

10-1-2005

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### Recommended Citation

Waring, Yasmin Elaine (2005) "Is DNA TNT for Civil Liberties? Defusing Ohio's Explosive New DNA Collection Law," *University of Dayton Law Review*: Vol. 31: No. 1, Article 5.  
Available at: <https://ecommons.udayton.edu/udlr/vol31/iss1/5>

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## Is DNA TNT for Civil Liberties? Defusing Ohio's Explosive New DNA Collection Law

### Cover Page Footnote

The author dedicates this article to her parents, Joseph and Betty Waring, for being there, always; and, Professor Susan Brenner for the kernel.

# IS DNA “TNT” FOR CIVIL LIBERTIES?: DEFUSING OHIO’S EXPLOSIVE NEW DNA COLLECTION LAW

*Yasmin Elaine Waring\**

## I. INTRODUCTION

As the popularity of . . . [shows such as *Crime Scene Investigation* (“CSI”)] grows, jurors across the nation are increasingly interested in DNA testing . . . . In a recent case in Phoenix, jurors *demand*ed a blood-tainted coat be DNA-tested, even though whose blood was on the coat had *never* been in dispute.<sup>1</sup>

It is undisputed that CSI and its slick offspring have heightened America’s awareness about the crucial role DNA<sup>2</sup> testing plays in the forensics process.<sup>3</sup> Criminal justice would be remiss without its admission at trial—this is both the public’s perception *and* expectation.<sup>4</sup> Congress would be remiss to ignore it. Thus, the passage of the DNA Analysis Backlog Elimination Act in 2000 (“DNA Act”) signaled a controversial turn

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<sup>1</sup> Trial Behavior Consulting, Inc., *CSI Ratings Skyrocket: Why Criminal Attorneys Should Pay Close Attention*, <http://www.trialbehavior.com/news/csi.htm> (accessed Jan. 26, 2005) (emphasis added).

CSI is an acronym for “Crime Scene Investigation” and refers to the television series about criminal cases solved by a fictional forensics team. Todd Kleffman, *Today’s Topic: TV Myth vs. Reality: City Lawmen Fight TV Stereotypes*, *Montgomery Advertiser* (Feb. 24, 2003); Trial Behavior Consulting, Inc., *CSI Ratings Skyrocket: Why Criminal Attorneys Should Pay Close Attention*, <http://www.trialbehavior.com/news/csi.htm> (accessed Jan. 26, 2005).

<sup>2</sup> DNA is the abbreviation for the chemical deoxyribonucleic acid which houses the body’s genetic “blueprint.” Victor Walter Weedn & John W. Hicks, *The Unrealized Potential of DNA Testing*, *Natl. Inst. of Just. Research in Action* (publication of the U.S. Dept. of Justice, Office of Justice Programs) 1, 7 (June 1998).

<sup>3</sup> “More than 200 published court opinions support . . . [the admissibility of DNA test results in the courtroom] . . . . Last year there were more than 17,000 cases involving forensic DNA in this country alone.” *Id.* at 1.

<sup>4</sup> “There are now at least on[e]-hundred and thirty-two Americans who have been exonerated by post-conviction DNA testing.” Innocence Project, *Testimony*, Peter J. Neufeld, *Co-Director of the Innocence Project Testimony to Subcommittee on Crime, Terrorism, and Homeland Security: Advancing Justice Through the use of Forensic DNA Technology*, [http://www.innocenceproject.org/docs/Neufeld\\_Congressional\\_Testimony.html](http://www.innocenceproject.org/docs/Neufeld_Congressional_Testimony.html) (July 14, 2003)

[hereinafter *Neufeld Testimony*].

in the application of Fourth Amendment protections.<sup>5</sup> So far, the DNA Act has survived constitutional attacks.<sup>6</sup> Individual state DNA collection statutes, nonetheless, hover over the threshold of constitutional violations because of their ever expanding parameters.<sup>7</sup>

States have been allowed to broaden the scope of their DNA collection based on a common perception that their DNA laws focused exclusively on sexual offenders and homicidal felons.<sup>8</sup> Now, the focus of these laws has shifted to include juvenile delinquents and misdemeanor offenses.<sup>9</sup> Such measures could have explosive repercussions on American civil liberties.<sup>10</sup> Ohio's newly revised statute is no exception; however, with

<sup>5</sup> 42 U.S.C.S. § 14135(a) (LEXIS 2005). The law subjects all federal parolees, probationers, those in custody and under supervisory release to the non-consensual extraction of DNA blood samples by proper authorities. William E. Ringel, *Searches and Seizures, Arrests and Confessions* vol. 2, 17:17 (2nd ed., West 2004). Its primary objective was to "authorize a new program of Federal assistance to States to enable them to clear their backlogs of DNA samples which have been collected from convicted offenders or crime scenes . . . because of shortfalls in resources and the failure of available laboratory capacity to keep pace with the growth of the DNA identification system." H.R. Rpt. 106-900(I) at 8 (Sept. 26, 2000).

<sup>6</sup> *U.S. v. Kincade*, 379 F.3d 813 (9th Cir. 2004), cert. denied, 125 S. Ct. 1638 (2005) (holding on rehearing en banc that the submission of certain federal offenders on parole, probation, or supervised release to non-consensual DNA extraction without reasonable suspicion for subsequent crimes did not violate the Fourth Amendment). *Kincade's* concurring opinion notes that its sister courts have also relied on the "special needs" doctrine to justify compulsory DNA testing. (The "special needs" doctrine is discussed further in § II(B)). See *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004); *U.S. v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003); *Roe v. Marcotte*, 193 F.3d 72, 79-82 (2nd Cir. 1999); see also *State v. Martinez*, 78 P.3d 769 (Kan. 2003) (holding that the state's interest in accurate crime solving outweighed the privacy interests of dangerous convicts); *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996) (holding valid a Colorado statute permitting DNA collection from convicted criminals); *In re Cooper v. Gammon*, 943 S.W.2d 699 (Mo. App. 1997) (validating the Missouri statute condoning DNA collection from sex offenders); *Rise v. Or.*, 59 F.3d 1556 (9th Cir. 1995) (allowing DNA collection from sex offenders).

<sup>7</sup> Louisiana has been acknowledged as the state with the broadest and "strongest" DNA collection statute which allows for DNA collection for all felony arrests, some misdemeanors and has no expungement requirements. La. Stat. Ann. § 15:609 (2005); Tim Schellberg, Speech, *DNA: Justice Speaks: The Expansion of Forensic DNA and Its Relationship to State Legislatures and Congress* (Nov. 20, 2003) (slide 30 of PowerPoint available

[http://dnaresource.com/New\\_Folder/DNA\\_Prosecutor%20Presentation%202.ppt](http://dnaresource.com/New_Folder/DNA_Prosecutor%20Presentation%202.ppt)).

<sup>8</sup> Both Walter Weedn, a Director of the Birmingham Regional Crime Laboratory of the State of Alabama's Department of Forensic Sciences, and John Hicks, a former Assistant Director of the FBI Laboratory Division, summarize that, "Today almost all States have legislation related to DNA databanking, most of it focusing on collecting and testing DNA from individuals convicted of sexual assaults and often homicides." Weedn & Hicks, *supra* n. 2, at 5.

<sup>9</sup> Ohio H. 525, 125th Gen. Assembly, 2003-04 Regular Sess. § 2152.74. The Ohio legislature's purpose for supporting this provision is discussed *infra* § III(A). A state survey of statutes allowing compulsory DNA testing of convicted offenders ranging from misdemeanors to felons include but are not limited to: Ohio Rev. Code Ann. § 2901.07 (West 2005); Ala. Code § 36-18-24 (2005); Alaska Stat. § 44.41.035 (2004); Ariz. Rev. Stat. § 31-281 (2004); Cal. Penal Code Ann. § 296.1 (LEXIS 2005); Colo. Rev. Stat. § 17-2-201(5)(g) (2005); Conn. Gen. Stat. Ann. § 54-102a (West 2005); Del. Code Ann. tit. 29, § 4713(b) (2005); Fla. Stat. § 943.325 (West 2005); Haw. Rev. Stat. § 706-603 (2005); 730 Ill. Comp. Stat. Ann. 5/5-4-3 (West 2005); 35 Pa. Consol. Stat. Ann. § 7651.306 (2004); Tex. Govt. Code Ann. § 411.142 (2005); Utah Code Ann. § 53-10-403 (2005); Wyo. Stat. Ann. § 7-19-403 (2005).

<sup>10</sup> Opponents of compelled DNA samples from parolees and all arrestees, without reasonable suspicion, argue that such acts violate the Fourth Amendment because of the degree of personal information available from a DNA sample. See generally Amicus Curiae Br. Electronic Privacy Information Center in Support of the Appellant at 7, *Kincade*, 379 F.3d. 813 (Feb. 27, 2004). The potential for misuse of this personal information outside of law enforcement also raises "privacy concerns" and could result in genetic discrimination of the individual, as well as the privacy rights of their blood relatives. *Id.*

amendment, these civil liberties can be protected.<sup>11</sup>

Ohio's House bill expanding the state's DNA collection statute ("ORC DNA") became law on February 15, 2005.<sup>12</sup> History has repeatedly proven that good law does not necessarily make good policy.<sup>13</sup> This comment advocates amendment of the ORC DNA and suggests how Ohio's legislature can still accomplish its purpose while preserving personal freedoms and fostering good public policy. Section II provides a primer on DNA analysis and its admissibility in court, including Ohio's own procedure. It then establishes why DNA collection statutes have been impervious to constitutional attacks. Section III examines the controversial aspects of the ORC DNA and how it has mistakenly diverged from its predecessors. This is followed by suggestions on how to amend the statute to maintain its potency while protecting fundamental rights and satisfying public interest. Section IV concludes by forecasting the catastrophic effects of DNA collection laws allowed to "mushroom" in their scope.

