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## EVERYBODY'S GOT A PRICE: WHY ORANGE COUNTY'S PRACTICE OF TAKING DNA SAMPLES FROM MISDEMEANOR ARRESTEES IS AN EXCESSIVE FINE

Michael Purtill\*

### I. INTRODUCTION

Charlie Wolcott was cited in May 2009 for allegedly trespassing on railroad property in Orange County, California.<sup>1</sup> Mr. Wolcott, a war veteran, had no prior arrests.<sup>2</sup> At his hearing, he hoped to tell the judge that the “No Trespassing” sign was yards away and that he was simply walking through the property as a shortcut.<sup>3</sup> Moments before his hearing, however, a deputy district attorney pulled him into a soundproof room and offered him a deal: the county would drop the charges if Wolcott agreed to submit a DNA sample.<sup>4</sup>

Orange County is the only county in California to maintain its own DNA database aside from the official California state DNA database.<sup>5</sup> This independence allows the county to work outside of the rules in place governing the federal and state DNA databases.<sup>6</sup> Unlike the state and federal DNA databases, which were created by statute and contain various procedural safeguards, the county database was created and is managed by the district attorney's office.<sup>7</sup>

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\* Candidate for Juris Doctor, Northwestern University School of Law, May 2011. Thank you to Professor Dorothy Roberts and to Warren Lipschitz, Dave Van Der Laan, Libby O'Neill, Matthew Berry, and Dimitrios Angelakos, all of who helped me immensely in writing this Comment.

<sup>1</sup> Tami Abdollah, *D.A.'s Database Growing in O.C.*, L.A. TIMES, Oct. 5, 2009, at A3.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> CAL. PENAL CODE § 296(a)(2)(C) (West 2008). In 2009, California began mandating the collection of DNA samples from all individuals arrested for a felony.

<sup>6</sup> Abdollah, *supra* note 1, at A3.

<sup>7</sup> *See id.*

Mr. Wolcott, who admitted to being “freaked out” by the whole experience, is one of approximately 7,500 individuals who agreed to submit a DNA sample to the county in exchange for the county dropping non-violent misdemeanor charges against them.<sup>8</sup> The county district attorney’s office has quadrupled the size of its DNA database to 15,000 samples since January 2009, in large part due to individuals like Wolcott.<sup>9</sup> The county explains the program to participants like Wolcott, but when faced with possible criminal prosecution, it is unclear how informed defendants are when they agree to submit to the county program.<sup>10</sup> The district attorney justifies the program on the grounds that it will deter criminal activity and become a powerful tool for criminal investigations.<sup>11</sup>

Civil libertarians and law professors question the program’s fairness.<sup>12</sup> Although the county claims that the program is voluntary for arrestees, one defense attorney suggests that she will advise all of her clients to submit a sample and avoid criminal prosecution.<sup>13</sup> The \$75 fee itself may be a particular burden to poor individuals who submit a DNA sample.<sup>14</sup>

Even law enforcement officials are critical of the county’s actions. The president of the Association of Orange County Sheriffs questions the deterrent effect of the program, arguing that there is no scientific evidence to suggest that the threat of DNA collection in exchange for release actually deters criminals.<sup>15</sup> Further, he contends that the program has a demoralizing effect on officers in the field who arrest suspected criminals only to see them released without charges.<sup>16</sup>

There are several potential legal challenges to the county’s DNA collection program. Federal and state statutes authorize the collection of DNA from certain criminals, most commonly for those convicted of sex crimes and other violent offenses.<sup>17</sup> Several states also authorize the collection of DNA from arrestees in certain circumstances.<sup>18</sup> While statutes authorizing DNA collection from convicts have been universally upheld, courts are split on the constitutional validity of statutes authorizing DNA

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Tami Abdollah, *Arrested in O.C.? A DNA Sample Could Buy Freedom*, L.A. TIMES, Sep. 17, 2009, at A1.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

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

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> The DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. §14135a (2006).

<sup>18</sup> See, e.g., LA. REV. STAT. ANN. §15:609(A)(1) (2004); VA. CODE ANN. §19.2-310.2:1 (1996).

collection from arrestees.<sup>19</sup> Challengers argue that these statutes authorize improper searches under the Fourth Amendment.<sup>20</sup>

The county's program could also be challenged on Fourteenth Amendment equal protection grounds.<sup>21</sup> One estimate suggests that 90% of urban black males will be arrested at some point in their lives.<sup>22</sup> Since there are necessarily more arrests than convictions, racial disparities in the county's DNA database may be even more severe than in databases currently in use.

The Fourth and Fourteenth Amendments provide interesting bases from which to challenge the county's DNA collection program. A thorough discussion of each potential constitutional challenge to the county's program is beyond the scope of this Comment. Instead, this Comment will focus on whether a county government's decision to drop criminal charges in exchange for a DNA sample to be permanently entered in a database and a \$75 fee constitutes an excessive fine under the Eighth Amendment Excessive Fines Clause.<sup>23</sup> This Comment will briefly summarize the current discussion on the constitutionality of statutes authorizing DNA collection from arrestees. From there, it will discuss the text, history, and judicial interpretations of the Excessive Fines Clause of the Eighth Amendment. Ultimately, this Comment will show that Orange County's program violates the Eighth Amendment rights of citizens to be free from the imposition of excessive fines.

## II. STATUTES AUTHORIZING COLLECTION OF ARRESTEES' DNA AND THEIR CONSTITUTIONALITY

The county program maintains an individual's DNA indefinitely regardless of the disposition of the arrestee's case.<sup>24</sup> All fifty states

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<sup>19</sup> Compare *In re Welfare of C.T.L.*, 722 N.W.2d 484, 492 (Minn. Ct. App. 2006) (holding that Minnesota's statute authorizing the taking of DNA from arrestees violates the Fourth Amendment), with *Anderson v. Commonwealth*, 650 S.E.2d 702, 706 (Va. 2007) (holding that DNA collection from an arrestee is justified). See also *infra* Part II.

<sup>20</sup> See *infra* Part II.

<sup>21</sup> See D.H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413, 452-457 (2003) (describing racial skewing of DNA databases); see also Mark A. Rothstein & Sandra Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 BROOK. L. REV. 127, 146 (arguing that distinguishing between types of criminals would classify such arrestees in a matter that would warrant rational basis review because types of crimes are not suspect classifications).

<sup>22</sup> Kaye & Smith, *supra* note 21, at 455.

<sup>23</sup> The Eighth Amendment, which includes the Excessive Fines Clause, reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

<sup>24</sup> Abdollah, *supra* note 10, at A1.

authorize criminal DNA databases, and every state—including California—requires that DNA samples be taken from certain convicts, most commonly convicted sex offenders.<sup>25</sup> Several states and the federal government authorize the collection of DNA at the time of arrest for certain crimes.<sup>26</sup> These statutes, however, authorize the collection of DNA upon arrest for felonies and federal crimes, not simple misdemeanors. Further, these statutes require the destruction of the DNA sample when certain conditions are met, such as the charges being dropped or the individual being acquitted of the crime.<sup>27</sup> The Orange County program has no such provision; individual samples are maintained in the DNA database indefinitely.

