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The Unintended Consequences of California Proposition 47: Reducing Law Enforcement's Ability to Solve Serious, Violent Crimes

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The Unintended Consequences of California Proposition 47: Reducing Law Enforcement's Ability to Solve Serious, Violent Crimes

Abstract

For many years, DNA databases have helped solve countless serious, violent crimes by connecting low-level offenders to unsolved crimes. Because the passage of Proposition 47 reduced several low-level crimes to misdemeanors, which do not qualify for DNA sample collection, Proposition 47 has severely limited law enforcement's ability to solve serious, violent crimes through California's DNA database and reliable DNA evidence. This powerful law enforcement tool must be preserved to prevent additional crimes from being committed, to exonerate the innocent, and to provide victims with closure through conviction of their assailants or offenders. Proposition 47's unintended consequences have led to devastating costs in the first year alone, including a decreased deterrent effect, a rise in crime rates, and a lack of rehabilitation. The goal of ensuring the safety and security of citizens should remain at the forefront of future actions.

This Comment analyzes the impact Proposition 47 has had and will have on the DNA database in California. Additionally, this Comment examines the history of both state and federal DNA databases, the evolution of California's DNA database, and case law considering the constitutionality of DNA database programs. Specifically, this Comment assesses the consequences of Proposition 47 and considers different approaches to handling the arising issues. This Comment concludes by summarizing the importance of restoring DNA collection for the low-level crimes Proposition 47 reduced to misdemeanors to ensure the safety and security of California citizens by keeping serious, violent criminals off the streets.

TABLE OF CONTENTS

I.	INTRODUCTION	1041
II.	HISTORY AND BACKGROUND.....	1043
	<i>A. A Brief History of DNA Databases</i>	1043
	<i>B. The Evolution of California’s DNA Database</i>	1044
	1. Prior to Proposition 69: 1984–2004	1044
	2. Proposition 69: “The DNA Fingerprint, Unsolved Crime and Innocence Protection Act”	1045
	3. After Proposition 69: 2009–Present	1047
	<i>C. Constitutional Challenges to DNA Collection as a Search Under the Fourth Amendment</i>	1048
	1. Constitutionality of DNA Sample Collection from Convicted Offenders	1048
	2. Constitutionality of DNA Sample Collection from Arrestees	1049
III.	PROPOSITION 47: “THE SAFE NEIGHBORHOODS AND SCHOOLS ACT”	1053
	<i>A. How Proposition 47 Works</i>	1053
	1. Reduces Various Felony or Wobbler Offenses to Misdemeanors	1054
	2. Provides a Procedure for Inmates Serving Felony Sentences to Petition for Misdemeanor Resentencing	1056
	3. Provides a Procedure for Individuals Who Have Completed Felony Sentences to Apply for Misdemeanor Reclassification	1057
	<i>B. Proposition 47 and California’s DNA Database</i>	1058
	1. Limitations on Law Enforcement’s Ability to Solve Serious, Violent Crimes	1058
	2. Retention of DNA Samples from Offenders with Reclassified Misdemeanors	1061
IV.	ANALYSIS OF POSSIBLE SOLUTIONS TO PROPOSITION 47’S UNINTENDED CONSEQUENCES	1063
	<i>A. Legislative Action</i>	1063
	<i>B. Judicial Interpretation</i>	1067
	1. Juveniles and Proposition 47	1068
	2. Proposition 36	1069
	<i>C. Other DNA Collection Laws</i>	1071

1. Convicted Offender DNA Collection..... 1071
 2. Arrestee DNA Collection 1073
 3. Misdemeanor Arrestee DNA Collection 1074
 V. IMPACT AND SIGNIFICANCE 1076
 VI. CONCLUSION 1081

I. INTRODUCTION

In 1989, Sophia McAllister, an eighty-year-old woman, was brutally raped, robbed, and murdered in her home.¹ The crime went unsolved for twenty years until Donald Carter was arrested in 2009 on an unrelated, low-level drug possession charge.² After his arrest, law enforcement took a sample of his DNA and entered it into the DNA database, resulting in a match with the forensic sample taken at the scene of the murder.³ In 2010, a jury found Carter guilty of the rape and murder of Sophia.⁴

In 2010, a young woman was severely beaten, kidnapped, and sexually assaulted before being left on the side of the road.⁵ The police collected a DNA sample from the victim at the scene and entered it into the database, but it did not receive any matches.⁶ A few months later, the police arrested Octavio Castillo for receiving stolen property, and took a DNA sample.⁷ When the police entered his DNA into the database, it resulted in a match with the sample taken from the assault of the young woman.⁸ In 2012, Castillo was sentenced to fifteen years in prison after pleading guilty to

1. See Andy Furillo, *Man Convicted of 1989 Rape–Murder of Sacramento Woman*, SACRAMENTO BEE (Sept. 17, 2010), <http://blogs.sacbee.com/crime/archives/2010/09/man-convicted-o-8.html>.

2. See *id.*

3. See *id.*

4. See *id.*

5. See Kimberly White, *DNA Hit Leads Police to Watsonville Man Arrested for Kidnapping and Assaulting Woman in Santa Cruz*, SANTA CRUZ SENTINEL NEWS (May 12, 2011, 12:01 AM), <http://www.santacruzsentinel.com/general-news/20110512/dna-hit-leads-police-to-watsonville-man-arrested-for-kidnapping-and-assaulting-woman-in-santa-cruz>.

6. See *id.*

7. See *id.*

8. See *id.*

multiple charges arising from the 2010 sexual assault.⁹

Both of these cases exemplify the many crimes solved through the DNA database by connecting low-level offenders to unsolved serious, violent crimes of the past.¹⁰ DNA technology “constitute[s] the single greatest advance in the ‘search for truth,’ and the goal of convicting the guilty and acquitting the innocent.”¹¹ Under Proposition 47 (Prop 47), neither case would have been solved because DNA samples would not have been collected upon Carter’s arrest for drug possession or Castillo’s arrest for receiving stolen property.¹² Prop 47 reduced these “low-level” crimes to misdemeanors, and DNA collection upon arrest for misdemeanors is not authorized in California.¹³ Thus, Prop 47 limits law enforcement’s ability to solve serious, violent crimes using reliable DNA evidence.¹⁴ It is therefore essential that California restore DNA collection for the crimes that Prop 47 changed to misdemeanors, because doing so will preserve this powerful law enforcement tool and ensure the safety of California citizens.¹⁵

This Comment will analyze the impact Prop 47 has had and will have on the DNA database in California. Part II briefly describes the history of both state and federal DNA databases¹⁶ and the evolution of California’s DNA Database.¹⁷ Part II also examines case law considering the constitutionality of DNA database programs.¹⁸ Part III discusses Prop 47 in general¹⁹ and introduces its implications relating to California’s DNA Database and law

9. Jessica M. Pasko, *Watsonville Man Sentenced to 15 Years in Sexual Assault Case*, SANTA CRUZ SENTINEL NEWS (Sept. 24, 2012, 12:01 AM), <http://www.santacruzsentinel.com/article/ZZ/20120924/NEWS/120927546>.

10. See, e.g., *Using DNA to Solve Cold Cases*, NAT’L INST. JUST. SPECIAL REP. (July 2002), <https://www.ncjrs.gov/pdffiles1/nij/194197.pdf>.

11. See *People v. Wesley*, 533 N.Y.S. 2d 643, 644 (Cty. Ct. 1988); Robert Aaronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 FORDHAM L. REV. 1453, 1469 (2008); see also *United States v. Kincade*, 379 F.3d 813, 818–19 (9th Cir. 2004).

12. See *infra* Part III.

13. See *infra* Sections II.B & III.B.1.

14. See *infra* Parts III–V.

15. See *infra* Parts III–V.

16. See *infra* Section II.A.

17. See *infra* Section II.B.

18. See *infra* Section II.C.

19. See *infra* Section III.A.

enforcement's ability to solve serious, violent crimes.²⁰ Part IV further assesses the consequences of Prop 47 and considers different approaches to handling the arising issues.²¹ Part V examines the impact Prop 47 has had on California's criminal justice system after its first year of implementation and the significance of its repercussions looking forward.²² Part VI concludes by summarizing the importance of restoring DNA collection for the crimes Prop 47 reduced to misdemeanors to ensure the safety and security of California citizens by keeping serious, violent criminals off the streets.²³

II. HISTORY AND BACKGROUND

A. A Brief History of DNA Databases

DNA database systems are governed by both federal and state law and exist at various levels.²⁴ First, there are Local DNA Index System (LDIS) labs where DNA profiles are developed from crime scene evidence.²⁵ Then, State DNA Index System (SDIS) programs receive the crime scene profiles from the LDIS labs.²⁶ All fifty states have SDIS programs, which are governed by individual state laws.²⁷ SDIS programs upload the majority of

20. See *infra* Section III.B.

21. See *infra* Part IV (discussing the arguments of those in favor of amending the law to avoid the "unintended consequence" of Prop 47 and those in opposition to any change to the law after the passage of Prop 47).

22. See *infra* Part V.

23. See *infra* Part VI.

24. See generally J. MING W. CHIN ET AL., FORENSIC DNA EVIDENCE: SCIENCE AND THE LAW § 8:2 (Rutter Group 2015) (describing the different levels of DNA databases).

25. *Id.* LDIS "labs must satisfy the FBI's requirements to participate in the national DNA database system . . . and are typically affiliated with a municipal police agency, a county sheriff or medical examiner, a district attorney's office, or a state department of justice." *Id.*; see also *Frequently Asked Questions (FAQs) on the CODIS Program and NDIS*, FBI SERVS., <https://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited Apr. 12, 2017) [hereinafter *FBI FAQs on CODIS and NDIS*] ("States seeking to participate in NDIS sign a Memorandum of Understanding with the FBI Laboratory documenting their agreement to abide by the DNA Identification Act requirements as well as record-keeping and other operational procedures governing the uploading of DNA data, expungements, CODIS users, audits, etc.").