## II. BACKGROUND

In the capital murder trial of Robert Charles Jones, his attorneys mounted what became known as a "*CSI defense*." Defense attorney Mark Dukes repeatedly pressed police investigators about why they didn't collect hair and fiber samples, test blood found on clothes and money, or lift fingerprints from several pieces of evidence gathered in the investigation . . . [t]he strategy was at least partially successful.<sup>14</sup>

The probative value of DNA results is substantial.<sup>15</sup> DNA collection and analysis is a process with which the general public has been both acquainted, and misinformed, by the entertainment industry.<sup>16</sup> The Jones trial indicates that the probative value of *how* DNA is collected and the process of DNA analysis can be equally significant at trial.<sup>17</sup>

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<sup>11</sup> Ohio Rev. Code Ann. § 2901.07.

<sup>12</sup> The bill was originally introduced to Ohio's 125th General Assembly as Sub. H.B. 525 on July 8, 2004. Ohio Capital Connection, <http://www.ohcapcon.com/ipc/ipc.htm?125/bills/hb525bi.html> (accessed March 11, 2005).

<sup>13</sup> Statutes have been perceived as "'political' intrusions into the body politic and create new and unexpected rights and duties . . ." William Eskridge, Jr., Philip Frickey & Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 560 (3rd ed., West 2001).

<sup>14</sup> Kleffman, *supra* n. 1 (emphasis added).

<sup>15</sup> "It is now admissible in virtually all jurisdictions, but debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in court." David Faigman, David Kaye, Michael Saks & Joseph Sanders, *Modern Scientific Evidence: The Law and Science of Expert Testimony* vol. 3, 209 (West 2002).

<sup>16</sup> "Real-life forensic investigators say TV detective shows like CSI: Miami give a false impression of what the job is like." Celia Storey, *Crime Scene Imagination*, *Arkansas Democrat-Gazette* 34 (Jan. 8, 2004).

<sup>17</sup> "New problems of admissibility arise as advancing methods of analysis and novel applications of established methods are introduced." Faigman et al., *supra* n. 15, at 209.

A. *The ABCs of DNA Testing*

The viability of DNA analysis in solving criminal investigations lies in its unique character traits and stability.<sup>18</sup> The DNA chemical molecule is found in all life forms, contains the complete genetic information unique to that form, and can hold this information for decades—thus, making it possible to test and utilize evidence in cases that have been left unresolved for years.<sup>19</sup> Even more phenomenal, DNA “profiling” has made it possible to indict and charge the genetic identity of the accused without knowledge or custody of the person.<sup>20</sup>

Despite this precedent, the perception of DNA analysis as nearly infallible has been met with resistance in several jurisdictions.<sup>21</sup> In fact, Maine, Rhode Island, North Dakota, and Utah have been reluctant to allow admission of DNA evidence in criminal trials.<sup>22</sup> Nonetheless, the standard established by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* made the introduction of DNA evidence in both civil and criminal trials practically a non-issue.<sup>23</sup>

Much like real estate, both the accessibility and quality of DNA evidence is determined by *location, location, location*. “Virtually all biological evidence found at crime scenes can be subjected to DNA testing” because DNA exists in every living organism.<sup>24</sup> DNA can be successfully extracted—even in microscopic increments—from saliva, skin cells, bone, teeth, tissue, urine, feces, semen, and other biological remnants, including fingerprints, found at the crime scene.<sup>25</sup> Once the DNA has been collected

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<sup>18</sup> “DNA is the most powerful crime-fighting tool we have at our disposal.” Press Release from Jim Petro, Attorney General of Ohio, *Attorney General Jim Petro Applauds Signing Of HB 525, Prepares For Enactment To Help Solve More Crimes And Identify Remains* (Feb. 15, 2005) (available at [http://www.agstate.oh.us/press\\_releases/2005/pr20050215c.htm](http://www.agstate.oh.us/press_releases/2005/pr20050215c.htm)).

<sup>19</sup> Weedn & Hicks, *supra* n. 2, at 3.

<sup>20</sup> DNA profiling is defined as “[t]he use of biological residue, found at the scene of a crime, for genetic comparisons in aiding in the identification of criminal suspects.” The incident referred to was featured in *USA Today* (March 16, 2000) and contained the following details:

In March 2000, a man known only by his genetic makeup was indicted and charged with a series of sexual assaults in Manhattan. Authorities said that it was the first indictment based solely on a DNA profile. No arrest has yet been made. The man, dubbed the “East Side Rapist” and named in the indictment as “John Doe, an unidentified male,” followed by his DNA profile, was charged with two sexual assaults in 1995 and one in 1997. He is alleged to have sexually attacked 16 women since 1994.

Frank Schmalleger, *Criminal Justice Today: An Introductory Text for the 21st Century* 772 (8th ed., Pearson Prentice Hall 2005) (emphasis added).

<sup>21</sup> Most states allow the admission of DNA evidence in civil trials. However, the admission of DNA evidence in criminal trials is still not universally accepted. *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> 509 U.S. 579 (1993) (establishing the following criteria to determine admissibility of scientific evidence: 1. Whether it has been subject to testing; 2. Whether it has been subject to peer review and publication; 3. Known or potential rates of error and standards involved for controlling the technique’s application and operation; 4. General acceptance in the scientific community).

<sup>24</sup> Weedn & Hicks, *supra* n. 2, at 2.

<sup>25</sup> *Id.*

from a site or an individual and submitted to a laboratory for analysis, the actual DNA extraction process begins and, ideally, ends with a viable DNA/genetic profile or “DNA fingerprint.”<sup>26</sup>

The process begins by removing the DNA molecule from the evidentiary specimen.<sup>27</sup> After the DNA molecule is isolated, an enzyme is applied that fragments the DNA and chromosome.<sup>28</sup> These fragments are separated into band patterns or “alleles.”<sup>29</sup> The forensic analyst is able to determine the genotype, or genetic profile, by “reading” the pattern of alleles based on its location along the chromosome.<sup>30</sup> Currently, there are three different types of tests preferred by analysts, any of which can be employed to produce the final DNA fingerprint.<sup>31</sup>

The restriction fragment length polymorphism (“RFLP”) test is the oldest DNA testing method used in criminal forensics.<sup>32</sup> This test involves the application of radiation probes which allow the analyst to examine and identify the fragments.<sup>33</sup> A match or “hit” occurs when the DNA patterns from the evidence stain and the suspect’s sample DNA are determined to be identical.<sup>34</sup> Despite the effectiveness of the technique, it is the most time consuming and least practical because it cannot be applied to degraded materials and has a minimum six-week turnaround time for results.<sup>35</sup>

Polymerase Chain Reaction (“PCR”) and Short Tandem Repeat (“STR”) are two alternative test methods which allow the DNA analysts to work with degraded specimens and produce the DNA fingerprint in a shorter amount of time.<sup>36</sup> PCR testing involves the repeated copying of the target DNA region from a degraded sample.<sup>37</sup> This repetitive action “amplifies” or increases the number of DNA fragments in the region, thereby producing a readable DNA region, and ultimately, a fingerprint.<sup>38</sup> The downside of this application is the potential for contaminants to increase each time the DNA fragment is amplified and create inconclusive or invalid results.<sup>39</sup> STR is an

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<sup>26</sup> “DNA profiling also termed *DNA fingerprinting*, makes use of human DNA for purposes of identification.” Schmallegger, *supra* n. 20, at 772.

<sup>27</sup> *Id.* at 773. The DNA is housed within a chromosome (which also contains nucleic acids and proteins). Most normal human cells contain 46 chromosomes. Faigman et al., *supra* n. 15, at 298.

<sup>28</sup> Schmallegger, *supra* n. 20, at 773.

<sup>29</sup> The process of separating the DNA fragments and identifying the band patterns is known as “electrophoresis.” *Id.* at 772 - 773. Alleles are defined as “any DNA region (whether or not it constitutes a gene) used for [DNA] analysis.” Faigman et al., *supra* n. 15, at 297.

<sup>30</sup> *Id.* at 243.

<sup>31</sup> Weedn & Hicks, *supra* n. 2, at 7.

<sup>32</sup> *Id.* RFLPs are further divided into classes. One frequently identified class is known as VNTR—variable number tandem repeat. VNTRs are longer fragments than STRs or “short tandem repeat.” Faigman, *supra* n. 15, at 305-306.

<sup>33</sup> Weedn, *supra* n. 2, at 7.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Contamination refers to foreign materials contained within the test sample. “The contamination of greatest concern is that resulting from the *addition* of human DNA.” *Id.*; Faigman et al., *supra* n. 15, at 261-262 (emphasis added).

even shorter, faster, and highly automated method that displays patterns among individual truncated fragments of DNA (as opposed to fragments within entire regions of DNA as with PCR and RFLP testing).<sup>40</sup>

DNA analysis technology is advancing at hyper-speed,<sup>41</sup> but the process is still far from foolproof.<sup>42</sup> Inconclusive or invalid DNA analyses may result from single or multiple variables ranging from samples originally contaminated at the crime scene, contamination from mishandling of sample evidence in the laboratory, contamination from technical procedures, and errors arising from misinterpreting the evidence.<sup>43</sup> Given the potential for inaccuracy, law enforcement agencies note that although non-matches may result about twenty-five percent of the time “most samples are unaffected by contaminants . . . [i]n rare instances, no DNA profile or inconclusive results may be obtained.”<sup>44</sup> William Sessions, former director of the FBI, acknowledged that in twenty-five percent of post-conviction cases, the DNA gathered in the investigation did not match the suspect’s DNA.<sup>45</sup>

Ohio’s recommended procedure for collecting DNA samples from convicted offenders consists of a “buccal collection device.”<sup>46</sup> It enables law enforcement agents to more easily obtain cheek swabs from the individual with the aid of a portable kit.<sup>47</sup> The kits are treated as evidence and come sealed with the appropriate materials to ensure the procedure is safe, thorough, well documented, and expedited.<sup>48</sup> Law enforcement agents are instructed that “[r]easonable use of force may be used to collect the DNA specimen if necessary.”<sup>49</sup> The Office of the Attorney General mandates that all uses of force *must* be videotaped.<sup>50</sup> The collected sample and documents are then sealed and mailed to the Bureau of Criminal Identification and Investigation (“BCI”).<sup>51</sup> The final DNA results are

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<sup>40</sup> Faigman et al., *supra* n. 15, at 297.