Courts are split on the constitutionality of taking DNA from arrestees. The federal statute and two conflicting judicial interpretations thereof provide an excellent starting point for the discussion.<sup>28</sup> Although both of these cases focus on the statute's constitutionality under the Fourth Amendment, there are several relevant issues that suggest how future courts would rule on an Eighth Amendment challenge.<sup>29</sup>

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<sup>25</sup> Aaron P. Stevens, Note, *Arresting Crime: Expanding the Scope of DNA Databases in America*, 79 TEX. L. REV. 921, 922–23 (2001).

<sup>26</sup> See, e.g., Violence Against Women Act, 42 U.S.C. § 14135a (2006); DNA and Forensic Identification Database and Data Bank Act of 1998, CAL. PENAL CODE § 295 (West 2008).

<sup>27</sup> See, e.g., 42 U.S.C. § 14132(d)(1)(A) (2008) (requiring the director of the FBI to expunge an arrestee's record if the conviction is overturned or if the charges are dropped, the individual is acquitted, or the individual is never charged); CAL. PENAL CODE § 299 (requiring the destruction of an individual's DNA sample if the person has no past, present, or pending charge which qualifies for inclusion in the database; the person is never charged with the crime for which he or she was arrested; the individual's conviction has been reversed or his or her case has been dismissed; or the individual has been found not guilty of the charged offense).

<sup>28</sup> See 42 U.S.C. § 14135a (2006) (“The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested, facing charges, or convicted or from non-United States persons who are detained under the authority of the United States.”).

<sup>29</sup> A thorough discussion of Fourth Amendment cases is well beyond the scope of this Comment. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. Searches must be based on probable cause. If there is no warrant or showing of probable cause, the search must fall into one of two exceptions: the “special needs” exception or the “totality of the circumstances exception.” For a thorough explanation of Fourth Amendment jurisprudence and the application of the “special needs” and “totality of the circumstances” exceptions to the probable cause requirement, see generally John D. Biancamano, *Arresting DNA: The Evolving Nature of DNA Collection Statutes and Their Fourth Amendment Justifications*, 70 OHIO ST. L.J. 619 (2009); Paul M.

In *United States v. Pool*, a criminal defendant pled not guilty to a crime involving possession of child pornography.<sup>30</sup> The defendant had no prior criminal record. At his arraignment, he agreed to a series of pretrial conditions but refused to submit to court-ordered DNA testing as required by the Bail Reform Act<sup>31</sup> and the DNA Fingerprinting Act of 2005.<sup>32</sup> He challenged both statutes on the grounds that they authorized an unconstitutional search.<sup>33</sup>

The court rejected Pool's argument, but suggested that it would not authorize DNA collection from all arrestees. First, the court rejected Pool's argument that the presumption of innocence for criminal defendants warrants a "special needs" analysis for the reasonableness of a search.<sup>34</sup> Because the defendant had already been indicted and arraigned, he was subject to greater restrictions than an "ordinary citizen."<sup>35</sup> The court reasoned that "[t]he judicial or grand jury finding of probable cause within a criminal proceeding is a watershed event . . . . After such a judicial finding, a defendant's liberty may be greatly restricted—even denied."<sup>36</sup>

Although the court was willing to uphold the legality of collecting DNA from Pool and other pretrial detainees, it was not willing to extend its holding to misdemeanor arrestees:

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Monteleoni, *DNA Databases, Universality, and the Fourth Amendment*, 82 N.Y.U. L. REV. 247 (2007).

<sup>30</sup> 645 F. Supp. 2d 903 (E.D. Cal. 2009), *aff'd* *United States v. Pool*, No. 09-10303, 2010 U.S. App. LEXIS 19133 (9th Cir. Sept. 14, 2010).

<sup>31</sup> See 18 U.S.C. § 3142(b). The statute provides:

Release on personal recognizance or unsecured appearance bond. The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135(a)), unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person in the community.

<sup>32</sup> Pub. L. No. 96-162, § 1001-05 (codified 42 U.S.C. § 14135a).

<sup>33</sup> *Pool*, 645 F. Supp. 2d at 905-06.

<sup>34</sup> *Id.* In most cases, for a search under the Fourth Amendment to be "reasonable," it must be based on individualized probable cause. Courts recognize exceptions to this doctrine, however, when a "special need" exists that requires government officials to go outside the restrictions placed on law enforcement. For a thorough special needs analysis of DNA collection statutes, see Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (And Will) The Supreme Court Do?*, 33 J.L. MED. & ETHICS 102, 107-08 (2005).

<sup>35</sup> *Pool*, 645 F. Supp. 2d at 909.

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

The undersigned emphasizes what this holding does not encompass. It does not authorize DNA sampling after citation or arrest for infractions or misdemeanors, as in these cases there will be no *judicial* finding of probable cause soon after the arrest or citation, or no *grand jury* finding before or after the arrest. *See*, Fed. R. Crim. P. 7(a). It does not authorize police officials to perform DNA sampling prior to a judicial finding of probable cause which must be made within 48 hours after arrest and detention. Again, it is the finding of probable cause on criminal charges which allows the court to set release conditions similar to those of probation and parole, which is the underpinning of the court's holding in this case.<sup>37</sup>

The court seems to suggest that without a judicial or grand jury finding of probable cause, the taking and storage of DNA from an arrestee constitutes a punishment in the absence of a conviction.

Just months after *Pool*, a federal district judge in the Eastern District of Pennsylvania disagreed with the *Pool* court and held that the DNA collection statute was unconstitutional under the Fourth Amendment.<sup>38</sup> In *United States v. Mitchell*, the defendant was indicted for allegedly attempting to possess five kilograms or more of cocaine with intent to distribute.<sup>39</sup> He objected to the trial court's request for a pretrial DNA sample and a magistrate judge stayed the DNA collection until the district court could hear the case.<sup>40</sup>

The court rejected *Pool*'s holding that the grand jury indictment carries special weight in the determination of a defendant's guilt.<sup>41</sup> According to the *Mitchell* court, the presumption of innocence stays with a criminal defendant until a verdict is entered, and it is unjust to treat him as though he is guilty at the indictment stage.<sup>42</sup> The court also placed particular weight on the intensely private nature of DNA data.<sup>43</sup> An individual has a strong interest in keeping his "complex and comprehensive" genetic information private.<sup>44</sup> Once information becomes pervasively available to the public, however, the individual may lose his privacy interest in the information.<sup>45</sup> This concern warrants Fourth Amendment protection of an individual's DNA when he is presumed to be innocent of any crime.<sup>46</sup>

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<sup>37</sup> *Id.* at 913 (emphasis in original).

<sup>38</sup> *United States v. Mitchell*, 681 F. Supp. 2d 597 (W.D. Pa. 2009).

<sup>39</sup> *Id.* at 599.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 603–04.

<sup>42</sup> *Id.* at 606.

<sup>43</sup> *Id.* at 607.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

The court also found that DNA databases serve an inherently investigatory purpose that photograph and fingerprint databases do not.<sup>47</sup> Because a law enforcement agency can run a search against all the samples in the DNA database any time it wants, the individual who submits his DNA is subject to countless searches without a warrant or showing of probable cause.<sup>48</sup> Further, because DNA is immutable, there is no possibility of an individual altering his DNA to hide his identity.<sup>49</sup> If a law enforcement agency has a reasonable suspicion that an individual is involved in criminal activity, it can seek out a warrant for his or her DNA and can conduct a search legally.<sup>50</sup>

*Mitchell* supports the proposition that maintaining an arrestee's DNA indefinitely stretches the prosecutorial power beyond what is constitutionally acceptable. Although *Pool* allows the collection of a defendant's DNA prior to conviction, it is noteworthy that the *Pool* court was persuaded in part by the procedural safeguards associated with an indictment. Orange County's program does not wait until a defendant is indicted to collect and preserve his DNA sample.