26. See CHIN ET AL., *supra* note 24, § 8:2.

27. See *id.* Each state determines the classifications of criminal offenders who can lawfully be required to provide known reference DNA samples to the state for processing and uploading into the

their contents into the National DNA Index System (NDIS), which is the United States' national-level database administered by the FBI.²⁸ The Combined DNA Index System (CODIS) refers to the DNA database software developed by the FBI and licensed to SDIS and LDIS laboratories, creating a national network.²⁹ CODIS is also used as an umbrella label for all DNA database programs in general.³⁰ California's DNA Data Bank Program—one of the largest in the world—has existed since 1984, but has significantly evolved since its initial enactment.³¹

B. *The Evolution of California's DNA Database*

1. Prior to Proposition 69: 1984–2004

California has collected DNA samples for forensic identification purposes from statutorily enumerated criminal offenders since 1984.³² In 1984, the legislature enacted Penal Code section 290.2, requiring sex registrants paroled from state prison to provide blood samples to a DOJ laboratory “for analysis and categorizing into blood groupings” for law

state database for subsequent comparison against crime-scene evidence profiles. *Id.*

28. *Id.* (“[The FBI] conducts national level comparisons and reports interstate cold hits—both offender-to-case hits and case-to-case matches.”); *see also* *FBI FAQs on CODIS and NDIS*, *supra* note 25 (“The DNA Identification Act of 1994 (42 U.S.C. § 14132) authorized the establishment of this National DNA Index. The DNA Act specifies the categories of data that may be maintained in NDIS (convicted offenders, arrestees, legal, detainees, forensic [casework], unidentified human remains, missing persons, and relatives of missing persons) as well as requirements for participating laboratories relating to quality assurance, privacy, and expungement.”).

29. *See* CHIN ET AL., *supra* note 24, § 8:2.

30. *See* *United States v. Kincade*, 379 F.3d 813, 845 n.2 (9th Cir. 2004) (“CODIS is a three-tiered hierarchical system of information sharing. The FBI's National DNA Index System (NDIS) constitutes the highest level in the CODIS hierarchy[;] all participating laboratories at the local and state level have access to the NDIS database. All DNA profiles in the CODIS system are collected at the local level (LDIS) before flowing to operative state databases (SDIS.”); *see also* *Combined DNA Index System (CODIS)*, FBI, <https://www.fbi.gov/about-us/lab/biometric-analysis/codis/> (last visited Apr. 12, 2017); NATHAN JAMES, CONG. RESEARCH SERV., R41800, DNA TESTING IN CRIMINAL JUSTICE: BACKGROUND, CURRENT LAW, GRANTS, AND ISSUES 2–3 (2012).

31. *See infra* Section II.B.

32. *See* CHIN ET AL., *supra* note 24, § 8:3. Courts have also described the historical evolution of California's DNA Databank Program. *See, e.g.,* *People v. Robinson*, 224 P.3d 55, 63 (Cal. 2010); *Alfaro v. Terhune*, 120 Cal. Rptr. 2d 197, 201–02 (Ct. App. 2002).

enforcement purposes.³³ Penal Code section 290.2 was amended (and expanded) several times,³⁴ until 1998 when it was ultimately repealed and replaced by sections 295 to 300.3, known as the “DNA and Forensic Identification Data Base and Data Bank Act of 1998” (DNA Act of 1998).³⁵

The DNA Act of 1998 described the operation, requirements, and limitations of the DNA Data Bank Program in comprehensive detail.³⁶ The DNA Act of 1998 also expanded the list of qualifying offenses to include many serious and violent crimes.³⁷ This Act remained in effect until 2004,³⁸ when Proposition 69 became the governing authority for California’s DNA Data Bank Program.³⁹

2. Proposition 69: “The DNA Fingerprint, Unsolved Crime and Innocence Protection Act”

Proposition 69 (Prop 69), approved by voters in 2004, dramatically expanded California’s DNA Database.⁴⁰ Prop 69 was enacted out of a perceived necessity “to clarify existing law and to enable the state’s DNA and Forensic Identification Database and Data Bank Program to become a

33. CAL. PENAL CODE § 290.2 (1984) [hereinafter FORMER CAL. PENAL CODE § 290.2], *repealed* by DNA and Forensic Identification Data Base and Data Bank Act of 1998, 1998 Cal. Stat. 696 (codified as amended at PENAL §§ 295–300.3); *see also* CHIN ET AL., *supra* note 24, § 8:3.

34. *See* CHIN ET AL., *supra* note 24, § 8:3; *see also* FORMER CAL. PENAL CODE § 290.2. In 1988, the law was amended, expanding collection to include felony sex registrants released on probation or from county jail. *Id.* § 290.2. In 1989, the law was amended again—this amendment expanded collection to include those convicted of enumerated felony assault and battery crimes, in addition to felony sex offenders; provided for DNA testing “and other genetic typing analysis” instead of blood type; described the computerized DNA database; and set forth use and disclosure restrictions. *Id.* In 1993, the law was amended again, expanding the law to include those convicted of murder, and providing for coordination between the DOJ and local public DNA laboratories. *Id.*

35. *See* DNA and Forensic Identification Data Base and Data Bank Act of 1998, 1998 Cal. Stat. 696 (codified as amended at PENAL §§ 295–300.3 (West 2004)).

36. *See* PENAL §§ 295–300.3.

37. *See id.* § 296(a). In 1998, the list of qualifying offenders included those convicted of committing (or attempting to commit) sex offenses, murder, voluntary manslaughter, spousal abuse, aggravated sexual assault of a child, specific assault or battery, kidnapping, mayhem, and torture. *Id.* By 2002, the list of qualifying offenders had expanded to include those convicted of burglary, robbery, arson, carjacking, and terrorist activity. *Id.*

38. *Id.*

39. *See* DNA Fingerprint, Unsolved Crime and Innocence Protection Act, CAL. PROPOSITION 69 [hereinafter PROP 69] (codified as PENAL §§ 295–300.3).

40. *See id.*

more effective law enforcement tool.”⁴¹ Prior to the passage of Prop 69, California law required the collection of DNA samples only from those *convicted* of serious, violent felonies.⁴² Prop 69 expanded the categories of individuals from which DNA samples may be taken to include all convicted felons—including juveniles—and, beginning in 2009, all adults *arrested* for *any* felony offense.⁴³ This proposition applied retroactively and authorized DNA collection from those incarcerated or those serving probation or parole for qualifying offenses at the time.⁴⁴ Prop 69 also modified the DNA removal process⁴⁵ and granted judges complete discretion in deciding whether to grant expungement requests.⁴⁶

41. PENAL § 295(b)(3).

42. See discussion *supra* Section II.B.1.

43. See PENAL § 296.

44. See *id.* § 296.1. Scholars predicted that, in the first year following the passage of Prop 69, over 600,000 people would qualify for DNA collection. See Tania Simoncelli & Barry Steinhardt, *California’s Proposition 69: A Dangerous Precedent for Criminal DNA Databases*, 34 J.L. MED. & ETHICS 199, 200–01 (2006) (“This figure represents more than ten times the number of samples the California Department of Justice (CA DOJ) has ever processed in a given year, and three times the total number of offender profiles that were in the database at the time of Proposition 69’s passage.”); see also Alice A. Noble, *Summary of Key Provisions of the California Proposition 69 Initiative Statute*, AM. SOC’Y LAW, MED. & ETHICS (2004), https://www.aslme.org/dna_04/spec_reports/cal_prop_69.pdf (expounding upon the main components of Proposition 69).

45. See PENAL § 299(a)–(g) (listing requirements for removal). An individual can request removal of DNA from the database if proven innocent or if a court dismisses the charges. See *id.* § 299(b)(2)–(3). The petitioner must send a copy of the request to the court, the prosecuting attorney, and the California Department of Justice laboratory that manages the DNA samples. See *id.* § 299(c)(1). If no one objects, then 180 days after the petitioner gives notice, the judge may order the samples expunged. See *id.* § 299(c)(2)(D).

46. See *id.* § 299(c)(1) (giving the judge discretion to grant or deny petitioner’s request for expungement). Section 299 does not require a judge to expunge the DNA samples even if the petitioner meets all the requirements for DNA removal. See *id.* § 299(e). A person cannot appeal the denial of a removal request, nor can he challenge it by a petition for writ. See *id.* § 299(c)(1).

Even if a judge orders expungement, database administrators may fail to fully expunge the record and any information not removed remains available for future identifications. See *id.* § 297(c)(2). Section 297 prevents invalidating or dismissing any identification, warrant, arrest, or probable cause to arrest based on a database match because of failure to expunge a record. *Id.* Section 297 also precludes overturning a conviction, arrest, or detention based on database information acquired or retained by mistake. See *id.* § 297(g). Section 298 refuses to invalidate an arrest, plea, or conviction because of a failure to comply with the statute. *Id.* § 298(c)(3).

3. After Proposition 69: 2009–Present

Since the implementation of Prop 69’s provision requiring the collection of DNA samples from all adult felony *arrestees* in 2009, the “crime-solving efficacy” of California’s database program has more than doubled.⁴⁷ California’s data shows that, as of August 2016, over 42,000 of California’s 50,320 total DNA database hits occurred after California began collecting DNA samples from adult felony arrestees.⁴⁸ Thus, the collection of DNA samples from adult felony arrestees is “a vital law enforcement tool.”⁴⁹ Additionally, two studies by the California Department of Justice dispel a common misconception that states have no need to collect DNA samples upon arrest for low-level crimes.⁵⁰

There have been several arguments made both in support of and in opposition to the changes to the DNA database following the enactment of Prop 69.⁵¹ The California Supreme Court has not yet considered the

47. See *BFS DNA Frequently Asked Questions: Effects of the All Adult Arrestee Provision*, ST. CAL. DEP’T JUST., <https://oag.ca.gov/bfs/prop69/faqs> (last visited Apr. 12, 2017) [hereinafter *FAQ: Effects of the All Adult Arrestee Provision*]; see also *People v. Buza*, 129 Cal. Rptr. 3d 753, 776 n.23 (Ct. App. 2011) (“In 2009, the average DNA sample submission rate increased to about 26,500 per month, or about a 120% increase over the average in 2008 of about 12,000 per month. In addition, the average number of monthly hits increased 51% from 183 per month in 2008 to about 280 in 2009.”).