<sup>41</sup> According to a research team at Macquarie University’s Research Institute for Biotechnology in Sydney, Australia, EAT Proteinase, a newly discovered enzyme found in an Antarctic volcano, will make possible the collection of usable DNA evidence from items like socks, dandruff, steering wheels, apple cores, and latex gloves. Seth Fewster, *Forget the Gloves, Criminals, DNA Will Get You*, *The Advertiser* (Australia) 13 (Jan. 9, 2004).

<sup>42</sup> Post-conviction DNA analysis on behalf of Brian Kelly, the first person in Scotland to be convicted solely on the basis of DNA evidence in 1989, revealed that “cross contamination” may have produced a false positive, and otherwise inconclusive result. Ian Johnston, *DNA Flaws Set to Clear Officer Jailed for Rape*, *Scotland on Sunday* 5 (Nov. 23, 2003).

<sup>43</sup> Faigman et al., *supra* n. 15, at 261-263.

<sup>44</sup> Ohio Bureau of Criminal Identification and Investigation, *DNA – Determining the Answers*, brochure from the Ohio Bureau of Criminal Identification and Investigation, Office of Jim Petro, Attorney General, State of Ohio, [http://www.ag.state.oh.us/online\\_publications/bci/dna\\_brochure\\_2003-72.pdf](http://www.ag.state.oh.us/online_publications/bci/dna_brochure_2003-72.pdf) (accessed Sept. 25, 2005); Schmallegger, *supra* n. 20, at 775.

<sup>45</sup> William S. Sessions, Editorial: *DNA Tests Can Free the Innocent. How Can We Ignore That?*, *Washington Post* B2 (Sept. 21, 2003).

<sup>46</sup> *Buccal Collection Device for Convicted Offenders*, Ohio State Attorney General Jim Petro.

<sup>47</sup> *Id.*

<sup>48</sup> *Collection of Buccal Samples*, Ohio State Attorney General Jim Petro (May 18, 2005).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*



evaluated and stored in a database.<sup>52</sup> The actual (and disputed) use of these results and the original DNA sample is discussed in Section III(A).

Although highly technical processes are involved in DNA analysis, DNA labs lack mandatory government regulation in quality control and assurance.<sup>53</sup> The repercussions of unwieldy standards have impacted the results of DNA analysis, and ultimately, the liberties of those inculpated by erroneous DNA results.<sup>54</sup> How the ORC DNA addresses this issue is discussed in Section III(A).

B. *Beating the Rap —Why DNA Collection Statutes Survive Constitutional Attack*

“Every state has enacted a statute creating a DNA . . . database for use in solving various classes of crimes. While these statutes have frequently been challenged, the challenges usually have been unsuccessful.”<sup>55</sup> The assault against DNA collection laws has involved brandishing constitutional protections ranging from the First Amendment’s Free Exercise Clause to prohibitions against statutory vagueness.<sup>56</sup>

<sup>52</sup> This database includes the Ohio BCI DNA lab which is linked to the FBI’s National DNA Index System (NDIS) and Combined DNA Index System (CODIS). Ohio Bureau of Criminal Identification and Investigation, *DNA – Determining the Answers*, brochure from the Ohio Bureau of Criminal Identification and Investigation, Office of Jim Petro, Attorney General, State of Ohio, [http://www.ag.state.oh.us/online\\_publications/bci/dna\\_brochure\\_2003-72.pdf](http://www.ag.state.oh.us/online_publications/bci/dna_brochure_2003-72.pdf) (accessed Sept. 25, 2005).

<sup>53</sup> “Quality control refers to measures to help ensure that a DNA-typing result (and its interpretation) meets a specified standard of quality. Quality assurance refers to monitoring, verifying, and documenting laboratory performance.” Although guidelines have been established for quality assurance procedures in DNA labs by FBI-appointed organizations (The Technical Working Group on DNA Analysis Methods (TWGDAM) and the DNA Advisory Board (DAB), *the only laboratories subject to these standards are those who seek federal funds*). Faigman et al., *supra* n. 15, at 257 (emphasis added). For example, The DNA Backlog Elimination Act of 2000 provides:

(2) Quality assurance standards. – (A) The Director of the Federal Bureau of Investigation shall maintain and make available to States a description of quality assurance protocols and practices that the Director considers adequate to assure the quality of a forensic laboratory. (B) For purposes of this section, a laboratory satisfies quality assurance standards if the laboratory satisfies the quality control requirements described in paragraphs (1) and (2) of section 210304(b) of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 14132(b)).

H.R. Rpt. 106-900(I) at 2.

<sup>54</sup> A reference to what is recognized as the “biggest forensic science scandal in U.S. history.” The Houston Police Department Crime Lab is the largest *unaccredited* public lab in America. In September, 2003, the Houston Chronicle revealed that all but one of the *scientists* who worked in the lab did not meet the quality assurance standards for education and training for DNA analysis. They were also never tested regularly for proficiency. Following a grand jury investigation, the District Attorney ordered the retesting of DNA evidence in 378 cases. As of January, 2004, about 23% of the new DNA test results had discrepancies with the original findings. One teenager, convicted and sentenced for rape, was exonerated and released based on the new findings. Peter McQuilan, *The Innocence Project: DNA News*, <http://www.innocenceproject.org/dnanews/index.php> (accessed Feb. 23, 2005) (emphasis added).

<sup>55</sup> Robin Cheryl Miller, J.D., *Validity, Construction, and Operation of State DNA Database Statutes*, 76 A.L.R.5th 239, 1 (2005).

<sup>56</sup> Examples of various failed constitutional arguments in both state and federal courts include: *Shaffer v. Saffle*, 148 F.3d 1180 (10th Cir. 1998) (holding that under Virginia’s DNA collection statute creating a DNA Offender Database which compelled DNA collection from convicts for the purposes of criminal identification and prosecution was religion-neutral, even if it inadvertently affected religious practices,

*Schmerber v. California* established that compulsory blood samples constitute a Fourth Amendment search.<sup>57</sup> Thus, the most incessant attacks against DNA collection laws have challenged their Fourth Amendment validity and the corollary charge that they violate privacy interests.<sup>58</sup> Despite the relentless barrage of personal and privacy interest arguments, expansive DNA collection laws have emerged virtually unscathed.<sup>59</sup>

DNA collection laws have proven resilient due to both the shielding effect of the *special needs doctrine* and the public perception of DNA testing as the ultimate crime-fighting weapon. Thus, even DNA analysts are elevated to quasi-heroic status.<sup>60</sup> Although the ORC DNA may seem constitutionally impenetrable, it still possesses an *Achilles heel*—maybe even a foot.

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and did not violate the First Amendment's Free Exercise Clause; also holding that because compulsory DNA samples are neither testimonial nor penal in nature, Virginia's DNA collection statute does not violate either the Fifth Amendment right against self-incrimination or the Constitution's Article 1 provision against ex post facto laws); *Johnson v. Commw.*, 529 S.E.2d 769 (Va. Sup. Ct. 2000), *cert. denied*, *Johnson v. Va.*, 531 U.S. 981 (2000) (holding that compelling DNA from a prisoner under the Virginia DNA database statute did not constitute cruel and unusual punishment because the DNA statutes were not penal in nature); *Roe*, 193 F.3d 72 (holding that Connecticut's DNA collection statute required only a rational basis standard of review because the claimant's classification was based on the nature of the offense, and because no compelling need to test other violent felons was demonstrated, the statute did not violate the federal Equal Protection Clause); *Rise*, 59 F.3d 1556 (holding that the denial of prisoners for a hearing on how Oregon's DNA collection statute should be applied does not violate the procedural due process rights of convicts compelled to give a DNA sample that is added to the DNA data bank); *Vore v. U.S. Dept. of Just.*, 281 F. Supp. 2d 1129 (D. Ariz. 2003) (holding that the DNA Analysis Backlog Elimination Act of 2000 did not offend the ordinary sense of justice by compelling the drawing of blood from a convicted federal prisoner by a medical professional in a proper environment, and did not violate substantive due process requirements); *State v. Olivas*, 856 P.2d 1076 (Wash. 1993) (holding in part that Washington's DNA collection statute was not proven unconstitutionally vague as applied to the facts of the case—and was not a case for facial vagueness as the stated issues did not involve First Amendment rights).

<sup>57</sup> 384 U.S. 757, 767 (1966).

<sup>58</sup> *Kincade* is demonstrative of such Fourth Amendment arguments. 379 F.3d at 813. The Ohio Court of Appeals also established that Fourth Amendment claims against DNA collection statutes invoke a two-pronged inquiry: 1) considering whether the statute's primary purpose exceeds normal law enforcement needs pursuant to *Skinner's* "special needs" doctrine; and 2) if the special needs doctrine applies, a balancing test of certain factors must be applied to determine the reasonableness of the intrusion. *State v. Steele*, 802 N.E.2d 1127 (Ohio App. 1st Dist. 2003); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (holding that the absence of reasonable suspicion and warrantless searches were permissible, as applied to mandatory drug testing, if the tests accomplish a "special need" beyond normal law enforcement for compelling government interests; the individual's privacy expectations are balanced against the government's interests to justify the departure from the Fourth Amendment safeguards).