To reiterate, both of these cases concentrated their analyses on the Fourth Amendment. These cases are relevant, however, to understand the punitive nature of DNA collection statutes, especially when they require the collection of DNA from individuals who are still presumed innocent. To fit the county's DNA collection program into the Eighth Amendment excessive fine framework, it is necessary to discuss the text and history of the Excessive Fines Clause.

### III. THE EXCESSIVE FINES CLAUSE: TEXT AND HISTORY

The Eighth Amendment of the Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>51</sup> An originalist interpretation of the term "fine" is "a pecuniary punishment; penalty; forfeit; money paid for any exemption or liberty."<sup>52</sup>

The Supreme Court did not hear a case interpreting the Excessive Fines Clause (the Clause) until 1989.<sup>53</sup> When the Court did analyze the

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<sup>47</sup> *Id.* at 609.

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

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

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

<sup>51</sup> U.S. CONST. amend. VIII.

<sup>52</sup> JOHN WALKER, A CRITICAL PRONOUNCING DICTIONARY (1791).

<sup>53</sup> *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (holding that the Excessive Fines Clause does not apply to awards of punitive damages in civil actions between private parties).

Clause, it summarized the historical context in which the Clause was adopted to discern its meaning. At least eight of the original thirteen states already had an excessive fines clause in their declaration of rights or state constitution.<sup>54</sup> The Clause was adopted almost verbatim from the English Bill of Rights.<sup>55</sup> Prior to the adoption of the English Bill of Rights, judges had used their power to fine convicts to extract revenge on the King's enemies.<sup>56</sup> Some of the King's opponents were unable to get out of jail because of disproportionate fines levied from the bench.<sup>57</sup> The Excessive Fines Clause is in place to "limit[] the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends."<sup>58</sup>

One common fine is a required forfeiture of money as part of a punishment for a criminal act.<sup>59</sup> In *Powell v. Texas*, an alcoholic pled guilty to violating a Texas statute that forbade individuals from being intoxicated in public.<sup>60</sup> The trial court ordered him to pay \$20.<sup>61</sup> Fines such as the one in *Powell* are criminal forfeitures; the fine is imposed after the individual has been convicted of a crime.

A penalty imposed by the government on an individual does not necessarily have to attach itself to a criminal conviction to be a fine. Several statutes allow for the seizure of an individual's property when that property is used in the course of a criminal act;<sup>62</sup> this government action is a civil forfeiture, where conviction is not a prerequisite.<sup>63</sup> The traditional rule

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<sup>54</sup> *Id.* at 264.

<sup>55</sup> "Excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large 440, 441 (1689).

<sup>56</sup> *Browning-Ferris*, 492 U.S. at 267.

<sup>57</sup> *Ingraham v. Wright*, 430 U.S. 651, 664 (1977).

<sup>58</sup> *Browning-Ferris*, 492 U.S. at 267.

<sup>59</sup> *See, e.g., Powell v. Texas*, 392 U.S. 514, 517 (1968).

<sup>60</sup> *Id.* (quoting TEX. PENAL CODE, art. 477 (1952), which stated: "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars.").

<sup>61</sup> *Id.* *Powell* appealed on the grounds that his chronic alcoholism made it impossible to abide by the statute. The Supreme Court rejected this contention and held that fining an individual with alcoholism for public drunkenness does not necessarily constitute cruel and unusual punishment. *Id.* at 535.

<sup>62</sup> *See, e.g.,* 18 U.S.C. § 981 (2006) (subjecting real and personal property to forfeiture when used in the commission of certain federal offenses); 18 U.S.C. § 1955(d) (2006) (allowing for the forfeiture of any property used in violation of the Prohibition on Illegal Gambling Businesses statute); 18 U.S.C. § 2253 (2006) (allowing for the seizure of real and personal property pertaining to or obtained with profits from the sale or production of child pornography when an individual has been convicted of a relevant offense); 31 U.S.C. § 5316 (2006) (allowing for forfeiture of property in money laundering offenses).

<sup>63</sup> *The Palmyra*, 25 U.S. 1, 15 (1827).

was that civil forfeiture, as opposed to criminal forfeiture, was against the property itself and not the individual.<sup>64</sup> As a result, the guilt or innocence of the owner was irrelevant. In *The Palmyra*, the Supreme Court held that a criminal conviction was not necessary to allow the government to seize the property of a ship owner and his crew suspected of piracy.<sup>65</sup> *The Palmyra* stands for the proposition that a fine is a required forfeiture of property by an individual to the government. It does not have to be attached to a conviction; the property itself is considered to be guilty.<sup>66</sup>

The Supreme Court altered the course of excessive fines jurisprudence in 1993. In *Austin v. United States*, the Court resolved the question of whether a civil forfeiture can be excessive under the Excessive Fines Clause.<sup>67</sup> The defendant was indicted on four counts of violating South Dakota's drug laws, and the United States government filed a civil action seeking forfeiture of the defendant's mobile home and auto body shop under 21 U.S.C. §§ 881(a)(4) and 881(a)(7).<sup>68</sup> Austin filed suit against the Government, alleging that the required forfeiture of his property represented an excessive fine under the Eighth Amendment.<sup>69</sup>

The Court first rejected the Government's argument that the Eighth Amendment protection against excessive fines is limited only to criminal actions. The Fifth and Sixth Amendments explicitly mention criminal prosecutions to limit their scope to criminal proceedings; the Eighth Amendment has no such limitation.<sup>70</sup> Further, the Framers, in discussing

<sup>64</sup> *Id.* at 14. This explains the interesting party names in this field of law. See, e.g., *United States v. \$184,505.01 in U.S. Currency*, 72 F.3d 1160 (3d Cir. 1995).

<sup>65</sup> *Palmyra*, 25 U.S. at 15.

<sup>66</sup> This is a recent development brought about by the Court's decision in *Austin v. United States*, 509 U.S. 602 (1993). Prior to *Austin*, courts viewed civil forfeiture as "a means of remedying the government's injury and loss." *United States v. A Parcel of Land with A Bldg. Located Thereon at 40 Moon Hill Road, Northbridge, Mass.*, 884 F.2d 41, 44 (1st Cir. 1989).

<sup>67</sup> *Austin*, 509 U.S. at 602.

<sup>68</sup> *Id.* at 604–05. 21 U.S.C. § 881(a) (2006) provides, in relevant part:

The following shall be subject to forfeiture to the United States and no property right shall exist in them: . . . (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9) . . . (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment.

<sup>69</sup> *Austin*, 509 U.S. at 606.