48. See *CAL-DNA Hits Reported Jan. 1984 to Aug. 2016*, ST. CAL. DEP’T JUST., http://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/cal_dna_hit_trend-08-16.pdf (last visited Apr. 12, 2017) (noting a “638% increase in hits over collections after felony conviction”).

49. See *FAQ: Effects of the All Adult Arrestee Provision*, *supra* note 47 (“[F]rom May 2013 through September 2013, California’s DNA Database Program averaged 517 hits and 626 investigations aided per month.”).

50. See *DNA Database Hits to Murder, Rape, and Robbery: Two Studies of the Correlations Between Crime of Arrest and DNA Database Hits to Murder, Rape, Robbery Offenses*, ST. CAL. DEP’T JUST., <http://oag.ca.gov/sites/all/files/pdfs/bfs/arrestee.pdf> (last visited Apr. 12, 2017) [hereinafter *Arrestee Hits to Violent Crime Survey*] (providing pie graphs to visually illustrate qualifying offenses). A study of one hundred adult felony arrestees with no prior felony convictions found the majority of DNA database hits to murder, rape, and robbery crimes come from DNA database samples collected at their arrest for drug, driving under the influence of alcohol, fraud, and property offenses. *Id.* Another study of 3778 adult felony arrestees found only eight percent of DNA database hits to murder, rape, and robbery crimes come from DNA database samples collected from persons who have their DNA collected at arrest for another murder, rape, or robbery crime. *Id.* Thus, these studies demonstrate the importance of collecting DNA samples upon arrest for low-level crimes in solving murders, rapes, and robberies. See discussion *infra* Section III.B.

51. See, e.g., Brief for the States of California et al. as Amici Curiae Supporting Petitioner, *Maryland v. King*, 133 S. Ct. 1958 (2013) (No. 12-207) (“Collecting forensic identification DNA

constitutionality of Prop 69 governing the DNA database, but several cases are currently pending review.⁵²

C. Constitutional Challenges to DNA Collection as a Search Under the Fourth Amendment

1. Constitutionality of DNA Sample Collection from Convicted Offenders

The constitutionality of the warrantless, suspicionless collection of DNA samples from the classes of qualifying offenders enumerated in state law has been the subject of much litigation in the last decade.⁵³ Every state—along with the District of Columbia and the federal government—collects and tests DNA from individuals convicted of certain crimes.⁵⁴ The United States Supreme Court established that compelled DNA sampling for database

samples from arrestees serves a compelling government interest in solving crime.”); *see also* Press Release, *Governor Arnold Schwarzenegger Endorses Prop. 69, the DNA Fingerprint Initiative*, (July 8, 2004), <http://www.prnewswire.com/news-releases/governor-arnold-schwarzenegger-endorses-prop-69-the-dna-fingerprint-initiative-71205032.html> (“[Prop 69] helps solve crime, free those wrongfully accused and stop serial killers.”). *But see* Robert Berlet, *A Step Too Far: Due Process and DNA Collection in California After Proposition 69*, 40 U.C. DAVIS L. REV. 1481, 1513 (2007) (“California’s DNA database statute as amended by Proposition 69 cannot survive unchanged.”).

52. *See, e.g.*, *People v. Buza*, 180 Cal. Rptr. 3d 753, 757 (Ct. App. 2014), *review granted and opinion superseded by* 342 P.3d 415 (Cal. 2015) (“The sole issue in this case is the constitutionality of a provision of the DNA and Forensic Identification Database and Data Bank Act of 1988”); *People v. Lowe*, 165 Cal. Rptr. 3d 107, 114 (Ct. App. 2013), *review granted and opinion superseded by* 320 P.3d 799 (Cal. 2014) (“[W]e hold that the 2004 Amendment authorizing the mandatory and warrantless collection and analysis of buccal swab DNA samples from felony arrestees does not violate the Fourth Amendment.”). If the California Supreme Court decides that California’s DNA collection law is unconstitutional, several other issues will arise for discussion, and the rules governing California’s DNA collection will become even more complicated. Assembly Bill 84 (AB 84), introduced by Assembly Member Mike Gatto, proposed a new law that would allow DNA testing to resume in California, but the bill died in January 2016. *See* A.B. 84, 2015–2016 Reg. Sess. (Cal. 2015), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB84; Christopher Simmons, *Calif. Assemblyman Mike Gatto Introduces Bill to Create New DNA Testing Regime to Solve Crimes—AB 84* CALIFORNIA NEWSWIRE (Jan. 6, 2015), <https://californianewswire.com/calif-assemblyman-mike-gatto-introduces-bill-to-create-new-dna-testing-regime-to-solve-crimes-ab-84/>.

53. *See* cases cited *infra* notes 58–81 and accompanying text.

54. *See* discussion *infra* Section IV.C.1.

purposes is a search subject to the Fourth Amendment.⁵⁵ California case law affirms that database collections from all convicted felons, regardless of the nature of the felony offense, are constitutional under the Fourth Amendment's reasonableness balancing test.⁵⁶ Federal courts have also consistently upheld the constitutionality under the Fourth Amendment of collecting DNA samples from convicted felons.⁵⁷

2. Constitutionality of DNA Sample Collection from Arrestees

As of 2014, thirty states, as well as the federal government, collect DNA samples from those arrested but not yet convicted of certain criminal offenses.⁵⁸ Despite the United States Supreme Court's 2013 decision addressing this issue in *Maryland v. King*,⁵⁹ the constitutionality of DNA sample collection from arrestees continues to be the subject of litigation.⁶⁰ In *King*, the Court upheld Maryland's law and concluded that "DNA

55. See *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616 (1989) (holding that a "compelled intrusion into the body for blood to be analyzed for alcohol content" constitutes a search under the Fourth Amendment).

56. See, e.g., *People v. Robinson*, 224 P.3d 55, 65–67 (Cal. 2010) ("The nonconsensual extraction of biological samples for identification purposes [under the DNA Act] does implicate federal constitutional interests under Fourth Amendment, but such nonconsensual extraction of biological samples from adult felons is reasonable because those convicted of serious crimes have a diminished expectation of privacy and the intrusions authorized by the Forensic Identification Database and Data Bank Act of 1998 are minimal while the act serves compelling governmental interests, including the overwhelming public interest in prosecuting crimes accurately.").

The constitutional collection of statutorily mandated DNA samples from convicted and adjudicated offenders is not limited to those who have committed serious, violent, or sex offenses—all convicted and adjudicated felons are included. See *People v. Travis*, 44 Cal. Rptr. 3d 177, 191–93 (Ct. App. 2006) (discussing the constitutionality of DNA collection, juveniles, and the role of the Fourth Amendment). Collection of DNA from a juvenile adjudicated of a felony offense is also constitutional. See *In re Calvin S.*, 58 Cal. Rptr. 3d 559, 562 (Ct. App. 2007) ("[N]onconsensual extraction of the biological samples necessary for DNA testing is a minimal intrusion into the privacy of the offender.").

57. See, e.g., *United States v. Kriesel*, 508 F.3d 941, 950 (9th Cir. 2007); *Hamilton v. Brown*, 630 F.3d 889, 896 (9th Cir. 2001).

58. See discussion *infra* Sections IV.C.2–3; see also CHIN ET AL., *supra* note 24, § 8:16 ("The scope of these laws varies, with different classifications of arrestees targeted in different jurisdictions.").

59. *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013).

60. See Stephanie B. Noronha, *Maryland v. King: Sacrificing the Fourth Amendment to Build up the DNA Database*, 73 MD. L. REV. 667, 678–80 (2014) (analyzing the Supreme Court's decision in *King* and its impact on Fourth Amendment protections).

identification of arrestees is a reasonable search that can be considered part of a routine booking procedure.”⁶¹ Maryland’s DNA collection law allows DNA collection only from individuals arrested for serious offenses, and the Court’s holding repeatedly states DNA collection only affects those arrested for serious offenses;⁶² however, as Justice Scalia argued in his dissent, the majority did not provide a valid principle justifying such a limitation.⁶³ Because “DNA collection laws in states like California are much broader [than Maryland’s],”⁶⁴ the majority’s broad ruling in *King* is likely the reason for the continuing litigation on this subject because courts may “find no significant difference between [these] case[s] and *King*.”⁶⁵

In California, the constitutionality of arrestee DNA collection—under both the California Constitution and the United States Constitution—is being considered in *People v. Buza*.⁶⁶ Prior to *King*, the California Court of Appeal held California’s arrestee collection law was unconstitutional,⁶⁷ but

61. *King*, 133 S. Ct. at 1980. The Court conducted its Fourth Amendment analysis of DNA collection upon arrest by using a totality-of-the-circumstances balancing test, weighing legitimate government interests against “the degree to which [the search] intrudes upon an individual’s privacy.” *Id.* at 1963 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

62. *Id.* at 1967.

63. *Id.* at 1989 (Scalia, J., dissenting). Scalia acknowledged the “vast (and scary) scope” of the majority’s holding “by promising a limitation it cannot deliver.” *Id.* (“If one believes that DNA will ‘identify’ someone arrested for assault, he must believe that it will ‘identify’ someone arrested for a traffic offense.”).

64. See Noronha, *supra* note 60, at 690 (“The California statute . . . is unlike the Maryland DNA Collection Act in that it does not provide for automatic, mandatory expungement of the DNA profile if the arrestee is acquitted or the charges are dismissed; . . . nor does it limit DNA collection to individuals arrested for serious felonies.”).