*Griffin v. Wisconsin* established that both prisoners and probationers have diminished expectations of privacy. 483 U.S. 868, 874 (1987). *Alfaro v. Terhune* exemplifies a hybrid Fourth Amendment and privacy rights violation claim brought by death row prisoners against California's DNA collection statute. The appellate court found that although constitutional interests were implicated, they were not violated because of the prisoner's diminished expectation of privacy and the compelling government interest to prosecute criminals. 98 Cal. App. 4th 492 (Cal. App. 3rd Dist. 2002).

<sup>59</sup> "All fifty states have enacted DNA database statutes and courts have almost uniformly held that they do not violate the Fourth Amendment." *Steele*, 802 N.E.2d at 1134. Also indicative of this national judicial policy, "Leonard R. Stamm, president of the Maryland Criminal Defense Attorney's Association, said he knows of no other trial judge in the state who has ruled in favor of a constitutional challenge to Maryland's DNA database." David Snyder, *Legality of Md.'s DNA Bank Challenged; Rights of Felons Cited in Rape Case*, The Washington Post, Metro (May 17, 2004).

<sup>60</sup> See *supra* n. 58. One Ohio newspaper capsulized public sentiment in its headline: *Too Effective to Scrap; Crime-Fighting Potency of DNA Matching Outweighs Potential for Overreaching*, The Columbus Dispatch Editorial & Comment (Jan. 22, 2005).

### III. ANALYSIS

In America, we must make doubly sure no person is held to account for a crime he or she did not commit—so we are dramatically expanding the use of DNA evidence to prevent wrongful conviction. (Applause).<sup>61</sup>

In March 2003, President Bush formally announced implementation of a DNA technology initiative.<sup>62</sup> The plan allots more than \$1.2 billion over the next four years to federal and state funding for DNA analysis and reducing backlog.<sup>63</sup> The measure also called for expanding the federal DNA database to include the collection of DNA samples from *all* felons.<sup>64</sup> Ohio may have literally “taken liberties” to qualify for federal funding.<sup>65</sup> The privacy interests of individuals outside the statute’s intended scope may also be compromised.<sup>66</sup> Thus, the ORC DNA has incorporated certain provisions—and neglected others—that deserve closer scrutiny. The objective here is to fashion a public policy that achieves “equilibrium” between both government and privacy interests.<sup>67</sup> This involves first examining model examples of DNA collection laws that contain express provisions offering more private interest protections then discussing the controversial aspects of the ORC DNA which could weaken its constitutional viability and public acceptance. The analysis concludes with pointed suggestions on how to strengthen these weaknesses without diminishing the statute’s purpose and potency.

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<sup>61</sup> Pres. George W. Bush, Speech, *State of the Union* (Washington, D.C., Feb. 2, 2005) (copy of transcript on file available at <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html>).

<sup>62</sup> The initiative is recognized as the Advancing Justice Through DNA Technology Act of 2003 (“AJTDTA”) (H.R. 3214) and is comprised of three titles: Title I: Rape Kits and DNA Evidence Backlog Elimination Act of 2003; Title II: DNA Sexual Assault Justice Act of 2003; Title III: Innocence Protection Act of 2003. H.R. Rpt. 108-321(I) at 1-2 (Oct. 16, 2003); Schellberg, *supra* n.7, at slide 42.

<sup>63</sup> “The National Institute of Justice estimated this year that 350,000 genetic samples from rapes, murders and other crimes nationwide have not been tested.” Mike Martindale, *DNA Delays Let Suspects Roam Free*, *The Detroit News A-Front* (Jan. 22, 2004). The “Advancing Justice Through DNA Technology Act of 2003” designated \$151,000,000 for each fiscal year between 2005-2009 to be divided and awarded to eligible states and local units of government for DNA analyses. H.R. Rpt. 108-321(I) at 4.

<sup>64</sup> Schellberg, *supra* n. 7, at slide 44.

<sup>65</sup> The legislative history for the DNA Evidence Backlog Elimination Act of 2000 clarifies that “[f]or a State to be eligible to receive a grant under this section, the chief executive officer of the State shall submit to the Attorney General an application in such form and containing such information as the Attorney General may require.” H.R. Rpt. 106-900(I) at 2.

<sup>66</sup> “First, DNA holds vastly more information than fingerprints. A DNA profile can be used in establishing kinship relationships, and the sample from which the profile was obtained may hold predictive health and other information of a sensitive nature. Second, as genetic information is shared with biological relatives, an individual’s profile might indirectly implicate a relative in an offence [sic].” Amicus Curiae Br. Electronic Privacy Information Center in Support of the Appellant at 7, *Kincade*, 379 F.3d. 813.

<sup>67</sup> Public policy is perceived as “the *equilibrium* reached in this struggle [i.e., the balance of power, among the contending groups at the time of voting] at any given moment, and it represents a balance which the contending factions of groups constantly strive to weight in their favor.” William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Legislation and Statutory Interpretation* 83-84 (Foundation Press 2000) (emphasis added).

A. *Under the Microscope: Examining the ORC DNA*

1. Diverging from Model Examples

The prior ORC DNA was modeled in part after the federal DNA Act and other federal DNA collection laws.<sup>68</sup> It was also derived from provisions in both Illinois' and Michigan's DNA collection laws.<sup>69</sup> Ohio's expanded law now deviates from federal precedent by subjecting all convicted felons, including juveniles, *and* specific misdemeanor offenders to compulsory DNA testing.<sup>70</sup> Some legislators support the effort.<sup>71</sup> Jim Petro, Ohio's Attorney General, justifies the expansion as a measure that "would provide additional evidence to help law enforcement agencies here and throughout the country solve more murders, rapes and other violent crimes."<sup>72</sup> Ohio is not alone in this trend.<sup>73</sup>

Comparatively, other states like Illinois feel justice can be advanced without subjecting minor offenders to compulsory DNA sampling.<sup>74</sup>

<sup>68</sup> "R.C. 2901.07 is identical in all important respects to the federal statutes at issue in these cases." *Steele*, 802 N.E.2d at 1137. The federal statute for collection and use of DNA identification information from certain Federal offenders (a.k.a. the DNA Backlog Elimination Act), allows for the compulsory sampling from convicted probationers and parolees of federal crimes. 42 U.S.C.S. § 14135(a).

<sup>69</sup> Ohio Attorney General Jim Petro, along with State Representative Bob Latta, advocated legislation expanding the scope of mandatory DNA collection laws to include, inter alia, "anyone convicted of a felony in Ohio" and "31 other states, including Illinois and Michigan, that already collect DNA samples from all convicted felons." *Petro Joins with Representative Latta to Expand DNA Testing to Fight Crime*, [http://www.jimpetro.com/show\\_event.asp?event\\_id=28&origin=newsroom.asp](http://www.jimpetro.com/show_event.asp?event_id=28&origin=newsroom.asp) (accessed Nov. 19, 2004) (emphasis added).

<sup>70</sup> The federal legislative history offers an express list of qualifying federal offenses which include any felony and expressly: murder, sexual abuse and exploitation offenses, slavery and peonage related offenses, kidnapping, robbery or burglary, attempt or conspiracy to commit any of the forementioned offenses and qualified military offenses. H.R. Rpt. 108-321(I) at 36-39. Federal DNA laws do not compel DNA sampling from petty offenses or misdemeanors as defined in 18 U.S.C.S. § 19 (LEXIS 2005).

The ORC DNA exceeds these implicit guidelines. The statute reads in part:

A person who is convicted of or pleads guilty to a felony offense and who is sentenced to a prison term or to a community residential sanction in a jail or community-based correctional facility . . . and a person who is convicted of or pleads guilty to a misdemeanor offense listed in division (D) of this section and who is sentenced to a term of imprisonment shall submit to a DNA specimen collection procedure . . . (emphasis added).

Ohio Rev. Code Ann. § 2901.07(B)(1).

<sup>71</sup> United States Congressman Schiff from California acknowledged, "States have taken the lead in the use of DNA and expanding that use." H.R. Rpt. 108-321(I) at 130.

<sup>72</sup> *Petro Joins with Representative Latta to Expand DNA Testing to Fight Crime*, [http://www.jimpetro.com/show\\_event.asp?event\\_id=28&origin=newsroom.asp](http://www.jimpetro.com/show_event.asp?event_id=28&origin=newsroom.asp) (accessed Nov. 19, 2004).

<sup>73</sup> Currently, thirty-nine states have provisions subjecting misdemeanants or juvenile delinquents or both to compulsory DNA testing. Ironically, New York, a state infamous for its high crime rates, currently has no such provisions in its DNA collection statutes; however, Governor George Pataki has made public his "wish to expand the database to include all felony and misdemeanor offenders." Michele Morgan Bolton, *DNA Database Plan Draws Praise, Criticism; Law Enforcers See a Needed Tool, Others Cite Potential for Abuse*, *The Times Union (Albany)* A1 (Jan. 16, 2004); Schellberg, *supra* n. 7, at slides 20-22.

<sup>74</sup> 730 Ill. Comp. Stat. Ann. 5/5-4-3(a)(1)-(5). Twenty-six states exclude misdemeanants from their DNA collection laws. Schellberg, *supra* n. 7, at slides 20-22.

