a burdensome expungement process, this would create a situation where an increasing number of individuals, who have never been convicted of any crime, have their genetic information on file.

An area where the New Jersey Act seems to get it right concerns the expungement itself, rather than the process of obtaining expungement. When a person does manage to get a DNA record expunged from the database, it is clear what exactly is deleted.¹⁹⁹ The law and regulations state that where a person obtains an expungement order, the DNA sample is destroyed, the DNA profile is deleted from the computer database, and any other electronic records containing personal identification information is deleted.²⁰⁰ This is important because if only the profile is deleted, then this “expungement” would not really remove anything. The State would be free to use the DNA sample still in its possession to create another DNA profile. In New Jersey’s case, there is no danger of this because all information, including the biological samples, is destroyed upon expungement.

VI: Prospective Changes to the Law

Given how courts in both New Jersey and elsewhere have analyzed the issue of mandatory DNA testing, the history of the New Jersey DNA-testing statute and the language in the newest amendment to the statute, a few changes could be made to the law, or adopted in the regulations implementing the law, to better safeguard individual privacy while addressing the legitimate needs of law enforcement.

¹⁹⁸ See NEW JERSEY STATE POLICE, 2009 UNIFORM CRIME REPORT, available at http://www.nj.gov/njsp/info/ucr2009/pdf/2009_uniform_crime_report_b.pdf (last visited Oct. 17, 2011).

¹⁹⁹ N.J.ADMIN.CODE § 13:81-6.1 (2007).

²⁰⁰ See *Id.* §§ 13:81-1.1 to -7.1.

The biggest change that should be made to New Jersey's law is that which is also the least likely to happen: courts should stop relying on conclusory statements that a DNA testing is in place for identification purposes and to start to address the real concerns about the information citizens are forced to hand over to the police. New Jersey courts, in their analysis of DNA testing, have concluded that DNA testing serves the special need of identification, when the purpose is clearly to solve crimes through the use of DNA evidence.²⁰¹ If the purpose of the law is to solve crime, then DNA searches upon arrest would be subject to the warrant requirement. If courts stopped relying on the analogy between DNA and fingerprints and were not so quick to dismiss the scientific evidence that the genetic material used in DNA testing contains personal information, it might become more difficult for courts to endorse compulsory arrestee DNA testing.

While courts across the country have started to scrutinize compulsory DNA-testing schemes more closely, the majority are maintaining the status quo and New Jersey's courts are likely to do the same. Due to this fact, it is critical that the New Jersey Legislature places adequate safeguards in the law, and not leave it up to the judiciary to vindicate the rights of the wrongfully accused. The process for expungement of a DNA record is the same as that for the expungement of a conviction.²⁰² A person must petition the court, and so long as the county prosecutor and the judge do not object, the record is expunged.²⁰³ First, New Jersey should guarantee a method for a person who is wrongly arrested or not convicted of any crime to have his or her DNA sample and profile removed from the databank and database. As the law is

²⁰¹ *Compare* State v. O'Hagen, 914 A.2d 267 (N.J. 2007) with People v. Buza, 129 Cal.Rptr.3d 753 (Cal. Dist. Ct. App. 2011).

²⁰² N.J. STAT. ANN. §§ 2C:52-1 to -52-32 (2011).

²⁰³ *Id.* §§ 2C:52-10, 52-11.

written now, this situation is not guaranteed, it is only a possibility.²⁰⁴ The laws and regulations should clearly state that when a person is cleared of the charges brought against them, the DNA sample and profile are deleted, along with all other records, as had been in the original version of the bill.²⁰⁵ The process should not force a person to have to jump through administrative hoops to remove their personal information which, as the facts or a court has determined, should never have been taken in the first place.

Some of the changes proposed must be affected by the Legislature—i.e., removing the DNA fingerprint analogy language from the legislative finding—but others do not. While it is unrealistic to expect that these changes will be addressed by the Legislature, given how recently the statute was passed, the most logical choice would be to implement them through the regulations. The Attorney General can draft the regulations in such a way as to streamline the expungement process, while still maintaining the DNA samples of dangerous felons who “get off on a technicality.”