<sup>70</sup> *Id.* at 607–08. The Fifth Amendment reads:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be

the Bill of Rights, made a conscious choice to limit the Fifth Amendment self-incrimination clause to criminal proceedings, and then moved the debate to discussion of the Eighth Amendment, to which there was no motion to limit its scope.<sup>71</sup> The Eighth Amendment limits the government's ability to punish individuals in both the criminal and civil contexts.<sup>72</sup> The pertinent question in an excessive fines analysis is not whether the forfeiture is civil or criminal, but whether it is a punishment.<sup>73</sup>

The Court next turned its attention to whether a civil forfeiture is a punishment. The Court determined from the language of the statute and from the statute's legislative history that civil forfeitures can indeed constitute punishments and are thus subject to Eighth Amendment Excessive Fines Clause analysis.<sup>74</sup> The Court noted that the statute included an "innocent owner" defense for those whose property was involved in criminal conduct without knowledge.<sup>75</sup> The Court inferred from this exception that Congress intended to punish those involved in the criminal conduct covered by the statute (in this case, drug trafficking).<sup>76</sup> Further, Congress explained in the statute's legislative history "that the traditional criminal sanction of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs."<sup>77</sup>

For the purposes of this Comment, it is important to distinguish between criminal and civil forfeitures.<sup>78</sup> To constitute a fine under the Eighth Amendment, the forfeiture must be a punishment.<sup>79</sup> Criminal

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subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V. The Sixth Amendment reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

<sup>71</sup> *Austin*, 509 U.S. at 608-09 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 294 (1989)).

<sup>72</sup> *Austin*, 509 U.S. at 609-10.

<sup>73</sup> *Id.* at 610.

<sup>74</sup> *Id.* at 621-22.

<sup>75</sup> *Id.* at 619.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 620 (quoting S. Rep. No. 98-225, at 191 (1983)).

<sup>78</sup> The Orange County district attorney's DNA collection program exists in a gray area between *in rem* and *in personam* forfeiture. See *infra* Part III.

<sup>79</sup> *Austin*, 509 U.S. at 624 (Scalia, J., concurring).

forfeiture punishes the owner's criminal conduct by taking his property; it is not necessary to establish a nexus between the property and the criminal conduct.<sup>80</sup> As a prerequisite for criminal forfeiture, there must be a criminal conviction. Civil forfeiture, however, is based on the legal fiction that the property itself bears some guilt in the matter.<sup>81</sup>

The Court's jurisprudence on the Excessive Fines Clause leaves the matter unsettled but does provide some guidelines for future excessive fines analysis. Monetary penalties or property forfeitures as part of a criminal sentence are the most obvious types of fines. A criminal conviction is a necessary condition for the government to impose these fines.

The question of whether a government action is a fine is more difficult in the civil context. The threshold question, as established in *Browning-Ferris* and *Austin*, is whether the government action is punitive. Once a government action taken against an individual (or his property) is determined to be a fine, the next step in the analysis is to determine whether it is excessive.

Since *Austin*, three approaches have developed to determine excessiveness. The first is a proportionality approach taken by the majority in *Austin* and later adopted by the Eighth Circuit.<sup>82</sup> Courts applying this approach compare the fine levied with the offense to determine whether the fine was proportional to the offense.

In *United States v. Bieri*, the Eighth Circuit acknowledged the lack of guidance from the Supreme Court on a multi-factor test for excessiveness and then created its own test.<sup>83</sup> First, the defendant has the burden of showing that the fine is grossly disproportionate to the offense.<sup>84</sup> Second, "The [E]ighth [A]mendment demands that a constitutionally cognizable disproportionality reach such a level of excessiveness that in justice the punishment is more criminal than the crime."<sup>85</sup> Relevant factors in determining the proportionality of the fine are the extent and duration of the criminal conduct, the gravity of the offense weighed against the sanction, and the value of the property forfeited.<sup>86</sup>

The general principle of the proportionality approach is that the gravity of the fine should not grossly exceed the culpability of the defendant. The

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See *United States v. Premises Known as 6040 Wentworth Ave. South, Minneapolis, Hennepin Cnty., Minn.*, 123 F.3d 685 (8th Cir. 1997); *United States v. Alexander*, 108 F.3d 853 (8th Cir. 1997); *United States v. Bieri*, 68 F.3d 232, 236 (8th Cir. 1995).

<sup>83</sup> *Bieri*, 68 F.3d at 236.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (quoting *United States v. Sarbello*, 985 F.2d 716, 724 (3d Cir. 1993)).

<sup>86</sup> *Id.*

burden is on the defendant, however, to show that the fine is grossly disproportionate to the offense. This creates a serious hurdle for individuals fined by the government to clear before proving that the fine levied against them was excessive.

The second approach to determining excessiveness is an instrumentality approach, first described by Justice Scalia in his concurring opinion to *Austin*.<sup>87</sup> The instrumentality approach maintains elements of the traditional rule that the fictional guilt of the property itself warranted its forfeiture. Justice Scalia's argument is that the only relevant question in an excessiveness analysis is whether the property forfeited played an instrumental role in the illegal activity. "Scales used to measure out unlawful drug sales, for example, are confiscable whether made of the purest gold or the basest metal. . . . The question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense."<sup>88</sup>

The Fourth Circuit adopted a three-part instrumentality test in *United States v. Chandler* when it determined that the forfeiture of a thirty-three acre farm worth \$569,000 was not excessive.<sup>89</sup> The court upheld the forfeiture because defendants had "distributed, packaged, sold, purchased and used controlled substances, including marijuana, cocaine and quaaludes," on the property and the property played an integral role in the illegal activity.<sup>90</sup> The court considered "(1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder."<sup>91</sup>

In applying the instrumentality approach, the court looked to Congress's intent in creating the statute that the defendant allegedly violated. Because Congress's intent was to punish drug traffickers, the key question—according to courts using the instrumentality approach—should be how tainted is the property by the illegal activity and not how valuable is the property relative to the gravity of the offense.<sup>92</sup>

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<sup>87</sup> *Austin v. United States*, 509 U.S. 602, 624 (Scalia, J., concurring).

<sup>88</sup> *Id.* at 627–28.

<sup>89</sup> *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994), *overruled by United States v. Bajakajian*, 524 U.S. 321, 334–35 (1998) (overruling three-part instrumentality test).

<sup>90</sup> *Id.* at 361.

<sup>91</sup> *Id.* at 365.

<sup>92</sup> *Id.* at 364.

Forfeiture of a \$14 million yacht, specially outfitted with high-powered motors, radar, and secret compartments for the sole purpose of transporting drugs from a foreign country into the United States, would probably offend no one's sense of excessiveness, even though the property has such a high value. On the other hand, forfeiture of a row house, which is owned by an elderly woman and which shelters her children and grandchildren, upon discovery of a trace amount of

For several years, courts were split on whether to apply the proportionality approach or the instrumentality approach.<sup>93</sup> The Supreme Court resolved the confusion over the proper test for excessiveness in *United States v. Bajakajian*.<sup>94</sup> In that case, police dogs stopped Bajakajian at the airport as he was preparing to board an international flight with \$357,144 in cash.<sup>95</sup> He was found to be in violation of a statute forbidding the removal of more than \$10,000 in cash without declaration and was ordered to forfeit all \$357,144 to the United States government as part of his penalty.<sup>96</sup>

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cocaine in a grandson's room, might arguably be found to be excessive, even though the house has a relatively low value of \$30,000. In both cases, the intuitive excessiveness analysis centers on the *relationship* between the property and the offense—the more incidental or fortuitous the involvement of the property in the offense, the stronger the argument that its forfeiture is excessive. When measuring the strength or extent of the property's relationship to the offense, *i.e.*, its instrumentality in the offense, we would look at whether the property's role was supportive, important, or even necessary to the success of the illegal activity. We would also inquire into whether the use of the property was deliberate or planned, as distinguished from incidental or fortuitous. We would note whether the property was used once or repeatedly, whether a small portion was used, and whether the property was put to other uses and the extent of those uses.