Illinois’ DNA collection law applies to convicted felons—including juveniles convicted of felonies and other qualifying offenses (sex offenders, parolees, and probationers)—not misdemeanants.<sup>75</sup> The policy behind the exclusion is a good one.<sup>76</sup> It is a reasonable effort to try and maintain privacy protections for ordinary citizens and those not deemed “career offenders.”<sup>77</sup> Where some states’ DNA collection laws may be perceived as less intrusive—or even lax—Illinois has incorporated measures that come closer to achieving the equilibrium ideal of effective public policy.<sup>78</sup> By excluding misdemeanors and including expungement provisions and punitive action for misuse of privileged DNA information, the state demonstrates a desire to both accurately and aggressively prosecute severe criminal acts, and still protect privacy interests.<sup>79</sup>

In contrast, Michigan belongs with the group of states that subject misdemeanor offenders and adjudicated juvenile delinquents to compulsory

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<sup>75</sup> 730 Ill. Comp. Stat. Ann. 5/5-4-3(a)(1)-(5). The statute enumerates who is subject to its provisions as those:

(1) convicted of a qualifying offense or attempt of a qualifying offense . . . and sentenced to a term of imprisonment, periodic imprisonment, fine, probation, conditional discharge or any other form of sentence . . . (1.5) found guilty or given supervision under the Juvenile Court Act of 1987 . . . for a qualifying offense or attempt of a qualifying offense . . . (2) ordered institutionalized as a sexually dangerous person . . . (3) . . . presently confined as a result of such conviction in any State correctional facility or county jail or is presently serving a sentence . . . (3.5) convicted or found guilty of any offense classified as a felony under Illinois law or . . . under the Juvenile Court Act of 1987 . . . (4) presently institutionalized as a sexually dangerous person or . . . as a person found guilty but mentally ill of a sexual offense or attempt to commit a sexual offense; (4.5) ordered committed as a sexually violent person . . . (5) seeking transfer to or residency in Illinois [as pertains to correctional internment] . . .

A misdemeanor is generally recognized as “[a] crime that is less serious than a felony and is usu[ally] punishable by fine, penalty, forfeiture, or confinement (usually for a brief term) in a place other than prison . . .” *Black’s Law Dictionary* 812 (Bryan A. Garner, ed., 7th ed., West 2000).

<sup>76</sup> Imagine the state sanctioned compulsion of DNA samples for misdemeanor offenses ranging from speeding and parking tickets to pet trespasses to acts of civil disobedience.

<sup>77</sup> In opposition to New York’s proposed expansion of its DNA collection statute to include misdemeanor offenders—e.g., civil disobedience, fortune-telling, unlawful dealing with fireworks, petit larceny and shoplifting—critics, including New York defense attorneys and the New York Civil Liberties Union, called the proposal “misguided,” “unconstitutional” and “Orwellian,” commenting that “[i]t just breaks down all the barriers between the state and the individual.” Michele Morgan Bolton, *DNA Database Plan Draws Praise, Criticism; Law Enforcers See a Needed Tool, Others Cite Potential for Abuse*, *The Times Union* (Albany) A1 (Jan. 16, 2004).

“Career offenders” is used in the statutory language of the AJTDTA to reference persons who have received federal sentences of imprisonment or death. H.R. Rpt. 108-321(I) at 10-11.

<sup>78</sup> See *supra* n. 67. Hawaii, Missouri, and Pennsylvania exclude the category of “all violent crimes” from the list of qualifying offenses subject to their DNA collection statutes. Both Hawaii and Missouri have narrowed the list of qualifying offenses to apply only to sex crimes and murder. Schellberg, *supra* n. 7, at slides 20-22.

<sup>79</sup> 730 Ill. Comp. Stat. Ann. 5/5-4-3(f)-(f-5). Illinois’s expungement provisions allow for the destruction of DNA records from the state and national DNA databases upon “notification of a reversal of conviction based on actual innocence. It also classifies any intentional misuse of privileged DNA information as a Class 4 felony subject to a minimum fine of \$5,000. Schellberg, *supra* n.7, at slides 20-22.

DNA collection.<sup>80</sup> What is notable about Michigan's law is its specificity.<sup>81</sup> The misdemeanor offenses—which also apply to juveniles—are “plainly” identified and less likely to be misconstrued.<sup>82</sup> In contrast to the Ohio statute, the Michigan law provides more than a fragmented list of codes or divisions that could be misinterpreted.<sup>83</sup> Michigan's explicit list of offenses, all of which are criminally lewd or sexual in nature, indicates the legislative intent behind the requirement.<sup>84</sup> The likelihood that violent and sexual misdemeanor offenders could, if not deterred, commit violent sexual felony offenses is used to promote the view that the privacy intrusion is minimal and, therefore, justified.<sup>85</sup> Thus, storing the offenders' DNA results in a criminal database does not violate the constitution.<sup>86</sup> It is also intuitively

<sup>80</sup> These states include Alabama, Alaska, Arizona, Arkansas, Kansas, Louisiana, Maine, Minnesota, New Jersey, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Utah, Vermont, Washington, and West Virginia. *Id.*

<sup>81</sup> Mich. Comp. Laws § 712A.18k(b)(i)-(vi)(2005).

<sup>82</sup> *Id.* The statute's plain text is also an allusion to the “plain meaning rule” which instructs the interpreter to follow the plain meaning of the statute's text unless the text suggests an absurd result or scrivener's error. The complaint here is that this section of the ORC DNA is less clear where it needs to be most clear. Eskridge et al., *supra* n. 13, at App. B, 19 (3rd ed., West 2001).

<sup>83</sup> Ohio's misdemeanor provision is written less plainly. Ohio Rev. Code Ann. § 2901.07(B)(1), (D); *see supra* n. 70. When the reader refers to “Division D” for the list of misdemeanors a list of code numbers is supplied. Ohio Rev. Code Ann. § 2901.07(D)(1)-(3). More specific details are provided in § 2901.07(D)(4) which reads “[a] sexually oriented offense or a child-victim oriented offense, both as defined in section 2950.01 of the Revised Code, that is a misdemeanor, if, in relation to that offense, the offender has been adjudicated a sexual predator, child-victim predator, habitual sex offender, or habitual child-victim offender, all as defined in section 2950.01 of the Revised Code.” Ohio Rev. Code Ann. § 2901.07(D)(4). In short, the qualifying misdemeanor offenses relate to violent and sex crimes; nonetheless, the law should be plainly written so it can be properly applied, especially in light of the potential privacy risks.

The Attorney General's office does provide a complete and “plainly” written list of qualifying felon and misdemeanor offenses—buried in its website. *See Offenses Requiring DNA Sample Submission*, [http://www.ag.state.oh.us/online\\_publications/bci/dna\\_qualifying\\_offenses.pdf](http://www.ag.state.oh.us/online_publications/bci/dna_qualifying_offenses.pdf) (accessed Mar. 18, 2005).

<sup>84</sup> The statute lists the misdemeanors as: “(i) . . . enticing a child for immoral purposes. (ii) . . . window peeping, . . . indecent or obscene conduct in public or loitering in a house of ill fame or prostitution; (iii) . . . indecent exposure. (iv) . . . prostitution . . . (v) . . . leasing a house for prostitution. (vi) . . . female under the age of 17 in house of prostitution.” Mich. Comp. Laws § 712A.18k(b)(i)-(vi).

<sup>85</sup> United States Attorney General Robert Raben urged Congress to include juveniles adjudicated delinquent juveniles in federal courts as qualifying offenders subject to compulsory DNA collection. He observed “[a]s a matter of policy, a 17-year-old who is adjudicated delinquent for (e.g.) molesting a child or committing a rape presents potentially the same future danger to public safety as an older person who commits such a crime. If he commits additional offenses later in life, the public interest in being able to solve these crimes and apprehend the perpetrator is the same, regardless of the age at which he commenced his course of criminal conduct.” H.R. Rpt. 106-900(I) at 35-36. Incidentally, Congress did not add juvenile delinquents to its 2003 amendments to federal DNA acts. H.R. Rpt. 108-321(I) at 35-36.

Ohio Representative Latta testified at the first hearing for the expanded bill that inclusion of “11 of the most serious misdemeanor convictions . . .” along with all convicted felons would result in “more crimes being solved, more unidentified remains would be identified, and more innocent individuals would be exonerated.” *Senate Committee on Judiciary HB 525*, <http://www.ohcapcon.com/ipc/ipc.htm?oils/read-notes.htm?session=125&billnum=HB525> (accessed Mar. 18, 2005).

The Plain Dealer commented in its Opinion page “Some may question the scope of the law requiring the collection of DNA samples from juvenile felons and for certain misdemeanors, but this effort in many ways is only an extension of the dated practice of fingerprinting all convicts.” *Adding to Justice's Tool Kit*, The Plain Dealer Opinion (Cleveland) (Dec. 13, 2004).

<sup>86</sup> *See supra* nn. 56-57 and accompanying text.

reasonable. Protecting the public from criminal offenders is a primary responsibility of the state. Storing the DNA results of people with unpaid parking tickets is not.

The committee reports for the ORC DNA revealed why the Ohio legislature detoured from more exemplary statutes like Illinois'.<sup>87</sup> Representative Robert Latta, co-sponsor of the bill, noted that taking DNA samples only from violent crime offenders reduced the number of crimes solved by fifty percent.<sup>88</sup> Including felons and specific misdemeanors is projected to increase the number of crimes solved by five hundred percent.<sup>89</sup> The statute's expansion will also help reduce the tremendous backlog of DNA specimens and better facilitate the identification of missing persons.<sup>90</sup> The less explicit reasons for its divergence, however, lie in the wielding of sovereign power, the advancement of political agendas, and perhaps a little paranoia.<sup>91</sup> Although the overall purpose behind the expansion of the ORC DNA is an idealistic one, certain provisions create a potential policy minefield.