65. See *King*, 133 S. Ct. at 1989 (Scalia, J., dissenting) (“When there comes before us the taking of DNA from an arrestee for a traffic violation, the Court will predictably (and quite rightly) say, ‘We can find no significant difference between this case and *King*.’”); see also Noronha, *supra* note 60, at 690 (“Compared to the Maryland DNA Collection Act, DNA collection laws in states like California are much broader and, therefore, raise more questions given the Court’s broad ruling in *King*.”).

66. *People v. Buza*, 180 Cal. Rptr. 3d 753 (Ct. App. 2014), *review granted and opinion superseded by* 342 P.3d 415 (Cal. 2015).

67. *People v. Buza*, 129 Cal. Rptr. 3d 753, 783 (Ct. App. 2011), *review granted and opinion superseded by* 262 P.3d 854 (Cal. 2011), *abrogated by King*, 133 S. Ct. 1958.

A study done by the California Department of Justice also found that, following the August 2011 decision in *Buza* that temporarily halted the program for collecting DNA upon felony arrest, the number of crimes solved by matches to the DNA database decreased by about 200 cases per month—until the database was restored. See *FAQ: Effects of the All Adult Arrestee Provision*, *supra* note 47 (“There was a significant decline in sample submissions from August 2011–March 2012, as

the California Supreme Court granted review and transferred the case back to the Court of Appeal “with directions to vacate its decision and to reconsider the cause in light of *Maryland v. King*.”⁶⁸ After reconsidering the case in light of *King*, the Court of Appeal again declared the arrestee DNA collection provision of California’s law unconstitutional, violating state constitutional privacy protections.⁶⁹ However, in 2014, the California Supreme Court granted review again and depublished the lower court’s decision.⁷⁰ As of April 2017, the California Supreme Court has not yet decided this case.

Meanwhile, a different division of the California Court of Appeal issued a decision in *People v. Lowe*,⁷¹ holding that California’s DNA collection law “authorizing the mandatory and warrantless collection and analysis of . . . DNA samples from felony arrestees *does not* violate the Fourth Amendment.”⁷² In *Lowe*, the California Court of Appeal found that *King*’s reasoning applied to California’s DNA database law just as it did to Maryland’s.⁷³ However, the California Supreme Court also granted review of this case and, as of April 2017, it has not been decided.⁷⁴

The Ninth Circuit also addressed the constitutionality of California’s arrestee DNA collection law in *Haskell v. Harris*.⁷⁵ The Ninth Circuit held that California’s DNA collection law was clearly “constitutional as applied

a result of the now depublished Court of Appeal Aug. 4, 2011 opinion in *People v. Buza*.”). Submissions dropped from the pre-*Buza* average submission rate of 17,763 a month, to as low as 7398 in October 2011. *See id.*; *see also Impacts of Buza Decision on CAL-DNA Submissions and Hits June 2011 to March 2012*, ST. CAL. DEP’T JUST., https://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/buza_effects_table.pdf? (last visited Apr. 12, 2017) [hereinafter *Buza Effects Table*]; *Percent Arrestee vs. Convicted Offender Submissions per Month*, ST. CAL. DEP’T JUST., https://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/arrestee_vs_co_submissions_since_2009_042412.pdf? (last visited Apr. 12, 2017) [hereinafter *Arrestee vs. Convicted Offender Submissions*]. In May 2012, after submissions increased to near pre-*Buza* levels, CAL-DNA recorded 490 hits. *See FAQ: Effects of the All Adult Arrestee Provision*, *supra* note 47.

68. *People v. Buza*, 302 P.3d 1051 (Cal. 2013).

69. *Buza*, 180 Cal. Rptr. 3d at 767–68.

70. *People v. Buza*, 342 P.3d 415 (Cal. 2015).

71. *People v. Lowe*, 165 Cal. Rptr. 3d 107, 122 (Ct. App. 2013), *review granted and opinion superseded by* 320 P.3d 799 (Cal. 2014).

72. *Id.* at 122 (emphasis added).

73. *Id.* at 122–23 (concluding that its holding was consistent with *King*).

74. *People v. Lowe*, 320 P.3d 799 (Cal. 2014).

75. *Haskell v. Harris*, 745 F.3d 1269, 1271 (9th Cir. 2014) (en banc), *aff’g by an equally divided court Haskell v. Brown*, 677 F. Supp. 2d 1187 (N.D. Cal. 2009).

to *anyone* ‘arrested for, or charged with, a felony offense by California state or local officials.’”⁷⁶ Additionally, several other decisions have considered the constitutionality of arrestee DNA collection in other federal and state courts.⁷⁷

Furthermore, constitutional challenges to DNA database statutes have not been limited to Fourth Amendment concerns.⁷⁸ Other challenges have considered issues of equal protection,⁷⁹ prohibition against *ex post facto* laws,⁸⁰ and procedural and substantive due process.⁸¹ It is likely that constitutional issues will continue to arise as amendments to California’s

76. *Haskell*, 745 F.3d at 1271 (citations omitted) (“After *Maryland v. King*, the answer is clearly yes.”); *see id.* (Smith, J., concurring) (“California’s DNA collection law is materially indistinguishable from the Maryland law upheld in *Maryland v. King*.”).

While California state courts are not bound by the Ninth Circuit’s decision in *Haskell v. Harris*, this decision may be used as persuasive authority to influence courts in deciding future cases. *See* *Howard Contracting, Inc. v. G.A. MacDonald Constr. Co.*, 83 Cal. Rptr. 2d 590, 597 (Ct. App. 1998) (“[F]ederal decisional authority is neither binding nor controlling in matters involving state law.”); *see also* 16 CAL. JUR. 3D *Courts* § 321 (2016) (“Although the decisions of federal courts are not binding on state courts in matters of state law, they may be persuasive.”); *Researching the Law*, CAL. CTS., <http://www.courts.ca.gov/1003.htm> (last visited Apr. 12, 2017) (defining mandatory and persuasive authority).

77. *See, e.g.*, *United States v. Mitchell*, 652 F.3d 387, 402, 416 (3d Cir. 2011) (“[U]nder the totality of the circumstances, . . . [the DNA] collection [was] reasonable and [did] not violate the Fourth Amendment.”); *Anderson v. Commonwealth*, 650 S.E.2d 702, 706 (Va. 2007) (holding that the statutorily authorized collection of DNA samples from arrestees is constitutional under the Fourth Amendment as a routine booking procedure analogous to the taking of fingerprints). *But see, e.g.*, *Friedman v. Boucher*, 580 F.3d 847, 860 (9th Cir. 2009) (finding that the “forcible taking” of a detainee’s DNA sample “without a warrant, court order, reasonable suspicion, or concern about facility security is a violation of the detainee’s clearly established rights under the Fourth Amendment”); *In re Welfare of C.T.L.*, 722 N.W.2d 484, 492 (Minn. Ct. App. 2006) (finding a Minnesota state statute requiring collection of a DNA sample from a person charged with but not yet convicted of a crime, violated the Fourth Amendment).

78. *See infra* notes 79–81 and accompanying text. These constitutional considerations are beyond the scope of this article. For a more detailed discussion, *see* CHIN ET AL., *supra* note 24, § 8:17.

79. *See, e.g.*, *People v. Travis*, 44 Cal. Rptr. 3d 177, 192–95 (Ct. App. 2006) (holding that California’s DNA Data Bank program does not violate the state or federal equal protection rights of offenders whose samples are collected pursuant to statute).

80. *See, e.g., id.* at 195–97 (holding that California’s DNA Data Bank program does not violate constitutional *ex post facto* prohibitions, even where an offender’s conviction predated the effective date of the DNA collection statute); *see also* *People v. Espana*, 40 Cal. Rptr. 3d 258, 261 (Ct. App. 2006).

81. *See, e.g., Travis*, 44 Cal. Rptr. 3d at 194–95 (finding that California’s DNA Data Bank program does not violate due process).

DNA collection law are introduced in an attempt to reverse Prop 47's devastating effects on the DNA database.⁸²

III. PROPOSITION 47: "THE SAFE NEIGHBORHOODS AND SCHOOLS ACT"

A. How Proposition 47 Works

Prop 47, enacted by California voters in November 2014, was intended to "ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K–12 schools, victim services, and mental health and drug treatment."⁸³ Prop 47 reduces various felony, or "wobbler,"⁸⁴ offenses—including certain nonserious and nonviolent property and drug crimes—to misdemeanors;⁸⁵ provides a procedure for inmates currently serving felony sentences for these offenses to petition for misdemeanor resentencing;⁸⁶ and provides a

82. See discussion *infra* Part IV.

83. *Safe Neighborhoods and Schools Act*, CAL. PROPOSITION 47 (2014) [hereinafter PROP 47] (codified as CAL. GOV'T CODE §§ 7599–7599.2; CAL. PENAL CODE § 1170.1; and codified as amended PENAL §§ 459.5, 473, 476a, 490.2, 496, 666; CAL. HEALTH & SAFETY CODE §§ 11350, 11357, 11377 (West Supp. 2014)). For the full text of Prop 47, see *Official Voter Information Guide for 2014 General Election*, UC HASTINGS SCHOLARSHIP REPOSITORY 70 (2014), http://repository.uchastings.edu/cgi/viewcontent.cgi?article=2328&context=ca_ballot_props [hereinafter *Prop 47 Voter Information Guide*].

84. "When the Legislature declares the punishment for an offense may alternatively be as a felony with imprisonment in state prison or as a misdemeanor with a county jail term of one year or less, these offenses are referred to as 'wobblers'; i.e., they may be handled either way." See J. RICHARD COUZENS ET AL., SENTENCING CALIFORNIA CRIMES: MISDEMEANOR AND INFRACTION SENTENCES § 22:13 (Rutter Group 2016). "If the offense is a 'wobbler' and was designated as a misdemeanor in the charging document, the sentencing court may not elevate the offense to a felony." *Id.* However, if the offense is designated a felony in the charging document, the court may reduce the crime to a misdemeanor by exercising its discretion under section 17(b). *Id.*; see also PENAL § 17(b)(4)–(5).