VII: Conclusion

Mandatory DNA testing has been an increasingly useful technique for law enforcement to solve crimes, identify suspects, and exonerate innocent individuals. New Jersey’s own DNA-testing system has been in place since 1994 for precisely these reasons. Originally only requiring testing of those persons convicted of sexual crimes, the scope of this program has been increased through the years, leading to the most recent amendment that expands DNA testing to individuals arrested of certain enumerated violent offenses. New Jersey’s law does contain some safeguards, but the potential for injustice should give a citizen pause before fully endorsing this latest amendment.

²⁰⁴ See N.J.STAT.ANN. §§ 53:1-20.17 to -20.37; N.J.ADMIN.CODE §§ 13:81-1.1 to -7.1 (2007).

²⁰⁵ See S. 214-737, 2d Sess., Law & Pub. Safety Comm. (N.J. 2011).

There are a few problems with New Jersey courts' analysis of compulsory DNA testing. First of all is the reliance of courts on the special need of identification as a compelling enough government interest to override an individual's interest in the privacy of his genetic information.²⁰⁶ Courts have relied on two intertwined, flawed assumptions to justify these programs. First, courts rely on the faulty analogy between DNA profiles and fingerprints.²⁰⁷ Courts relegate DNA profiles to containing only identification information, much like fingerprints are a unique pattern that serves only to identify a person. But advances in science and technology have begun to show that this statement is not necessarily true.²⁰⁸ Second, the DNA selected to be tested in DNA testing programs was originally thought to not contain any personal genetic information, but recent studies have shown that these "useless" segments of DNA do in fact contain personal genetic information, and are not as benign as originally thought.²⁰⁹ Given this information, courts should not be so quick to give personal privacy interests a cursory afterthought when balancing public and private interests.

An alternative, and more realistic approach would be to make sure New Jersey's laws and regulations contain adequate safeguards to protect personal privacy interests. Taking everything into account, New Jersey's DNA Database and Databank Act is neither perfect nor fatally flawed. A couple of changes could be made to New Jersey's law which would satisfy both the interests of law enforcement and the privacy interests of New Jersey's citizens. Amending the statute to require a judicial determination of probable cause before testing and streamlining the expungement process would help to more properly balance the interests of law enforcement while respecting the privacy interests of the individual.

²⁰⁶ See *supra* Part IV, A.

²⁰⁷ See *supra* Part II, C.

²⁰⁸ See *supra* Part II.

²⁰⁹ See *supra* Part II, B.

The primary problem with New Jersey's Act as amended is the language that was taken out of the bill when it was in committee, which would have provided for an automatic destruction of any DNA samples, records and profiles upon the dismissal of any charges or the failure of conviction for the charge for which the DNA sample was taken.²¹⁰ If the statute was amended to include this language, or language to this effect was put into any regulations promulgated by the State, the concern would no longer be as great. The State would not be retaining an innocent person's DNA, subject to an expungement process that only promises the possibility of the removal of private genetic information. No problem exists with the expungement itself, only the inefficient process in which it is implemented.

Another problem with the Act in its current form is DNA is to be taken from a person arrested, before they are released from custody.²¹¹ The statute is silent as to whether charges must be brought, or whether any type of judicial determination must be made before the sample may be compelled.²¹² Again, fears that this process could be abused would be assuaged if the sample could not be taken until formal charges have been brought. This would ensure the existence of other credible evidence as the basis of the arrest, lending more justification for DNA testing. The prevention of baseless testing would save time and money. Addressing these issues would help to ensure legitimacy of the DNA-testing program and protect innocent people from unfounded intrusions into their privacy.

²¹⁰ See *supra* Part V.

²¹¹ See *supra* Part III.

²¹² See *supra* Part V.