## 2. The Explosive Provisions and Stealth Omissions of the ORC DNA<sup>92</sup>

### a. O.R.C. § 109.573(B)-(G): "Use," "Misuse" and No Punishment

Arthur Miller wrote "there are at least four constitutionally-based privacy rights . . . [and] a fifth: informational privacy. That is a much harder one to tease out of the Constitution or the Supreme Court's decisions, although there are some intimations that to some degree it is there."<sup>93</sup> Conscious of these "intimations," the federal DNA Act "strictly" limits the

<sup>87</sup> Illinois has witnessed 21 cases of exoneration and release from death row based on DNA analyses or re-testing. *Neufeld Testimony*, *supra* n. 4; *House Criminal Justice HB 525*, <http://www.ohcapcon.com/ipc/ipc.htm?oils/read-notes.htm?session=125&billnum=HB525> (accessed Mar. 18, 2005).

<sup>88</sup> *House Criminal Justice HB 525*, <http://www.ohcapcon.com/ipc/ipc.htm?oils/read-notes.htm?session=125&billnum=HB525> (accessed Mar. 18, 2005).

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

<sup>90</sup> The Ohio Attorney General noted that increased funding for the BCI DNA laboratory has already resulted in a decreased processing time for DNA cases from 150 days to approximately 50 days and eliminated 600 cases that had no suspects from its backlog. *Petro Joins with Representative Latta to Expand DNA Testing to Fight Crime*, [http://www.jimpetro.com/show\\_event.asp?event\\_id=28&origin=newsroom.asp](http://www.jimpetro.com/show_event.asp?event_id=28&origin=newsroom.asp) (accessed Nov. 19, 2004).

<sup>91</sup> As observed by Publius in *The Federalist*, "[T]here is in the nature of sovereign power an impatience of control that disposes those who are invested with the exercise of it to look with an evil eye upon all external attempts to restrain or direct its operations." Quentin P. Taylor, ed., *The Essential Federalist: A New Reading of the Federalist Papers*, Federalist No. 15, 86 (Madison House 1998). It is interesting to note that Ohio Attorney General Jim Petro, one of the bill's strongest proponents, is also running for governor of Ohio in 2006 and his political website highlights his prominent role in the bill's creation and passage. See *Petro Joins with Representative Latta to Expand DNA Testing to Fight Crime*, [http://www.jimpetro.com/show\\_event.asp?event\\_id=28&origin=newsroom.asp](http://www.jimpetro.com/show_event.asp?event_id=28&origin=newsroom.asp) (accessed Nov. 19, 2004).

<sup>92</sup> The amended text referred to in this section can be located at File 178, Sub. H.B. No. 525, DNA Specimen Collection, 2004 Ohio Laws File 178 (Sub. H.B. 525); <http://www.ohcapcon.com/ipc/ipc.htm?oils/read-notes.htm?session=125&billnum=HB525> (accessed March 18, 2005).

<sup>93</sup> Arthur Miller is a world renowned authority on privacy issues in the information age. Arthur R. Miller, *The Right of Privacy: A Look Through the Kaleidoscope*, 46 SMU L. Rev. 37, 45 (1992).

use of DNA analyses stored in federal and national DNA databanks to “identification purposes and virtually nothing else.”<sup>94</sup> The ORC DNA expands upon the “uses” the federal DNA Act was trying to limit.<sup>95</sup> The actual “use” language of the statute reads in part “[t]he bureau [(BCI)] may use or disclose information from the population statistics database, for *identification research* and *protocol development*, or for *quality control* purposes.”<sup>96</sup> The wording here indicates that the DNA collections will be available for research and development purposes, in addition to identification purposes.<sup>97</sup> The legislature’s failure to elaborate on what *identification research* and *protocol development* involves is a problem because of the potential for misuse that could be justified under this vague description.<sup>98</sup>

Even more license for possible indiscriminate use is granted in the following provision which states “[t]he DNA record and personal identification information attached to it shall be used only for the purpose of personal identification *or for a purpose specified in this section*.”<sup>99</sup> This section comes with a blanket provision that allows the BCI to “disclose information to a law enforcement agency for the *administration of criminal justice*.”<sup>100</sup> This plain reading of the ORC DNA reveals the use of DNA collections is not confined to “identification purposes” but can be used for any purpose as long as it can be deemed remotely relative to the “administration of justice.”<sup>101</sup> Further, the language seems to extend the

<sup>94</sup> 42 U.S.C.S. § 14132(b)(3) (LEXIS 2005); 42 U.S.C.S. §§ 14133(b) – (c) (LEXIS 2005). United States Assistant Attorney General Robert Rabancritized what he called the “strict confidentiality rules” of the DNA Act because of their limitations on effecting criminal procedure commenting that “[c]onsiderations of privacy or confidentiality do not justify these restrictions.” H.R. Rpt. 106-900(I) at 35-36.

<sup>95</sup> Ohio Rev. Code Ann. § 109.573(B)-(F) (West 2005).

<sup>96</sup> *Id.* at § 109.573(B)(2)(c) (emphasis added).

<sup>97</sup> The amended bill’s preface states in its summation of the bill’s provisions that “other changes relating to the collection and use of DNA specimens” were made. File 178, Sub. H.B. No. 525, DNA Specimen Collection, 2004 Ohio Laws File 178 (Sub. H.B. 525); <http://www.ohcapcon.com/ipc/ipc.htm?olis/read-notes.htm?session=125&billnum=HB525> (accessed March 18, 2005).

<sup>98</sup> United States Congresspersons John Conyers Jr., Jerrold Nadler, Robert C. Scott, Maxine Waters, William D. Delahunt and Steven R. Rothman expressed their views on the expansion of the national DNA database CODIS (a database into which Ohio will upload the results of its DNA analysis): “With this expansion comes the increased likelihood that the DNA samples and analyses could be misused. We must be ever mindful of our responsibility to protect the privacy of this DNA information, ensuring that it be *used only for law enforcement identification purposes*.” H.R. Rpt. 106-900(I) at 50-52 (emphasis added). The ORC DNA’s accompanying analysis and commentary of the expanded provisions does not elaborate on the issue. LSC Analysis for HB 525,

<http://www.ohcapcon.com/ipc/ipc.htm?125/bills/hb525bi.html> (accessed March 11, 2005).

<sup>99</sup> Ohio Rev. Code Ann. § 109.573(D) (emphasis added).

<sup>100</sup> Ohio Rev. Code Ann. § 109.573(B)(2)(a) (emphasis added) (“Administration of criminal justice” is defined as “the performance of *detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons* or criminal offenders. ‘Administration of criminal justice’ also includes criminal identification activities and the collection, storage, and dissemination of criminal history record information.”) Ohio Rev. Code. Ann. § 109.573(A)(9) (emphasis added).

<sup>101</sup> Ohio Rev. Code Ann. § 109.573. According to this language, DNA results could, for example, play a factor in plea bargaining, sentencing, etc., when certain predilections or genetic dispositions are made known because of the DNA results.



reach of DNA collections by using the language “accused persons.”<sup>102</sup> This could mean anyone declared “suspect,” including persons without any criminal history or record, can be subjected to compulsory DNA testing based on a “hunch.”<sup>103</sup>

Additionally, the ORC DNA does not incorporate measures that would effectively deter the misuse of DNA evidence.<sup>104</sup> In contrast, the federal DNA Act of 2000 was amended in 2003 to include a criminal penalty for misuse of privileged DNA information and to fine guilty persons up to \$250,000 for each instance of misconduct.<sup>105</sup> Illinois’ amended version of its DNA collection law also includes a punitive action for improper use of DNA analyses.<sup>106</sup> Without stricter use guidelines and severe penalties for misuse—especially in this age of genetic discrimination and cyber crime—the ORC DNA could be more instrumental in facilitating crime than justice.<sup>107</sup>

b. O.R.C. § 109.573(H): Unsure About Quality and Assurance

Josiah Sutton was a Houston teen convicted of rape in 1998 based on faulty DNA analyses.<sup>108</sup> He was exonerated over five years later, after the Texas Department of Public Safety and other organizations “revealed potential contamination problems at the subject lab as well as poor working

<sup>102</sup> The statutory phrase “Rehabilitation of accused persons or criminal offenders” extends rehabilitative practices to the accused *or* sentenced and convicted persons. The meaning of the “accused” in the statutory language is left open to narrow or broad interpretation. “Accused” in general can mean a person informally blamed for wrongdoing or a person who has been arrested and brought before a magistrate or who has been formally charged with a crime. *Black’s Law Dictionary* 18 (Bryan A. Garner, ed., 7th ed., West 2000). The ORC DNA does not define the term in its definitional section. Ohio Rev. Code Ann. § 109.573(A).

<sup>103</sup> Although the ORC DNA expressly allows for DNA collection from all *convicted* felons and sexual misdemeanants, the inclusion of the “accused” may signal a desire for future expansion of the law to include persons *charged* with felonies like Virginia. The first to pass a DNA collection law in 1989, Virginia expanded its statute in 2003 to include all persons charged with felonies. David Snyder, *Legality of Md.’s DNA Bank Challenged*, *The Washington Post*, Metro (May 17, 2004).

<sup>104</sup> While the statute warns that authorized persons can not “knowingly disclose” the privileged information and that unauthorized persons cannot “obtain” this information, the statute does not impose any punitive measures for this misconduct. Ohio Rev. Code Ann. § 109.573(G)(1)-(2).

<sup>105</sup> The amended section to 42 U.S.C.S. § 14135e(c) states, “A person who knowingly discloses a sample or result described in subsection (a) in any manner to any person not authorized to receive it, or obtains or uses, without authorization, such sample or result, shall be fined not more than \$250,000, or imprisoned for a period of not more than one year. Each instance of disclosure, obtaining, or use shall constitute a separate offense under this subsection.”