*Id.*

<sup>93</sup> Some courts have developed hybrid approaches incorporating the proportionality and instrumentality tests. One hybrid approach that has gained somewhat widespread acceptance is that taken by the Second Circuit in *United States v. Milbrand*, 58 F.3d 841 (2d Cir. 1995). The court held that a test for excessiveness depends on:

(1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder. In measuring the strength and extent of the nexus between the property and the offense, a court may take into account the following factors: (1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time during which the property was illegally used and the spatial extent of its use; (4) whether its illegal use was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense. No one factor is dispositive but, to sustain a forfeiture against an Eighth Amendment challenge, the court must be able to conclude, under the totality of circumstances, that the property was a substantial and meaningful instrumentality in the commission of the offense, or would have been, had the offensive conduct been carried out as intended.

*Id.* at 846.

The hybrid approach allows the court to consider many factors in determining whether the fine is excessive. A multi-pronged approach has the benefit of addressing any fairness concerns that may arise from strict adherence to the proportionality approach or the instrumentality approach. The hybrid approach, however, may be too detailed to be consistently applied.

<sup>94</sup> 524 U.S. 321 (1998).

<sup>95</sup> *Id.* at 324.

<sup>96</sup> *Id.* at 324–25. The statute states, in relevant part: “The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall

In its analysis, the Court cited back to *Austin* for the principle that whether a government proceeding is *in rem* or *in personam*, the key question in determining whether the action is a fine is whether it is a punishment.<sup>97</sup> The Court “ha[d] little trouble concluding that the forfeiture of currency ordered by § 982(a)(1) constitutes punishment.”<sup>98</sup> The next question, then, was whether the fine was excessive.

The Ninth Circuit had applied a hybrid test in its analysis of *Bajakajian*’s claim.<sup>99</sup> The Supreme Court, however, rejected this test and stated definitively that a proportionality approach was the proper way to analyze the excessiveness of a fine under the Excessive Fines Clause. A fine must be “grossly disproportional” to the offense in order to constitute an excessive fine.<sup>100</sup> The Court looked to the text and history of the Eighth Amendment and remarked that neither source helped to determine exactly how grossly disproportional a fine must be to become unconstitutional.<sup>101</sup> Instead, the Court identified two relevant sources. First, the Court held that judgments on the appropriate level of punishment for a particular offense should be made by the legislature.<sup>102</sup> When the legislature determines the types and limits of punishment for a particular crime, it is making a policy judgment within its Constitutional authority and should be given great deference by courts.<sup>103</sup> Second, the judiciary should be guided by the Supreme Court’s 1983 decision in *Solem v. Helm*,<sup>104</sup> which established a test for when punishment is cruel and unusual.<sup>105</sup>

In *Solem*, the Court held that although it would rarely uphold challenges to punishments on Eighth Amendment grounds outside of the capital punishment context, it would still consider several factors in questioning the constitutionality of a particular punishment.<sup>106</sup> This particular case involved a challenge to a criminal sentence on the grounds

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order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.” 18 U.S.C. § 982(a)(1) (2006).

<sup>97</sup> *Bajakajian*, 524 U.S. at 331 n.6.

<sup>98</sup> *Id.* at 328.

<sup>99</sup> *Id.* at 326 (stating that the Ninth Circuit held that “to satisfy the Excessive Fines Clause, a forfeiture must fulfill two conditions: The property forfeited must be an ‘instrumentality’ of the crime committed, and the value of the property must be proportional to the culpability of the owner.”). For a more detailed explanation of the hybrid approach, see *supra* note 93.

<sup>100</sup> *Id.* at 334.

<sup>101</sup> *Id.* at 335.

<sup>102</sup> *Id.* at 336.

<sup>103</sup> *Id.* (citing *Solem v. Helm*, 463 U.S. 277, 290 (1983) and *Gore v. United States*, 357 U.S. 386, 393 (1958)).

<sup>104</sup> *Solem*, 463 U.S. at 277.

<sup>105</sup> *Bajakajian*, 524 U.S. at 336.

<sup>106</sup> *Solem*, 463 U.S. at 290.

that the sentence was cruel and unusual.<sup>107</sup> The first factor is a comparison between the crime and the penalty—essentially a proportionality test.<sup>108</sup> The second factor is a comparison between sentences of other criminals in the jurisdiction for various crimes to get a sense of the range of acceptable sentences in the jurisdiction.<sup>109</sup> Third is a comparison between the defendant's sentence and the sentences given for similar crimes in different jurisdictions.<sup>110</sup>

Relying on this analysis from *Solem*, the Court addressed the fine levied on Bajakajian. His principal offense was that he did not report the money he tried to carry onto the plane; carrying the currency would have been legal had he reported it.<sup>111</sup> The statute was enacted to prevent drug traffickers, and requiring Bajakajian to forfeit the entire \$357,144 would not further the goals of the statute.<sup>112</sup> Second, the sentencing guidelines allowed a maximum six-month sentence and fine of \$5,000 for conviction under the particular section of the statute that Bajakajian allegedly violated.<sup>113</sup> Similar behavior to Bajakajian's would presumably net a much lighter sentence in other courts and jurisdictions.<sup>114</sup> On the basis of these two factors, the Court held that requiring forfeiture of the entire \$357,144 was an excessive fine and, for the first time in its history, invalidated a government-imposed fine as unconstitutional under the Excessive Fines Clause.<sup>115</sup>

Moving forward, the Supreme Court—and presumably lower courts—will likely evaluate Eighth Amendment Excessive Fines Clause challenges using the framework it established in *Bajakajian*.<sup>116</sup> The two sources of information relevant to the determination of whether a fine is excessive are the legislature and the courts.<sup>117</sup> If the fine imposed by the government is “grossly disproportional” to the punishment that the legislature intended or that the courts are dispensing for the same or similar crimes, then it is excessive.<sup>118</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *United States v. Bajakajian*, 524 U.S. 321, 337–38 (1998).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 338.

<sup>114</sup> *Id.* at 339.

<sup>115</sup> *Id.* at 344.

<sup>116</sup> *See id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

Much of the discussion of excessive fines in this Comment has focused on forfeitures of property. For the forfeiture of a DNA sample to be considered a fine, DNA must first be considered personal property. The next part of this comment explores the current debate on whether DNA is personal property.

#### IV. DNA AS PERSONAL PROPERTY

The Framers almost certainly did not contemplate the complexities of genetics when they drafted the Eighth Amendment. Recent actions by state legislatures and the California Supreme Court provide some insight into the question of whether courts will recognize DNA as personal property in the context of an Eighth Amendment Excessive Fines Clause challenge to the county's DNA collection program. In light of recent statutory trends towards recognizing a personal property interest in one's DNA for employment and insurance purposes, it seems that DNA should be recognized as personal property in the criminal context as well.