85. See *infra* Section III.A.1; see also PENAL § 459.5 (shoplifting); *id.* § 473 (forgery); *id.* § 476a (insufficient funds check with intent to defraud); *id.* § 490.2 (petty theft); *id.* § 496 (receiving stolen property); *id.* § 666 (petty theft with specified priors); HEALTH & SAFETY § 11350 (possession of narcotic); *id.* § 11357 (possession of concentrated cannabis); *id.* § 11377 (possession of non-narcotic controlled substance).

86. See *infra* Section III.A.2; see also PENAL § 1170.18(a)–(e), (i)–(o) (providing for a petition for resentencing for those still serving a sentence for an offense affected by this initiative). "The procedure for resentencing is generally more formal and similar to resentencing under Proposition

procedure for individuals who have completed felony sentences to petition to have these convictions reclassified as misdemeanors.⁸⁷

1. Reduces Various Felony or Wobbler Offenses to Misdemeanors

Prop 47 amended and added various provisions to the Penal Code and the Health and Safety Code to reduce several drug possession offenses and theft offenses to misdemeanors.⁸⁸ Penal Code section 459.5 was added, providing for misdemeanor punishment of up to six months in jail for “shoplifting.”⁸⁹ Penal Code section 473 was amended to provide for misdemeanor treatment for any forgery “relating to a check, bond, bank bill, note, cashier’s check, traveler’s check, or money order” where the amount does not exceed \$950.⁹⁰ Penal Code section 476a—making or delivering a check with insufficient funds—was amended to provide that the offense is punishable only as a misdemeanor if the total amount of all checks does not exceed \$950.⁹¹ Penal Code section 490.2—petty theft—was added to provide for misdemeanor treatment for obtaining any property by theft where the value of that property does not exceed \$950.⁹² Penal Code section 496—receiving stolen property—was amended to provide for misdemeanor treatment if the value of the property does not exceed \$950.⁹³ Under the amended sections of the Health and Safety Code, simple possession of most drugs—including concentrated cannabis, methamphetamine, cocaine, and

36, with a determination of whether the petitioner poses an unreasonable risk of danger to public safety if resentenced.” See J. RICHARD COUZENS ET AL., SENTENCING CALIFORNIA CRIMES: PROPOSITION 47 § 25:5 (Rutter Group 2016); see also PENAL § 1170.18.

87. See *infra* Section III.A.3; see also PENAL § 1170.18(f)–(h) (providing for a petition for resentencing for those currently serving a sentence for an offense affected by this initiative). “The procedure for reclassification is more informal, potentially done without a court hearing and without any consideration of dangerousness.” See COUZENS ET AL., *supra* note 86, § 25:5; see also PENAL § 1170.18.

88. See *infra* notes 89–94 and accompanying text.

89. PENAL § 459.5. Shoplifting is defined as “entering a commercial establishment with intent to commit larceny . . . where the value of the property that is taken or intended to be taken does not exceed . . . (\$950).” *Id.*

90. *Id.* § 473.

91. *Id.* § 476a.

92. *Id.* § 490.2. Penal Code section 666—petty theft with a prior—was amended, providing that petty theft may only be punished as a felony if the two requirements are satisfied. *Id.* § 666.

93. *Id.* § 496.

heroin—is now a misdemeanor punishable by up to one year in county jail.⁹⁴

The benefits of reduced punishment and the ability to request resentencing or reclassification established by Prop 47 are expressly denied to persons with prior convictions for designated violent offenses⁹⁵ or for crimes that require registration as a sex offender.⁹⁶ If the defendant (or petitioner) has any of the designated prior convictions, he will be subject to the traditional punishment for these offenses and may not request resentencing or reclassification of an otherwise Prop 47-eligible crime as a misdemeanor.⁹⁷

94. See HEALTH & SAFETY § 11350 (possession of narcotic); *id.* § 11357 (possession of concentrated cannabis); *id.* § 11377 (possession of non-narcotic controlled substance).

Simple possession requires: “(1) the defendant unlawfully possessed a controlled substance; (2) the defendant knew of its presence; (3) the defendant knew of the substance’s nature or character as a controlled substance;” (4) the controlled substance was, or was an analog of, one of the controlled substances listed in Health and Safety Code sections 11054–11058; and “(5) the controlled substance was in a usable amount.” See ADVISORY COMM. ON CRIMINAL JURY INSTRUCTIONS, JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS 226–27, § 2304 (2015), http://www.courts.ca.gov/partners/documents/calcrim_2016_edition.pdf (Simple Possession of Controlled Substance). *But see* ADVISORY COMMITTEE ON CRIMINAL JURY INSTRUCTIONS, *supra*, at 220–22, § 2302 (2015) (Possession for Sale of Controlled Substance) (requiring that the defendant intended to sell the controlled substance he possessed). Prop 47 did not affect the greater offense of possession for sale. See HEALTH & SAFETY §§ 11351, 11351.5, 11378, 11378.5.

95. See PENAL § 667(e)(2)(C)(iv). A prior conviction of any of the following serious or violent felonies (“super strikes”) will disqualify a person from receiving any benefit from the changes brought by Prop 47: a “sexually violent offense,” oral copulation, sodomy, or sexual penetration committed with a person under fourteen; a lewd act involving a child under fourteen; any homicide offense, including any attempted homicide offense; solicitation to commit murder; assault with a machine gun on a peace officer or firefighter; possession of a weapon of mass destruction; any serious or violent offense punishable in California by life imprisonment or death. See *id.*; COUZENS ET AL., *supra* note 86, § 25:3.

96. See PENAL § 290(c).

97. See *id.* § 1170.18(i); see also COUZENS ET AL., *supra* note 86, § 25:3.

2. Provides a Procedure for Inmates Serving Felony Sentences to Petition for Misdemeanor Resentencing

Penal Code section 1170.18(a) provides:

A person [currently] serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under [Prop 47] had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with [the sections amended or added by Prop 47].⁹⁸

However, even if a person is currently serving a sentence for a crime that is now a misdemeanor, resentencing is denied if the person has a prior disqualifying conviction,⁹⁹ or if “the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.”¹⁰⁰

For persons currently serving a sentence, the resentencing process is defined in section 1170.18, subdivisions (a)–(e) and (i)–(o).¹⁰¹ The individual requesting resentencing must file a petition to initiate the resentencing process.¹⁰² Additionally, all petitions must be filed prior to November 4, 2022, unless the petitioner can show good cause for a later filing.¹⁰³ After considering the merits of the petition as well as applicable

98. PENAL § 1170.18(a). For a more detailed discussion on those eligible for relief under section 1170.18(b), see COUZENS ET AL., *supra* note 86, § 25:6.

99. See PENAL § 1170.18(i); see also *supra* notes 95–97 and accompanying text.

100. See PENAL § 1170.18(b).

101. See *id.* § 1170.18(a)–(e), (i)–(o). For a more detailed discussion on Prop 47’s resentencing process, see COUZENS ET AL., *supra* note 86, § 25:7 (“Like the resentencing of third strike offenders under section 1170.126, Proposition 47 contemplates a potential four-step process: (1) the filing of a petition requesting resentencing; (2) an initial screening for eligibility; (3) a qualification hearing where the merits of the petition are considered, and, if appropriate; (4) a resentencing of the crime.”).

102. See COUZENS ET AL., *supra* note 86, § 25:8 (“Nothing in Proposition 47 suggests the court has any *sua sponte* obligation to act on any case without the request of the petitioner.”).

103. PENAL § 1170.18(j) (“Any petition or application under this section shall be filed on or before November 4, 2022, or at a later date upon showing of good cause.”); see also COUZENS ET AL., *supra* note 86, § 25:8 (acknowledging that Prop 47 does not define what constitutes “good cause” for this purpose).

laws, the court may grant the petition for resentencing; if the court grants the petition, “the petitioner’s felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to [the new penalties]”¹⁰⁴ Further, if resentencing occurs, the conviction must be treated as a misdemeanor for all purposes, except for the right to own or possess firearms.¹⁰⁵

3. Provides a Procedure for Individuals Who Have Completed Felony Sentences to Apply for Misdemeanor Reclassification

Penal Code section 1170.18 also allows persons who have completed their sentence to apply for reclassification of the offense as a misdemeanor.¹⁰⁶ However, the same limitations described above apply to those petitioning for reclassification as well.¹⁰⁷ The procedure for obtaining reclassification of a qualified crime is designed to be simple and, wherever possible, avoid the need for formal court hearings.¹⁰⁸ As with the procedure for resentencing, the process of obtaining reclassification begins with filing an application with “the trial court that entered the judgment of conviction.”¹⁰⁹ Further, if the court grants the application for reclassification, the crime will then be treated as a misdemeanor for all purposes except for the right to own or possess firearms.¹¹⁰

There are several issues that may arise from the enactment of Prop 47,¹¹¹ but this Comment will primarily focus on Prop 47’s impact on California’s

104. PENAL § 1170.18(b).

105. *Id.* § 1170.18(k).

106. *Id.* § 1170.18(f) (“A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.”).

107. *See supra* notes 99–100 and accompanying text; *see also* COUZENS ET AL., *supra* note 86, § 25:6.

108. *See* PENAL § 1170.18(f)–(g). Prop 47 expressly authorizes the court to either grant or deny an application for reclassification without a hearing, unless the applicant requests one. *Id.* § 1170.18(h).

109. *Id.* § 1170.18(f).

110. *See id.* § 1170.18(k).

111. *See generally* COUZENS ET AL., *supra* note 86, § 25:1 (discussing issues arising from the enactment of Prop 47).

DNA Database. Due to the broad mandate that these offenses be treated as misdemeanors for all purposes except for the right to own or possess firearms,¹¹² many questions have developed regarding Prop 47's application and the DNA database.