<sup>106</sup> “Any person who intentionally uses genetic marker grouping analysis information, or any other information derived from a DNA sample, beyond the authorized uses as provided under this Section, or any other Illinois law, is guilty of a Class 4 felony, and shall be subject to a fine of not less than \$5,000.” 730 Ill. Comp. Stat. 5/5-4-3(f-5).

<sup>107</sup> Given that the collection and storage of DNA analyses is largely electronic (and the state DNA databases are electronically linked to a national DNA database; making it one big network), the entire process is vulnerable to “cyber” attacks from individuals to corporations. “Not only is technology being used by criminals to further their illegal enterprises, but computers, cellular phones, and other sophisticated electronic devices are being used to gather counterintelligence on police operations. . . . Federal, state, and local law enforcement agencies and officers can expect to come under increasing attack as digital criminals increase in sophistication.” Marc D. Goodman, *Why the Police Don’t Care about Computer Crime*, 10 Harv. J.L. & Tech. 465, 474 (1997) (emphasis added).

<sup>108</sup> McQuilan, *supra* n. 54.

conditions and inadequate training.”<sup>109</sup> As Mr. Sutton’s case demonstrates, quality and assurance controls in the processing of DNA collections determine guilt or innocence.<sup>110</sup> Local and state governments upload their unregulated DNA results into a federally regulated national DNA database.<sup>111</sup> This increased potential for contaminating local, state, and national databases with defective analyses demands stringent, uniform, and nationally regulated quality and assurance controls for all DNA crime labs. Regulating these standards needs to be a threshold priority.<sup>112</sup> The content of the ORC DNA indicates that they are not.<sup>113</sup>

The ORC DNA does contain an umbrella procedural provision that delegates authority to the BCI for establishing procedures for “collection, maintenance, preservation, and analysis of DNA specimens” and the “creation, maintenance, and operation of the DNA database.”<sup>114</sup> What it does not contain are provisions *mandating* compliance with national accreditation organizations for crime labs.<sup>115</sup> Although the BCI laboratories are accredited by the ASCLD-LAB, the law does not require the third-party labs *they* contract with to have the same accreditation.<sup>116</sup> Thus, quality and assurance controls are out of control.

The legislature, the Attorney General’s Office, and the BCI can all draw a valuable lesson from the federal example.<sup>117</sup> Without strict legal

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<sup>109</sup> *Id.*; H.R. Rpt. 108-321(I) at 121.

<sup>110</sup> McQuilan, *supra* n. 54.

<sup>111</sup> Schmallegger, *supra* n. 20, at 775-776.

<sup>112</sup> Congressional reports on the matter reveal “[t]here are very few organizations currently that offer accreditation programs . . . and they are not required to adopt the FBI Director’s national quality assurance standards.” H.R. Rpt. 106-900(I) at 39.

<sup>113</sup> Neither the preface to the ORC DNA amended bill, the bill (LSC) analysis, or commentary mention the issue of improving quality and assurance controls. Ohio is not alone. At present at least two states, New York and California, *require* their forensic laboratories to be accredited. Rotunda, Inc., *HB525 DNA Collection (LATA, R) To Require DNA Specimen Collection From Delinquent Children and Criminal Offenders for all Felonies*, <http://www.ohcapcon.com/ipc/ipc.htm?125/bills/hb525bi.ihtml> (last accessed Mar. 11, 2005); Faigman et al., *supra* n. 15, at 257, n. 98.

<sup>114</sup> Ohio Rev. Code Ann. § 109.573(H)(1)-(10). BCI is the Ohio state Bureau of Criminal Identification and Investigation.

<sup>115</sup> *Id.* The American Association of Crime Laboratory Directors-Laboratory Accreditation Board (ASCLD-LAB) is the only nationally recognized organization that accredits forensic laboratories; accreditation is *voluntary*, not *mandatory*, and certification and accreditation are performed through *self-evaluation* and overseen by crime laboratory directors.

The FBI has two appointed groups that prepare guidelines and procedures for quality assurance: the Technical Working Group on DNA Analysis Methods (TWGDAM) and the DNA Advisory Board (DAB). Faigman et al., *supra* n. 15, at 257; H.R. Rpt. 108-321(I) at 120.

<sup>116</sup> The ORC DNA only requires third party labs to comply with requirements established by the bureau. The provision reads in part: “A public or private laboratory under contract with the bureau shall follow quality assurance and privacy requirements established by the superintendent of the bureau.” Ohio Rev. Code Ann. § 109.573(B)(5). The Office of the Ohio Attorney General publishes a brochure on the BCI “DNA Laboratory Services” that notes: “The BCI laboratories adhere to national quality assurance standards and are accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).” The Ohio Bureau of Criminal Identification and Investigation, Brochure, *DNA Laboratory Services*, available at [http://www.ag.state.oh.us/online\\_publications/bci/dna\\_labs2004.pdf](http://www.ag.state.oh.us/online_publications/bci/dna_labs2004.pdf) (accessed March 18, 2005).

<sup>117</sup> Peter Neufeld testified before a subcommittee for AJTDTA: “When it was revealed earlier this year that a FBI crime lab scientist failed to follow a required control in casework . . . the Inspector General opened and [sic] independent investigation to assess the scope of the failure, the potential impact on

mandates, and not only departmental guidelines, criminal DNA collection will disrupt due process and allow “our work ethic and our sense of duty to fall by the wayside to the detriment of innocent individuals.”<sup>118</sup>

c. The Sin of Omission

The most egregious problem with the ORC DNA, however, is what is missing. Despite provisions for post-conviction DNA testing and congressional testimony that “more innocent individuals would be exonerated” with the amended ORC DNA, the statute provides no expungement provisions.<sup>119</sup> This is not for lack of precedent.<sup>120</sup> There is no state consensus, however, on the inclusion of expungement provisions in DNA collection laws.<sup>121</sup>

Opponents of expungement provisions liken DNA records to fingerprint records—because fingerprint records are not expunged upon reversal of conviction, neither should DNA records.<sup>122</sup> The discrepancy between DNA records and fingerprint records has been well established.<sup>123</sup> The United States Department of Energy Office of Science determined in its *DNA Forensics* report that a “DNA sample can provide insights into many intimate aspects of a person and their families including susceptibility to particular diseases, legitimacy of birth, and perhaps predispositions to certain behaviors and sexual orientation. This increases the potential for genetic discrimination by government, insurers, employers, schools, banks, and others.”<sup>124</sup> Furthermore, with the widespread weaknesses in quality and assurance controls mentioned above, the likelihood for misuse increases; therefore, “strict confidentiality” within the operations of DNA databases is

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prosecutions, the reason existing quality controls failed and to recommend remedial action to reduce the risk of recurrence. . . . the Bureau is re-testing evidence in more than one-hundred cases assigned to the reckless scientist.” *Neufeld Testimony*, *supra* n. 4.

<sup>118</sup> An excerpt from the statement of the Honorable Sheila Jackson Lee of Texas on improving crime lab accreditation. H.R. Rpt. 108-321(I) at 121. *Mathews v. Eldridge* reaffirmed that “due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . [d]ue process is flexible and calls for such procedural protections as the particular situation demands.” 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

<sup>119</sup> Ohio Rev. Code Ann. § 2953.73 (West 2005) addresses post conviction DNA testing. Ohio Sen. Comm. on Jud., HB525 DNA Collection (LATA, R) To Require DNA Specimen Collection from Delinquent Children and Criminal Offenders for All Felonies, 125th Gen. Assembly (Dec. 8, 2004).

<sup>120</sup> Illinois’ Collection Laws allow for a DNA record and any of its copies to be expunged (destroyed and expelled) from the Illinois DNA Identification index and any law enforcement agency or forensic DNA laboratory on notification of a reversal of conviction or pardon based on actual innocence and with a letter sent to the court to verify and confirm destruction of all DNA records. 730 Ill. Comp. Stat. 5/5-4-3(f-1). U.S. military law also allows for expungement of DNA analysis from designated indexes once a final court has established that a conviction for a qualifying offense has been overturned. 10 U.S.C.S. § 1565(e) (LEXIS 2005).

<sup>121</sup> “The states vary in whether they provide for expungement under their DNA provisions in case of reversal of conviction.” H.R. Rpt. 106-900(I) at 39.

<sup>122</sup> H.R. Rpt. 106-900(I) at 37-38.

<sup>123</sup> “DNA profiles are different from fingerprints, which are useful only for identification.” Amicus Curiae Br. Electronic Privacy Information Center in Support of the Appellant at 6, *Kincade*, 379 F.3d 813.

<sup>124</sup> *Id.*

more myth than reality.<sup>125</sup> These systemic flaws call for more substantive remedies for the wrongly accused.<sup>126</sup> Expungement is one such remedy.

d. Missing the Point of *Miranda*

A final issue that must be considered by the drafters of the ORC DNA is the statute's impact on the rights guaranteed by *Miranda*.<sup>127</sup> Although some courts have established that DNA samples are not testimonial in nature,<sup>128</sup> DNA evidence invariably "speaks" for the individual before that individual has a chance to speak for themselves thereby breaking the promise of *Miranda's* "procedural safeguards."<sup>129</sup> Such considerations are not meant to upset the balance of powers.<sup>130</sup> *Miranda's* status as the Court's most famous criminal law decision, however, and the fact that even "[s]chool children are more likely to recognize the *Miranda* warnings than the Gettysburg Address," make it a paramount matter of public policy to protect those rights.<sup>131</sup>

Overly expansive DNA collection laws can be construed as the legislature's de facto narrowing of *Miranda's* holding.<sup>132</sup> The Court itself has narrowed *Miranda's* holding.<sup>133</sup> In this brave new world of genetic culpability, the Court needs to reexamine *Miranda*, consider cases like *Kincade*, and clarify a defendant's procedural rights—not leave them vulnerable to loose interpretation.<sup>134</sup> Otherwise, statutes like the ORC DNA, left unchanged, will deprive individuals of *Miranda's* protection and turn this tool for effecting justice into an effective instrument of oppression.