In response to the possibility of genetic discrimination by insurance companies, some states have acted to protect an individual's right to her own genetic information. Four states—Alaska, Colorado, Florida, and Georgia—define the genetic information contained in DNA molecules as personal property by statute.<sup>119</sup> Of the four states, Alaska recognizes the most comprehensive individual right to one's own DNA. The Alaska statute contains an explicit provision stating, "A DNA sample and the results of a DNA analysis performed on the sample are the exclusive property of the person sampled or analyzed."<sup>120</sup> The three other statutes refer to an individual's property right in his or her genetic information.<sup>121</sup>

One possible interpretation is that the Alaska statute protects both the genetic information stored on the DNA molecule and the physical sample itself. The Colorado, Florida, and Georgia statutes may only protect the actual genetic information, which may be indicative of risk factors for certain health conditions, and not the physical sample. It bears mentioning, however, that it would be difficult to parse "genetic information" from a

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<sup>119</sup> ALASKA STAT. § 18.13.010(a)(2) (2008) ("[A] DNA sample and the results of a DNA analysis performed on the sample are the exclusive property of the person sampled or analyzed."); COLO. REV. STAT. ANN. § 10-3-1104.7(1)(a) (West 2010) ("Genetic information is the unique property of the individual to whom the information pertains."); FLA. STAT. ANN. § 760.40(2)(a) (West 2010) ("[T]he results of such DNA analysis, whether held by a public or private entity, are the exclusive property of the person tested, are confidential, and may not be disclosed without the consent of the person tested."); GA. CODE ANN. § 33-54-1(1) (West 2003) ("Genetic information is the unique property of the individual tested.").

<sup>120</sup> ALASKA STAT. § 18.13.010(a)(2).

<sup>121</sup> COLO. REV. STAT. ANN. § 10-3-1104.7(1)(a); FLA. STAT. ANN. § 760.40(2)(a); GA. CODE ANN. § 33-54-1(1).

“DNA sample” because one cannot extract the genetic information from an individual without taking a physical DNA sample.

Another relevant consideration is the context in which the statutes were written. The Alaska and Florida statutes serve as general bans on the misappropriation of another person's genetic information.<sup>122</sup> The Colorado and Georgia statutes address concerns that insurance companies would use genetic information to discriminate against potential customers on the basis of some genetic indicators of possible pre-existing or future conditions.<sup>123</sup> Although both statutes serve the purpose of protecting consumers from prying insurance companies, it seems reasonable to infer a property interest in one's DNA that would extend to other contexts.

Congress recognized an individual's interest in freedom from genetic discrimination by employers when it enacted the Genetic Information Nondiscrimination Act (GINA) in 2008.<sup>124</sup> GINA prohibits employers from requesting, requiring, or purchasing genetic information from potential or current employees or their family members.<sup>125</sup> Employers cannot use genetic information to make any decisions relevant to employment, including discharge and compensation.<sup>126</sup>

The bill was passed 95–0 in the Senate and 414–1 in the House.<sup>127</sup> The overwhelming margin by which GINA was passed suggests that Congress recognizes a personal interest in genetic information. Underlying the aforementioned state statutes and GINA seems to be a concern that an innocent person's genetic information could be used against them. Courts, however, have not yet definitely answered the question of whether DNA is personal property.

The California Supreme Court has come closest to addressing whether genetic information is personal property. The most prominent case on the

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<sup>122</sup> Neither the Alaska statute nor the Florida statute contains language suggesting that the statutes were enacted to protect consumers against insurance companies, though the Florida statute requires entities to notify individuals if genetic information was used to deny them insurance. *See* FLA. STAT. ANN. § 760.40(3).

<sup>123</sup> COLO. REV. STAT. ANN. § 10-3-1104.7(1)(d) (“The intent of this section is to prevent information derived from genetic testing from being used to deny access to group disability insurance or long-term care insurance coverage.”); GA. CODE ANN. § 33-54-1(4) (“The intent of this chapter is to prevent accident and sickness insurance companies, health maintenance organizations, managed care organizations, and other payors from using information derived from genetic testing to deny access to accident and sickness insurance.”).

<sup>124</sup> Genetic Information Nondiscrimination Act, Pub. L. No. 110-233, 122 Stat. 881 (2008).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Congressman Ron Paul was the lone dissenter. 145 Cong. Rec. H2980 (2008).

subject is *Moore v. The Regents of the University of California*.<sup>128</sup> Although *Moore* does not directly address whether genetic information is personal property, the court's discussion provides insight into how a modern court would analyze an argument that a litigant holds an actionable interest in his own DNA. In that case, the plaintiff (Moore) underwent treatment for hairy-cell leukemia at UCLA Medical Center.<sup>129</sup> In the course of treatment, defendant physicians conducted a splenectomy and regularly removed blood, bone marrow aspirate, and other bodily substances.<sup>130</sup> Moore, under the impression that the splenectomy was necessary to save his life, signed a consent form for the procedure.<sup>131</sup> Unbeknownst to Moore, his doctors were using the material they extracted from him to develop a highly lucrative commercial cell line from which they planned to make a considerable profit.<sup>132</sup> Moore filed suit, alleging breach of fiduciary duty and conversion of his personal property.<sup>133</sup> The California Supreme Court's analysis of his conversion claim provides a relevant insight into one answer to the DNA-as-personal-property question.<sup>134</sup>

The foundation of Moore's claim of conversion was that he had a proprietary interest in any product that might be created from his cells.<sup>135</sup> This was a departure from traditional conversion theory because the plaintiff must have actual ownership or possession of the good that the defendant converts.<sup>136</sup> Further, physical possession of one's cells—or any other human tissue—after their removal in a scientific procedure was prohibited by statute in California.<sup>137</sup>

Moore failed to convince the court to extend conversion liability to his particular case for three reasons. First, the court considered the policy implications of extending liability,<sup>138</sup> acknowledging tension between

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<sup>128</sup> 51 Cal. 3d 120 (Cal. 1990).

<sup>129</sup> *Id.* at 125.

<sup>130</sup> *Id.* at 125–26.

<sup>131</sup> *Id.* at 126.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 128.

<sup>134</sup> The court defined conversion as “the plaintiff was possessed of certain goods, that he casually lost them, that the defendant found them, and that the defendant did not return them, but instead ‘converted them to his own use.’ From that phrase in the pleading came the name of the tort.” *Id.* at 135 (quoting PROSSER & KEETON ON THE LAW OF TORTS 89 (W. Page Keeton et al. eds., 5th ed. 1984)).

<sup>135</sup> *Moore*, 51 Cal. 3d at 135.

<sup>136</sup> *Id.* at 136.

<sup>137</sup> *Id.* at 137 (“Human tissues . . . following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state department [of health services] to protect the public health and safety.”) (quoting CAL. HEALTH & SAFETY CODE § 7054.4 (West 2007)).

<sup>138</sup> *Id.* at 142–43.

competing policy goals.<sup>139</sup> The judicial system should provide recourse to patients whose doctors act with motives other than the patient's health that may affect their professional decision-making.<sup>140</sup> The judicial system should also, however, allow doctors to engage in the "socially useful" practice of medical research without fear of liability when there is no reason to believe that a patient would object to their work.<sup>141</sup> Ultimately, the court determined that laws governing disclosure of information to patients cover the dispute better than subjecting doctors to tort liability for conversion.<sup>142</sup>

The court's second rationale for rejecting Moore's claim was that major changes in policy are best suited for the legislature.<sup>143</sup> Third, the court argued that a cause of action for conversion is not necessary to protect patients because laws governing disclosure of information serve that purpose more effectively than tort liability.<sup>144</sup>

One reading of *Moore* suggests that the California Supreme Court would be unsympathetic to a claim that an individual's DNA is his or her personal property. Several details in the *Moore* decision indicate, however, that the court's decision may not be the final word on whether DNA is personal property.