B. Proposition 47 and California's DNA Database

1. Limitations on Law Enforcement's Ability to Solve Serious, Violent Crimes

By using the DNA of recidivist criminal offenders, law enforcement has been able to accurately identify those who have committed prior unsolved serious and violent crimes.¹¹³ This has benefitted the people of California by allowing for the introduction of reliable scientific evidence that provides powerful proof of identity, both in exonerating some individuals and convicting others.¹¹⁴ By enacting Prop 47, it was "the purpose and intent of the people of the State of California" to ensure that people convicted of serious, violent crimes, like rape, murder, and child molestation, did not benefit from its enactment.¹¹⁵

The passage of Prop 47 created an "unintended consequence" by "limit[ing] the ability of law enforcement to solve rapes, murders, robberies

112. See PENAL § 1170.18(k); see also *infra* Section IV.B.1.

113. See *supra* notes 47–50 and accompanying text (supporting the government's compelling interest in collecting DNA samples from felony arrestees); see also *Hearing on A.B. 390 Before the Assemb. Comm. on Pub. Safety*, 2015–2016 Reg. Sess. (Cal. 2015) (statement of Assemb. Jim Cooper, Member) [hereinafter *Hearing on A.B. 390 Before the Assemb. Comm. on Pub. Safety*] ("Proposition 69 was aimed at making the criminal justice system a more reliable, accurate and expeditious identification system through the use of DNA from recidivist criminal offenders . . .").

114. See *Hearing on A.B. 390 Before the Assemb. Comm. on Pub. Safety*, *supra* note 113 ("The impact of Proposition 69 has helped solve many old murders, rapes, assaults, home burglaries and other serious and violent crimes and has insured the integrity of convictions so that innocent individuals are not needlessly arrested, prosecuted or convicted.").

115. See PROP 47, *supra* note 83, § 3 ("In enacting this act, it is the purpose and intent of the people of the State of California to . . . [e]nsure that people convicted of murder, rape, and child molestation will not benefit from this act.").

The enactors directed that Prop 47 "shall be broadly construed to accomplish its purposes," and it "shall be liberally construed to effectuate its purposes." PROP 47, *supra* note 83, §§ 15, 18. Thus, it is likely courts will interpret Prop 47's effect on the DNA Database as an "unintended consequence." See discussion *infra* Part IV.

and other serious and violent crimes through reliable DNA evidence.”¹¹⁶ The reclassification of felony offenses to misdemeanors under Prop 47 will result in a significant reduction of DNA samples collected from offenders because DNA collection is not authorized upon arrest for misdemeanors.¹¹⁷ Prior to Prop 47, the DNA database was expanding and had tremendous success accurately identifying individuals who had committed prior unsolved violent crimes while exonerating others.¹¹⁸

Further, studies conducted by the California Department of Justice demonstrate the importance of collecting DNA upon arrest for low-level crimes;¹¹⁹ many of these low-level crimes were reduced to misdemeanors under Prop 47, meaning law enforcement can no longer collect DNA samples for these crimes.¹²⁰ One study indicated that the majority of hits to unsolved, violent crimes were the result of DNA samples collected upon arrest for these low-level crimes.¹²¹

From a sample of one hundred cases that resulted in hits to murders, rapes and robberies,¹²² 17% of the qualifying offenses were property crimes and 25% of the qualifying offenses were drug crimes.¹²³ This means that over 40% of the serious, violent crimes in this study were solved because of DNA samples taken upon arrest for drug and property crimes.¹²⁴ Because

116. See *Hearing on A.B. 390 Before the S. Comm. on Pub. Safety, supra* note 113 (“The passage of Proposition 47 created an unintended consequence . . .”).

117. *Id.*; see also *Proposition 47: A Bad Idea’s Unintended Consequence; It Restricts DNA Collection*, SACRAMENTO BEE (Feb. 14, 2015, 4:00 PM), <http://www.sacbee.com/opinion/editorials/article10136777.html> (“More than 250,000 DNA samples collected since November can no longer be analyzed. That number grows daily. Several hundred thousand more that were collected in felony arrests before Proposition 47 passed may be expunged from the database because those crimes have since been reclassified as misdemeanors. We shudder to think of the serious crimes that will go unsolved as a result.”).

118. See *Hearing on A.B. 390 Before the S. Comm. on Pub. Safety, supra* note 113.

119. See *supra* Section II.B.3. The California Department of Justice analyzed the criminal records of 100 California felony arrestees who were linked by their DNA booking samples to unsolved rapes, robberies or murders (“violent crimes”). See *Arrestee Hits to Violent Crime Survey, supra* note 50 and accompanying text. This study only included individuals who had no prior felony convictions at the time their DNA samples were collected upon arrest. *Id.*

120. See *supra* Section II.B.3.

121. See *Arrestee Hits to Violent Crime Survey, supra* note 50.

122. *Id.* (examining cases as of December 4, 2012). Of the one hundred cases, seventeen resulted in hits to murders, sixty-four resulted in hits to rapes, and nineteen resulted in hits to robberies. *Id.*

123. *Id.*

124. See *id.*

these drug and property crimes are now misdemeanors, which no longer qualify for collection of DNA samples upon arrest under Prop 47, over 40% of the murders, rapes, and robberies solved in this study would have remained unsolved if Prop 47 was in effect at the time of the qualifying arrests.¹²⁵ These statistics demonstrate Prop 47's impact on the DNA database and law enforcement's ability to solve serious, violent crimes, such as murder,¹²⁶ rape,¹²⁷ and robbery.¹²⁸

Another study of 3778 cases where adults had their DNA collected upon arrest for a felony found that only eight percent of the DNA database hits to murders, rapes, and robberies came from DNA samples collected from those arrested for another murder, rape, or robbery crime.¹²⁹ These results show that those who commit serious, violent felonies also commit low-level offenses, and it is the DNA samples taken in connection with the low-level crimes that lead to the ultimate conviction in serious, violent cases.¹³⁰

Under Prop 47, DNA samples would no longer be collected upon arrest for these low-level crimes now classified as misdemeanors, resulting in numerous serious, violent crimes remaining unsolved.¹³¹ Also, collecting

125. See *id.*; see also *infra* notes 126–28 and accompanying text.

126. See *Arrestee Hits to Violent Crime Survey*, *supra* note 50. Under Prop 47, no more than seven (or 41%) of the seventeen murder cases would have received hits. *Id.* (reporting that 30% of the hits came from drug crimes and 29% of the hits came from property crimes).

127. *Id.* Under Prop 47, no more than thirty-six (or 57%) of the sixty-four rape cases would have received hits. *Id.* (reporting that 23% of the hits came from drug crimes, 11% of the hits came from property crimes, and 9% of the hits came from fraud crimes).

128. *Id.* Under Prop 47, no more than nine (or 47%) of the nineteen robbery cases would have received hits. *Id.* (reporting that 27% of the hits came from drug crimes and 26% of the hits came from property crimes).

129. See *id.* (examining cases as of September 30, 2013).

130. See *id.*; see also *infra* notes 214–16 and accompanying text. Further, in 79% of cases reviewed, the felony arrest at which DNA was collected was not the first arrest. *Arrestee Hits to Violent Crime Survey*, *supra* note 50. In about 35% of the cases reviewed, the arrestees were on misdemeanor probation or under other state supervision at the time they committed the serious, violent crimes. *Id.*

131. See *id.* Several cases outside of California also demonstrate the effects of not collecting DNA samples from arrestees. See, e.g., Brief for the States of California et al. as Amici Curiae Supporting Petitioner at 13, *King v. State*, 434 Md. 472 (2013) (No. 12-207) (“Had an arrestee DNA collection program been in effect in Colorado, the [1997] Chase homicide would have been solved ten years earlier and the [subsequent] Wyoming kidnapping would never have occurred.”); *Man Found Guilty of Beating, Raping CU Student*, DENVER CHANNEL (June 27, 2009, 11:46 AM), <http://www.thedenverchannel.com/news/man-found-guilty-of-beating-raping-cu-student>.

DNA samples at the time of arrest has helped bring closure to victims' families; under Prop 47, these samples would not have been obtained, and these victims' families would not have received the closure they needed.¹³² In Part IV, this Comment will consider whether this effect was in fact an "unintended consequence" and analyze arguments for and against amending California's DNA laws.¹³³

2. Retention of DNA Samples from Offenders with Reclassified Misdemeanors

Additionally, there has been some discussion regarding the retention of DNA samples in the database taken from offenders whose crimes may be reclassified as misdemeanors under Prop 47.¹³⁴ California Penal Code section 296 provides for the collection of DNA samples from any adult arrested or charged with a felony.¹³⁵ Prop 47 set up a process for people who are serving or have served a sentence for a felony that would have been a misdemeanor had the act been in effect to apply for resentencing or redesignation of the offense as a misdemeanor.¹³⁶ One question that arose

132. See Brief for the States of California et al. as Amici Curiae Supporting Petitioner at 13, *King*, 434 Md. 472 (No. 12-207). Sixty-seven-year-old Elizabeth Crossman was raped and strangled in 1980. *Id.* ("In 2002, police in Hemet, California submitted vaginal swabs from the crime for analysis and upload to [CODIS], but no DNA match resulted. In October 2010 Shelby Glenn Shamblin was arrested for felony drug possession and submitted a required DNA database sample at booking. Shamblin's DNA was matched to the semen samples from the 1980 Crossman homicide two months after Shamblin had been granted diversion on the 2010 drug offenses."). Shamblin was interviewed as part of the initial investigation, but there was insufficient evidence linking him to the 1980 crime before the DNA sample was collected upon his arrest for drug possession. *Id.*

In 2013, a jury found Shamblin guilty of first-degree murder in the 1980 slaying of sixty-seven-year-old Elizabeth Crossman. Michael J. Williams, *HEMET: Jury Convicts Man in 33-Year-Old Murder Case*, PRESS ENTERPRISE (June 25, 2013, 5:54 PM), <http://www.pe.com/articles/shamblin-678927-dna-crossman.html> ("Clearly after [thirty-three] years, the only thing that could bring this case into being was DNA."). However, after Prop 47, Shamblin's 2010 felony drug possession arrest would be classified as a misdemeanor and not result in collecting a DNA sample. See *supra* Section III.A. Thus, under Prop 47, Elizabeth Crossman's family would still be searching for closure, and Shamblin would have remained a free man.