B. *Defusing the Bomb: A "To Do" List for the Ohio State Legislature*

The courts have established that DNA collection laws are

<sup>125</sup> This is reference to the argument that retention of a person's DNA profile in the DNA identification index "has no effect on him later in life" because of the strict confidentiality rules that forbid unauthorized disclosure. H.R. Rpt. 106-900 (I) at 37-38.

<sup>126</sup> As Peter Neufeld of "The Innocence Project" expressed: "But for the arrestee once the criminal charges are dismissed or he is acquitted, or for the volunteer once his DNA is compared and he is excluded, striking a proper balance with privacy and equal protection requires the destruction of his sample and the expungement of his profile." *Neufeld Testimony*, *supra* n. 4.

<sup>127</sup> *Miranda v. Ariz.*, 384 U.S. 436, 444 (1966) (holding that defendant's statements obtained in police custody, without the presence of counsel and without disclosure of constitutional rights violated the Fifth Amendment privilege against self-incrimination and were not admissible at trial).

<sup>128</sup> See *Shaffner*, 148 F.3d 1180; *In re Cooper*, 943 S.W.2d 699; *Boling*, 101 F.3d 1336.

<sup>129</sup> *Miranda*, 384 U.S. at 444.

<sup>130</sup> The argument continues over Congress's power to "supersede" *Miranda* and the Court's own holding that declared the procedures were "prophylactic rules" and not "constitutional requirements." Laurie Magid, *The Miranda Debate: Questions Past, Present, and Future: A Review of the Miranda Debate Law, Justice, and Policing*, 36 Hous. L. Rev. 1251, 1281 (1999).

<sup>131</sup> *Id.* at 1252.

<sup>132</sup> The compulsory withdrawal of DNA samples from certain individuals without reasonable suspicion or probable cause undermines the Fifth Amendment's protection against self-incrimination. See *supra* n. 56 and accompanying text.

<sup>133</sup> "For example, the Court has refused to give an expansive definition to either 'custody' or 'interrogation,' the two baseline requirements to trigger *Miranda's* protections." Magid, *supra* n.130 at 1261.

<sup>134</sup> A reference to the popular argument that police are not constitutionally required to read defendants their *Miranda* rights if their interrogational conduct does not violate due process. Steven D. Clymer, *Are Police Free to Disgard Miranda* [sic], 112 Yale L.J. 447, 450 (2002).

constitutional.<sup>135</sup> That does not mean they are infallible. With the ORC DNA, Ohio’s criminal justice agencies hope to experience the law enforcement success Virginia has had since expanding its collection laws.<sup>136</sup> The looming policy concern, however, is to what degree individual privacy is expendable and indiscriminate unfairness is allowed to proliferate with these evolving criminal procedural processes. The ORC DNA can help assuage these concerns by implementing certain changes. The following are suggestions on how to amend the ORC DNA without diminishing its effectiveness for law enforcement.

1. Include Expungement Provisions

Inclusion of expungement provisions serves to reinforce the expressed purpose behind the expansion of the ORC DNA: to further justice and exonerate the innocent.

2. Stipulate Punitive Measures for Misuse

The ORC DNA has no punitive measures for misuse—only warnings. Punitive action serves as a deterrent and fosters a culture of procedural integrity.

3. Stipulate Punitive Measures for Non-compliance with Quality and Assurance Standards

Quality and assurance control is the foundation for the integrity of DNA analyses. Without uniform and rigorous standards the system will collapse. Therefore, severe penalties must be imposed to reinforce the foundation and ensure that the structure remains secure.

4. Extend Deadlines for Post-conviction DNA Testing

The ORC DNA has extended by one year, until October 29, 2005, the deadline for eligible inmates to submit DNA testing deadlines.<sup>137</sup> On its face, and without sufficient explanation in the legislative history, the legislature’s imposition of an application deadline for those who meet the eligibility requirements seems inherently unfair given that the applicant pool is largely death row inmates. The Model Statute for Obtaining Post-Conviction DNA Testing, upon which the federal Innocence Protection Act of 2003 was based, provides no deadline for eligible inmates.<sup>138</sup>

5. Compensate Post-conviction Exonerations

The ORC DNA provides no compensation for exonerated death row

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<sup>135</sup> See *supra* n. 56 and accompanying text.

<sup>136</sup> The Columbus Dispatch reported that “[i]n late September [2004], the crime lab in Richmond, Va., processed its 2,000th DNA test that linked suspects to unsolved crimes.” *Proof Positive: DNA-Test Success Should Make it a Funding Priority*, The Columbus Dispatch A8 (Nov. 2, 2004).

<sup>137</sup> Ohio Rev. Code. Ann. § 2953.73(A).

<sup>138</sup> The model statute was created by Professor Barry Scheck and attorney Peter Neufeld, co-founders of The Innocence Project. The Innocence Project, *Model Statute for Obtaining Postconviction DNA Testing*, [http://www.innocenceproject.org/docs/Model\\_Statute.html](http://www.innocenceproject.org/docs/Model_Statute.html) (accessed Sept. 14, 2005).

inmates or inmates who were unjustly incarcerated.<sup>139</sup> Federal law allows former death row plaintiffs to receive up to \$100,000 in compensation for each 12-month period of incarceration.<sup>140</sup> Other plaintiffs can receive up to \$50,000 in compensation for each 12-month period of wrongful incarceration.<sup>141</sup> Although the amount need not be the same, the ORC DNA should guarantee some form of remuneration for those wrongfully incarcerated. This would help satisfy conventions of fairness and restitution.

Incorporating these suggestions into the ORC DNA will bring it closer to reaching the “delicate compromise” that was accomplished in the United States Congress with the passage of the AJTDTA: maintaining fundamental privacy protections while broadening criminal procedure.<sup>142</sup>

#### IV. CONCLUSION

“They that can give up essential liberty to obtain a little safety deserve neither liberty nor safety.”<sup>143</sup> Franklin’s haunting dictum has not diminished in relevance over the centuries. How expendable are essential liberties when it comes to *a little* safety? The fundamental objective behind the ORC DNA is to further ensure the safety of Ohio citizens in the hope that expansion will “lead to more crimes being solved.”<sup>144</sup> The downside is that the rights of every individual are also compromised in these broad—and oftentimes blind—sweeps of justice propelled by political and economic agendas.<sup>145</sup> As is, the ORC DNA is just one example.

If laws like the ORC DNA continue to expand without express provisions protecting these rights, then intrusions like “DNA dragnets” of non-suspects could become real routine police procedure and not the inconsequential sub-plot of a CSI episode.<sup>146</sup> Worse yet is the possibility

<sup>139</sup> Ohio Rev. Code Ann. § 2953.73; Ohio Rev. Code Ann. § 2953.82 (West 2005).

<sup>140</sup> 28 U.S.C.S. § 2513(e) (LEXIS 2005).

<sup>141</sup> *Id.*

<sup>142</sup> A reference to Congressman John Conyers’s ultimate support for the amended AJTDTA of 2003 (after expressing his desire to see the rights of the wrongfully accused better addressed in the bill). He remarked,

“Nevertheless, I strongly support the delicate compromise that has been reached today. And, I urge my colleagues to support this worthy initiative, so that we can move this legislation to the House floor for its ultimate passage.” H.R. Rpt. 108-321(I) at 119.

<sup>143</sup> *Kincade*, 379 F.3d at 842 (quoting Benjamin Franklin from his 1759 treatise, *Historical Review of Pennsylvania*) (Reinhardt, J., dissenting).

<sup>144</sup> Ohio Senate Committee on Judiciary (Dec. 1, 2004). State of Ohio, *Ohio Senate, Judiciary Committee*, <http://www.ohcapcon.com/ipc/ipc.htm?olis/read-notes.htm?session=125&billnum=HB525> (last accessed Sept. 15, 2005).

<sup>145</sup> “Between the Internet, Google and the huge appetite government and private industry have for tax and marketing data, we are now a nation of busybodies where private lives have become casualties of the information age. Average folks are increasingly suspicious and rightfully raise questions about what happens to personal data and DNA.” Mike Barnicle, *Truro Men Have Right to Keep Mouths Shut*, *The Boston Herald* 7 (Jan. 11, 2005).

<sup>146</sup> A reference to the “DNA dragnet” under way in Truro, Massachusetts. In an effort to solve the 2002 murder of a prominent resident, the police have “voluntarily” collected DNA samples from 200 of the town’s male residents by approaching them in public places—stores, coffee shops, etc.—and asking them to submit to a cheek swab. The results of which will “eventually” be expunged. “Even though the men are not required to participate, the fact that refusal might be viewed as suspicious makes the tactic less

that these procedures could triumph over constitutional challenges resulting in draconian actions by law enforcement and an increased state of paranoia by the general public.<sup>147</sup> This is why it is necessary for the drafters of the ORC DNA to incorporate expungement provisions, establish and uphold mandatory quality and assurance standards, punish the misuse of DNA information, modify procedures for post-conviction testing, and offer remuneration for post-conviction exonerations. Otherwise, the *Buckeye State* will be guilty of bucking constitutional integrity and public trust.

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than fully voluntary." *DNA dragnet: Truro's Voluntary Sampling Legal, but Misguided*, Worcester Telegram & Gazette (Jan. 12, 2005).

<sup>147</sup> Barnicle, *supra* n. 145.