The court explicitly stated that Moore could not expect to maintain an ownership interest in his cells once they had been removed.<sup>145</sup> For Moore to lose an ownership interest in his cells, he had to have some original ownership interest in the biological material. For an individual to relinquish his property interest by signing a consent form, he must have a property interest to relinquish. The court also noted that the commercial cell line from which the defendants profited was a fundamentally different product than the cells excised from Moore. This distinction does not exist between DNA in the body and DNA as stored as a sample in a database.

Finally, the court explicitly reserved the question of whether Moore's DNA is his personal property.<sup>146</sup> After *Moore*, it is unclear whether a California court would recognize DNA as personal property.

A variety of arguments have been made both for and against recognition of DNA as personal property. It is beyond the scope of this

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 143.

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

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 147.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 136–37.

<sup>146</sup> *Id.* at 135.

Comment to fully explore current scholarship on this topic.<sup>147</sup> The debate over whether DNA is personal property will likely continue until Congress or the Supreme Court decisively resolves the question. For the purposes of the analysis, however, this Comment sides with the Alaska, Colorado, Georgia, and Florida legislatures and the Congress that enacted GINA in determining that DNA is the personal property of the individual to whom the genetic information belongs.

V. IS THE FORFEITURE OF AN ARRESTEE'S DNA AN EXCESSIVE FINE  
UNDER THE EIGHTH AMENDMENT?

A government program that punishes individuals without granting them a criminal trial is inherently suspicious. The county's DNA collection program exists in a gray area between civil and criminal action. One of the essential components of the county's program is that it is a substitute for a criminal conviction. As a result, it does not fit neatly into criminal forfeiture analysis. The government's action is not distinctly civil either; it exists within the criminal justice system. Although an argument could be made that one's genetic material is always instrumental to the commission of any offense, it is almost impossible that such an argument fits within the "guilty property" fiction used to justify civil forfeitures in rem prior to *Austin* and *Bajakajian*.

The county program, however, should be challenged as an excessive fine under the Eighth Amendment. The analysis begins with the text and purpose of the Eighth Amendment. The purpose of the Amendment, as

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<sup>147</sup> See Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359 (2000) (exploring the various judicial and legislative approaches to the question of what property interests an individual has in his or her own body); see also Leigh M. Harlan, *When Privacy Fails: Invoking a Property Paradigm to Mandate the Destruction of DNA Samples*, 54 DUKE L.J. 179 (2004) (arguing that the proper legal challenges to databases that maintain DNA samples for purposes other than particular criminal investigations are on property grounds). Harlan contends that the Fourth Amendment is inadequate to protect individuals' DNA from permanent databases and that labor, utilitarian, and personality arguments all justify the recognition of DNA as personal property. Thus the Fifth and Fourteenth Amendments would provide more adequate protection of individual rights. See also Erik S. Jaffe, Note, "*She's Got Bette Davis's] Eyes*": *Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses*, 90 COLUM. L. REV. 528 (1990) (arguing that laws authorizing coroners to remove tissue from cadavers without the consent of the deceased's next of kin violates the Fifth Amendment Takings Clause and the Fourteenth Amendment Due Process Clause).

The issue of human organ trafficking is another interesting point for discussion that is tangentially related to DNA collection statutes. For further reading, see Theodore Silver, *The Case for a Post-Mortem Organ Draft and a Proposed Model Organ Draft Act*, 68 B.U. L. REV. 681 (1988) (arguing that there is no property right to post-mortem organs and that the National Organ Transplant Act makes human organs valueless on the open market).

interpreted by the Supreme Court in *Browning-Ferris* and *Austin*, is to limit the prosecutorial power of the government.<sup>148</sup>

By collecting DNA samples from arrestees in circumvention of the federal and state DNA collection statutes, the district attorney's office has expanded its prosecutorial power in several ways. First, inclusion in a DNA database makes the individual a de facto person of interest in any crime in which a DNA sample taken from the crime scene is checked against the database. Law enforcement agencies have greater access to a larger number of potential suspects without having to do the field work that would be necessary absent a database of DNA data.<sup>149</sup> This is a significant expansion of the county's prosecutorial power.

The statutes that authorize DNA collection in all fifty states and by the federal government have provisions that order the destruction of the sample and removal from the database upon the fulfillment of certain circumstances. These conditions include acquittal, completion of sentence, and having the charges dropped, upon which every state statute authorizing the collection of DNA from arrestees calls for the destruction of collected samples.<sup>150</sup> The county operates its database without such safeguards. These problems suggest that the county government is operating beyond its prescribed scope of prosecutorial power and that it is using the DNA collection program to further expand the scope of the prosecutorial power.

One argument against this interpretation is that the county, by dropping criminal charges against arrestees, is actually relinquishing its prosecutorial power. Although this is a relevant consideration, on balance the state emerges from the "exchange" with a lasting DNA sample while the arrestee emerges with a one-time reprieve from criminal prosecution for a misdemeanor offense. The county does not actually "relinquish" anything, given that it makes the decision whether to offer the deal to an arrestee and holds a lasting power over the arrestee by keeping his DNA on file permanently without limitation. The county maintains the power to prosecute any arrestee who declines the offer. At no point does the county relinquish the prosecutorial power. It merely chooses whether to exercise it immediately (through criminal prosecution) or "save it for later" (by taking a DNA sample).

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<sup>148</sup> *Austin v. United States*, 509 U.S. 602, 610 (1992); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1988).

<sup>149</sup> Expanded DNA databases are increasingly valuable tools for law enforcement agencies. One article reports that it takes only 500 microseconds to search a database of 100,000 profiles. Tony Duster, *DNA Dragnets and Race: Larger Social Context, History, and Future*, GENEWATCH, <http://www.councilforresponsiblegenetics.org/GeneWatch/GeneWatchPage.aspx?pageId=56&archive=yes> (last visited Nov. 12, 2010).

<sup>150</sup> See *supra* Part II.

The next question in an excessive fines analysis is whether the government action is punitive. The district attorney's office suggested several purposes for its program. The program could deter potential criminals, help the law enforcement in future investigations, and reduce the burden on the stressed district attorney's office and law enforcement agencies.<sup>151</sup> The stated purpose of deterrence is an obvious indicator that the government views the program as a punishment. "Deterrence . . . has traditionally been viewed as a goal of punishment."<sup>152</sup> The publication of this program to county residents has the possible effect of deterring conduct that would result in a misdemeanor arrest and thus the offer for inclusion in the database. This is a general deterrent and can be interpreted as a punishment. An alternative argument for considering the program to be a punishment is the government's targeting of arrestees facing trial. If this program was not a punitive device, the county government could simply inform individuals that they may submit a sample to the county's DNA database as a public safety measure. By targeting suspected criminals, the county manages to focus squarely on deterring criminal behavior through alternative punishment.

The timing of the offer also indicates that the county intends the program to be punitive. Consider again the example of Charlie Wolcott, who went into the county court house to fight his misdemeanor trespassing charge:

Before he was called in front of the judge, Wolcott . . . w[as] called into a soundproof room in the back of the court. There, Deputy Dist. Atty. Nicholas Zovko made [him] an offer. "He takes me and one other guy to the back of the courtroom, and says basically, 'The district attorney's office would like to make a deal with you,'" Wolcott said. "'If you give a DNA sample, we will drop all charges.'"<sup>153</sup>

The county presumably could have offered this particular deal to Wolcott at the time of arrest or when notifying him of his court date. Instead, the Deputy District Attorney chose the moment before Wolcott was about to go in front of the judge to offer a sort of alternative arrangement.