133. See *infra* Part IV.

134. See, e.g., GARRICK BYERS, PROPOSITION 47: ANALYSIS AND EMERGING ISSUES 37 (Nov. 24, 2014), http://www.adi-sandiego.com/pdf_forms/Byers_analysis.pdf [hereinafter BYERS ANALYSIS]; CHIN ET AL., *supra* note 24, § 8:10; COUZENS ET AL., *supra* note 86, § 25:11.

135. CAL. PENAL CODE § 296(a)(2)(C) (West 2004).

136. See discussion *supra* Sections III.A.2–3; see also COUZENS ET AL., *supra* note 86, § 25:11.

after the enactment of Prop 47 is: What happens to DNA samples taken from those who committed a felony offense—now considered a misdemeanor—that are already in the DNA database?¹³⁷

When this question first developed, scholars noted that it seemed unlikely that Prop 47 would have any effect on DNA samples already in the DNA database because at the time of their taking, the underlying crime was a felony.¹³⁸ The fact that a felony offense is subsequently reduced to a misdemeanor does not alter the fact that the taking was authorized because of the felony arrest or conviction.¹³⁹ The California Court of Appeal ruled that when the initial collection of a DNA sample was taken in compliance with the Fourth Amendment, subsequent reduction to a misdemeanor is immaterial, and the DNA sample remains in the database.¹⁴⁰

Further, in October 2015, Governor Brown approved Assembly Bill 1492 (AB 1492), an act to amend and add Sections 298 and 299 of the California Penal Code.¹⁴¹ The provisions of AB 1492 explicitly prohibit the trial court from expunging DNA records in connection with the granting of a Prop 47 petition, reducing a prior felony offense to a misdemeanor.¹⁴² Because Prop 47 was ambiguous with respect to expungement of records, the new law “clarifies, rather than changes, the meaning of the relevant provisions of Proposition 47.”¹⁴³ Nonetheless, as a result of the many

137. See COUZENS ET AL., *supra* note 86, § 25:11.

138. *Id.* But see BYERS ANALYSIS, *supra* note 134, at 37 (quoting *People v. Nasalga*, 12 Cal. 4th 784, 795 (1996)) (“By enacting Prop 47, the voters have determined that the ‘new lighter penalty [is] now deemed to be sufficient.’ . . . That should be considered on the question of whether the DNA should be expunged in light of Prop 47’s relief.”).

139. See COUZENS ET AL., *supra* note 86, § 25:11.

140. See *Coffey v. Superior Court*, 29 Cal. Rptr. 3d 59 (Ct. App. 2005). But see *infra* Section IV.B.1.

141. See A.B. 1492, 2015–2016 Reg. Sess. (Cal. 2015), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1492 [hereinafter AB 1492].

142. See *id.* While Penal Code section 299 allows for the filing of a request to expunge DNA records in certain circumstances, such as reversal of a qualifying conviction and dismissal of the charges, subdivision (f) of Penal Code section 299 provides a list of statutes that do not allow a trial court to order expungement of DNA records when granting relief. CAL. PENAL CODE § 299 (West 2016). AB 1492, which amended Penal Code section 299, added section 1170.18 to that list in subdivision (f). *Id.* § 299(f). Therefore, where a trial court reduces a felony to a misdemeanor under Prop 47, it is not authorized to order the expungement of DNA samples already in the DNA database. See AB 1492, *supra* note 141.

143. See *In re J.C.*, 201 Cal. Rptr. 3d 731, 733 (Ct. App. 2016) (holding that AB 1492 applies retroactively to preclude the granting of requests for expungement made prior to its enactment).

conflicting views regarding Prop 47, there are several other questions that need to be addressed.¹⁴⁴

IV. ANALYSIS OF POSSIBLE SOLUTIONS TO PROPOSITION 47'S UNINTENDED CONSEQUENCES

Since Prop 47 was enacted in November 2014, there has been extensive discussion about its effects.¹⁴⁵ While some members of the legislature have introduced bills attempting to reverse the “unintended consequences” of Prop 47, others oppose a change to the current law.¹⁴⁶ Regardless of whether legislative action is passed, courts will have the task of determining how to apply Prop 47 to the cases that come before them.¹⁴⁷ DNA collection laws of other states may guide California in determining how the law should develop.¹⁴⁸ This Part will consider some of these approaches, including arguments in support of and in opposition to possible actions.

A. Legislative Action

In February 2015, Assemblymember Jim Cooper introduced Assembly Bill 390 (AB 390), which aimed for restoration of DNA collection for crimes that used to be felonies (or wobblers) but are now misdemeanors after the passage of Prop 47.¹⁴⁹

[AB 390] provides that the following misdemeanor offenses will be included in the DNA Databank: [s]hoplifting; forgery where the value for the forged document does not exceed \$950; [c]heck fraud where the total amount of checks does not exceed \$950; [g]rand theft that is punishable as a misdemeanor; possession of stolen property that is punishable as a misdemeanor; [a] misdemeanor violation for possession of a list of specified drugs, including

144. See discussion *infra* Parts IV–V.

145. See *infra* Sections IV.A–C.

146. See *infra* Section IV.A.

147. See *infra* Section IV.B.

148. See *infra* Section IV.C.

149. See A.B. 390, 2015–2016 Reg. Sess. (Cal. 2015), http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201520160AB390 [hereinafter AB 390].

cocaine, methamphetamine, concentrated cannabis; and [a] misdemeanor violation of petty theft with specified prior theft convictions, and prior convictions for serious or violent felonies, or required to register as a sex offender.¹⁵⁰

However, AB 390 would have permitted DNA collection only upon *conviction*—not arrest—for these crimes that are now misdemeanors under Prop 47.¹⁵¹ Additionally, AB 390 would have resolved the question posed about what happens to DNA samples already in the DNA database after resentencing or reclassification by explicitly stating that DNA samples will not be removed.¹⁵² Proponents of AB 390 focused on the importance of DNA technology and the fact that Prop 47’s effect on DNA collection was an “unintended consequence.”¹⁵³

In support of AB 390, the Los Angeles County District Attorney’s Office (LADA) stated, “[w]ithout legislative correction Proposition 47’s unintended consequence would lead to a disastrous reduction in ‘cold hits.’”¹⁵⁴ Further, the LADA stated that this bill would help meet the goals of Prop 47.¹⁵⁵ The Sacramento County District Attorney’s Office also stated that the passage of Prop 47 “thwarted” many of the goals of Prop 69 “by allowing serious offenders to escape detection and entry into the DNA database.”¹⁵⁶ AB 390 would “link[] the goals of Proposition 69 . . . with Proposition 47 and ensure[] that dangerous criminals do not get an unintended benefit by reclassification of certain felony crimes to

150. See *Hearing on A.B. 390 Before the S. Comm. on Pub. Safety*, 2015–2016 Reg. Sess. 5 (Cal. 2015) (statement of Assemb. Jim Cooper, Member) [hereinafter *Hearing on A.B. 390 Before the S. Comm. on Pub. Safety*].

151. See discussion *infra* notes 171–76 and accompanying text.

152. *Hearing on AB 390 Before the S. Comm. on Pub. Safety*, *supra* note 150, at 8; see also *supra* notes 137–43 and accompanying text.

153. See *Hearing on AB 390 Before the S. Comm. on Pub. Safety*, *supra* note 150, at 6.

154. See *id.* at 9 (statement of Los Angeles County District Attorney’s Office) (“According to the Attorney General’s Office, 61% of the DNA samples entered into California DNA Databank that resulted in a ‘cold hit’ were for non-violent, ‘lower-level’ felony crimes such as drug offenses, fraud or other property crimes.”).

155. See *id.* (“Solving rapes, murders and other violent crimes through reliable DNA evidence will help meet Prop 47’s safety goals by keeping neighborhoods safe from dangerous recidivist sex and [violent] offenders who would otherwise remain undetected for their worst offenses.”).

156. See *id.* at 8 (statement of Sacramento County District Attorney’s Office).

misdemeanors.”¹⁵⁷

In opposition to AB 390, the American Civil Liberties Union of California (ACLU) argued, “AB 390 seeks to expand California’s DNA database beyond what most of the country has determined is necessary or reasonable.”¹⁵⁸ According to the ACLU, “AB 390 is an unnecessary invasion of our privacy and undermines the will of California voters who, by passing Proposition 47, determined that the minor crimes targeted by AB 390 should not be treated like felonies.”¹⁵⁹ Further, the ACLU asserted that “[e]xpanding the DNA database will not necessarily make our communities safer,”¹⁶⁰ and “[h]istorically, increasing the number of people from whom DNA is collected in California has not increased the overall rate at which law enforcement [has] been able to identify perpetrators of violent crimes.”¹⁶¹ However, history shows the flaws in these arguments.¹⁶²

Since California began collecting DNA samples from all adult felony arrestees in 2009, the “crime-solving efficacy” of California’s DNA

157. *See id.* (“Allowing collection of DNA samples from adults convicted of recently reduced ‘Prop 47’ misdemeanor crimes and other specified sex and violent offenses will better protect public safety and allow improved allocation of law enforcement resources to focus on serious violent offenders.”).

158. *See Hearing on AB 390 Before the Assemb. Comm. on Pub. Safety, supra* note 113, at 8 (statement of the American Civil Liberties Union of California). Due to the “very serious privacy implications” of DNA collection, “most state legislatures and the United States Supreme Court have taken great care to limit collection of DNA to more serious crimes.” *See id.* at 9. “Unlike fingerprints . . . DNA contains our genetic codes, which reveal the most intimate, private information, not only about the person whose DNA is collected but for everyone else in that person’s extended family.” *Id.*

159. *See id.* at 7. Additionally, Californians for Safety and Justice are “concerned” because AB 390 “seeks to require DNA testing specifically for the six crimes Proposition 47 changed to misdemeanors, without clarity as to how these particular crimes are more deserving of DNA testing than any of the other hundreds of misdemeanors that exist in California’s Penal Code.” *See Hearing on AB 390 Before the S. Comm. on Pub. Safety, supra* note 150, at 10 (statement of Californians for Safety and Justice).