The purpose of the program is ultimately to reduce crime and make the law enforcement process more efficient. To accomplish this goal, the government seeks to take DNA samples from arrestees and store them in a database for future investigations. The county's actions suggest a clear punitive intent to the program. Perhaps the most telling is a quote from the district attorney's office: "There's consequences when you commit a crime.

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<sup>151</sup> Abdollah, *supra* note 10, at A1.

<sup>152</sup> United States v. Bajakajian, 524 U.S. 321, 329 (1998).

<sup>153</sup> Abdollah, *supra* note 1, at A3.

This is actually a better option for them than other avenues, of, I guess, going through the penal process.”<sup>154</sup>

Although the purpose of the program suggests that providing a DNA sample is punitive, perhaps the effect of the program on individuals is more powerful evidence of its punitive nature. Permanent inclusion in a DNA database used exclusively for criminal investigations has a powerful punitive effect on the individual. Judge Reinhardt of the Ninth Circuit Court of Appeals perhaps best summarized the punitive effect of inclusion in such a database:

Every time new evidence is discovered from a crime scene, the government will search [the defendant's] genetic code to determine whether he has committed the crime—just as the government might search his house for evidence linking him to the crime scene—despite the fact that the government may never have cause to suspect him again.<sup>155</sup>

Though jurors and viewers of *CSI* may consider DNA evidence to be error-proof, there are significant risks associated with over-reliance on DNA evidence.<sup>156</sup> These lifelong concerns for individuals who submit to the county's program suggest that the program should be considered punitive under an Eighth Amendment excessive fines analysis.

The next question in the excessive fines analysis is whether the fine is excessive. One must first assume that DNA is personal property. As discussed in Part IV, there are statutory and case law grounds for considering one's DNA as his or her personal property. Even if it is personal property, however, genetic material does not fit within the framework of any statute authorizing forfeiture of property.<sup>157</sup> These

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<sup>154</sup> Abdollah, *supra* note 10, at A1.

<sup>155</sup> *United States v. Kincade*, 379 F.3d 813, 870 (9th Cir. 2004) (Reinhardt, J., dissenting).

<sup>156</sup> It is possible, when searching against a large database, for a “cold hit” to match a sample at a crime scene with an innocent individual. Further, human error can contaminate, mislabel, and misinterpret DNA evidence. See William C. Thompson, *The Potential for Error in Forensic DNA Testing*, GENEWATCH, <http://www.councilforresponsiblegenetics.org/GeneWatch/GeneWatchPage.aspx?pageId=57&archive=yes> (last visited Nov. 12, 2010).

<sup>157</sup> See 18 U.S.C. § 1955(d) (2006):

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizures, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in

statutes assume a tangible nexus between the prohibited action being punished and the property being forfeited. One obvious argument is that one's genetic makeup is a necessary component of every action (including illegal actions) that the individual takes. These statutes, however, clearly draw a distinction between the individual and his property. It seems highly improbable that Congress would draw a distinction between an individual and his genetic material to make such a determination.

In Part III, this Comment discussed the analytical framework that future courts will likely use in evaluating Excessive Fines Clause cases. The fine must be grossly disproportional to the offense for it to be excessive.<sup>158</sup> Courts will look to two sources: the legislature (to determine what punishment the legislature thought was appropriate for the offense) and other courts (to determine whether the punishment is consistent with that for similar crimes.)<sup>159</sup> Using this analytical framework for determining excessiveness, the forfeiture of DNA as an alternative punishment for criminal misdemeanor charges may be excessive.

The first consideration is how the punishment relates to the appropriate punishment for the offense set out by the legislature.<sup>160</sup> The appropriate punishment for a misdemeanor conviction varies, but the individuals subjected to the Orange County fine are not convicts. The presumption of innocence stays with a criminal defendant until he is found guilty, and it is unjust to punish him absent due process of law. Until there is a guilty plea, the defendant should maintain the right to be free from government punishment, especially in a misdemeanor case in which there would be no threat to society from his release while awaiting trial.

Another consideration, however, is that the program simply offers an alternative to the penal process and allows individuals to get out of criminal charges without a blemish on their criminal records. The defendant has a choice in this matter: he can elect to stand trial and fight the charges or he can submit a DNA sample, pay \$75, and move on from the incident. Perhaps a court would consider that to be appropriate given the nature of the charges facing defendants eligible for this program. On balance, however, significant weight should be given to the presumption of innocence that attaches to a criminal defendant. Further, if the county were to follow the guidelines set forth by the state and federal DNA databases, it would not be able to maintain DNA samples from individuals convicted of non-violent misdemeanors permanently without destroying them after a

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violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

<sup>158</sup> *United States v. Bajakajian*, 524 U.S. 321, 336 (1998).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

certain period. This suggests disproportionality between the offense and the punishment.

The second consideration in the *Bajakajian* test is whether the defendant's punishment is consistent with the punishment for similar crimes:

In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.<sup>161</sup>

Currently, Orange County is alone in operating such a program, so it is unclear how other jurisdictions would treat such a program. The Court in *Bajakajian*, however, declined to declare a bright-line rule on excessiveness because it felt that the question of the appropriateness of punishment was best left to the legislature.<sup>162</sup> It is important to note at this point that no legislature has actually authorized the Orange County district attorney's plan; it is currently an executive action without legislative approval. This may suggest a greater susceptibility to being struck down.

## VI. CONCLUSION

Challenges under the Eighth Amendment Excessive Fines Clause are rare. The overreaching nature of the Orange County district attorney's plan, however, raises a variety of legal and moral questions, and the question of whether this is an excessive fine is an important one.

Criminal defendants are entitled to the presumption of innocence. This presumption is fundamental to our criminal justice system and should not be disrupted. A non-violent misdemeanor arrestee should not be faced with the prospect of defending himself against criminal charges or subjecting himself to a lifetime of criminal investigations simply because a prosecutor offers a quick fix for his minor legal problem. The county plan, however, presents individuals with this choice moments before they are scheduled to face a judge. As it stands, the county program gives the county expanded prosecutorial power over non-violent misdemeanor arrestees that do not get the benefit of trial. This expansion of prosecutorial power is exactly what the Eighth Amendment was designed to protect against.

In *Bajakajian*, the Court held that it would consider the gravity of the offense and the harshness of the penalty when determining whether a fine is excessive.<sup>163</sup> Under the county program, an arrested individual who has not

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<sup>161</sup> *Solem v. Helm*, 463 U.S. 277, 290 (1983).

<sup>162</sup> *Bajakajian*, 524 U.S. at 336.

<sup>163</sup> *Id.* at 336–37.

been convicted an offense is still subject to a lifetime of criminal investigations any time the county chooses to run a DNA sample from a crime scene against its DNA database. This is a harsher penalty than a convict faces under statutes that require the destruction of the sample after the convict has completed his sentence.<sup>164</sup> A program that subjects an unconvicted individual to a harsher penalty than what he or she would face if convicted is excessive and should not stand up to a challenge under the Eighth Amendment's Excessive Fines Clause.

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<sup>164</sup> See *supra* Part II.