160. *See Hearing on AB 390 Before the Assemb. Comm. on Pub. Safety, supra* note 113, at 8 (statement of the American Civil Liberties Union of California) (“The use of DNA in solving crimes is limited by our ability to detect and collect DNA at crime scenes, not by the number of profiles in the DNA database.”).

161. *See id.* (“[W]hile more people have been added to the DNA database, and additional taxpayer dollars have gone towards greater collection efforts, the rate at which law enforcement officers have been able to solve violent crimes has not increased.”).

162. *See discussion supra* Section III.B.1.

database program has increased significantly.¹⁶³ From November 2004 to January 2009, when DNA samples were collected upon felony conviction, the DNA database reported 6779 hits.¹⁶⁴ Then, from January 2009, when California implemented Prop 69’s all-adult-felony-arrestees provision, to August 2016, the DNA database reported 42,433 hits.¹⁶⁵ This data indicates that collecting DNA samples upon felony arrest—rather than only upon conviction—has resulted in a 638% increase in DNA database hits.¹⁶⁶ Also, by December 1, 2012, California’s database program had aided 18,526 investigations in the four years since arrestee DNA collection began in January 2009, which was twice as many as it did in the preceding twenty-five years combined.¹⁶⁷

Although AB 390 died as an inactive bill, Assemblymember Jim Cooper reintroduced Assembly Bill 16 (AB 16)—an “identical iteration of [AB 390]”—in December 2016.¹⁶⁸ As with AB 390, AB 16 would “order investigators to gather swab samples, blood specimens, palm prints and fingerprints from offenders convicted of certain misdemeanors.”¹⁶⁹ Additionally, AB 16 would only apply to “misdemeanors that were considered felonies when voters in November 2004 passed Proposition 69,

163. See *infra* notes 164–67 and accompanying text.

164. *CAL-DNA Hits Reported Jan. 1984 to Aug. 2016*, *supra* note 48.

165. *Id.* From September 2015 to August 2016, California’s DNA Database averaged 626 hits per month. *Id.*; cf. *supra* note 67 (noting that the number of crimes solved by matches to the DNA database decreased by about 200 cases per month following the August 2011 decision in *Buza*, which temporarily halted the program for collecting DNA upon felony arrest).

166. *CAL-DNA Hits Reported Jan. 1984 to Aug. 2016*, *supra* note 48.

167. See *FAQ: Effects of the All Adult Arrestee Provision*, *supra* note 47. From September 2015 to August 2016, the average number of investigations aided per month was 802. *CAL-DNA Hits Reported Jan. 1984 to Aug. 2016*, *supra* note 48.

168. See Jazmine Ulloa, *Lawmakers Try to Fix a Side Effect of Reducing Drug and Theft Crimes: Not Enough DNA Samples for Cold Cases*, L.A. TIMES (Dec. 22, 2016, 12:05 AM), <http://www.latimes.com/politics/la-pol-ca-dna-collection-evidence-california-legislation-20161222-story.html>; see also A.B. 16, 2017–2018 Reg. Sess. (Cal. 2016), http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB16 [hereinafter AB 16].

The only notable difference between AB 390 and AB 16 is that AB 16 does not include the same provision explicitly stating that DNA samples will not be expunged from the database after resentencing or reclassification under Prop 47. Compare AB 390, *supra* note 149, with AB 16, *supra*. See also *supra* note 152 and accompanying text.

169. See AB 16, *supra* note 168; see also *Hearing on AB 16 Before the Assemb. Comm. on Pub. Safety*, 2017–2018 Reg. Sess. (Cal. 2017) (statement of Assemb. Jim Cooper, Member) [hereinafter *Hearing on AB 16 Before the Assemb. Comm. on Pub. Safety*].

which required authorities to collect DNA evidence from all felons.”¹⁷⁰

Like AB 390, AB 16 proposes restoration of DNA sample collection only upon *conviction* for the misdemeanor crimes that were felonies prior to the enactment of Prop 47.¹⁷¹ Although the number of DNA samples collected upon conviction would be less than it was prior to the enactment of Prop 47, AB 16 would help minimize Prop 47’s devastating impact on California’s DNA database, and it would help make California citizens safer in their neighborhoods.¹⁷² While AB 16’s opponents argue this bill “threatens privacy,”¹⁷³ it should be noted that this “invasion of privacy” is significantly less than what the voters determined was necessary and reasonable years ago when Prop 69 was enacted.¹⁷⁴ Further, the statistics demonstrate that passing this bill is both necessary and reasonable to further the goal of Prop 47, because it keeps serious, violent criminals off the streets.¹⁷⁵ While these bills are a step in the right direction toward overcoming the unintended consequences of Prop 47, until one is passed, judges will be faced with determining what is necessary and reasonable regarding Prop 47.¹⁷⁶

B. Judicial Interpretation

Regardless of whether legislation is passed, the courts have the complex task of interpreting and applying Prop 47 to the cases before them.¹⁷⁷ The

170. See AB 16, *supra* note 168.

171. See *id.*; see also AB 390, *supra* note 149.

172. See discussion *infra* Part V. However, opponents of this bill argue that “bigger is not better when it comes to arrestee and offender DNA databases.” See *Hearing on AB 16 Before the Assemb. Comm. on Pub. Safety, supra* note 169 (statement of The Electronic Frontier Foundation) (arguing that although “AB 16 will significantly increase the number DNA profiles contained in California’s already overly large DNA database[, it] will not solve more crimes.”).

173. See *Hearing on AB 16 Before the Assemb. Comm. on Pub. Safety, supra* note 169.

174. See discussion *supra* Section II.B.2. Over 62% of California voters determined DNA collection from felony arrestees was necessary and reasonable when they approved Prop 69 in 2004. See *California Proposition 69, Required Collection of DNA Samples from Felons (2004)*, BALLOTPEDIA (2004), [https://ballotpedia.org/California_Proposition_69_Required_Collection_of_DNA_Samples_from_Felons_\(2004\)](https://ballotpedia.org/California_Proposition_69_Required_Collection_of_DNA_Samples_from_Felons_(2004)) (last visited Apr. 12, 2017).

175. See statistics *supra* Section III.B.1 (noting the significant percentage of rapes, robberies, and murders that have been solved as a result of DNA samples collected for low-level crimes).

176. See *infra* Section IV.B.

177. See *infra* Sections IV.B.1–2.

role of the court in the interpretation of voter initiatives is discussed in *People v. Canty*,¹⁷⁸ where the California Supreme Court stated, “[a court’s] role in construing a statute is to ascertain the Legislature’s intent so as to effectuate the purpose of the law.”¹⁷⁹ Recently, the California Court of Appeal decided a case involving juveniles and Prop 47, but the California Supreme Court denied review and has not yet decided a case regarding Prop 47.¹⁸⁰ However, the discussion on this issue is undoubtedly far from over, and courts will continue to be faced with interpreting Prop 47 and applying its provisions.¹⁸¹

1. Juveniles and Proposition 47

In *Alejandro N. v. Superior Court of San Diego County*,¹⁸² the Superior Court held that Penal Code section 1170.18 did not apply to juvenile cases and denied the juvenile’s request for DNA expungement, stating that reduction of an offense from a felony to a misdemeanor under Prop 47 does not provide a basis for DNA expungement on its own.¹⁸³ However, the Court of Appeals disagreed.¹⁸⁴ After reviewing the plain language of section 1170.18 and applying rules of statutory construction, the Court of Appeals concluded:

178. *People v. Canty*, 32 Cal. 4th 1266, 1276 (2004) (“In interpreting a voter initiative such as Proposition 36, we apply the same principles that govern the construction of a statute.”).

179. *Id.* (citations omitted) (quoting *Curle v. Superior Court*, 24 Cal. 4th 1057, 1063 (2001)) (“The language is construed in the context of the statute as a whole and the overall statutory scheme, and [the court] give[s] ‘significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.’”); *see also supra* notes 83, 115, and accompanying text (discussing the purpose and intent of Prop 47).

180. *See* discussion *infra* Section IV.B.1.

181. *See infra* Sections IV.B.1–2.

182. 189 Cal. Rptr. 3d 907 (Ct. App. 2015).

183. *Id.* at 910 (“The [trial] court also denied Alejandro’s request for DNA expungement, stating that ‘even if a felony is later reduced to a misdemeanor, return of DNA is not required unless one of the conditions for expungement listed in section 299 is also met,’ and Alejandro had not met any of these conditions.”); CAL. PENAL CODE § 299 (West 2012); *see also* discussion *supra* Section III.B.2.

184. *Alejandro N.*, 189 Cal. Rptr. 3d at 916, 918 (“[S]ection 1170.18’s use of adult criminal terminology does not reflect an intent to exclude juvenile offenders from its provisions. . . . The fact that reclassification of a felony to a misdemeanor is not among the grounds listed in section 299 for DNA expungement does not convince us the remedy is unavailable for Proposition 47 reclassified misdemeanor offenses.”).

Based on the broad mandate set forth in section 1170.18, subdivision (k) to treat reclassified offenses as misdemeanors for all purposes except for firearm restrictions, as well as the extension of an expansive retroactive remedy under section 1170.18, . . . the voters did not intend that a reclassified misdemeanor offense be deemed a felony for purposes of retention of DNA samples.¹⁸⁵

However, as expressed in *In re J.C.*,¹⁸⁶ the Court of Appeal's holding in *Alejandro N.* was abrogated by AB 1492, prohibiting the trial court from expunging DNA records in connection with the granting of a Prop 47 petition.¹⁸⁷ Nevertheless, this will likely not be the end of discussion on this issue.¹⁸⁸ While several cases dealing with the retention of adult DNA samples are currently working their way through the system, courts may look to other areas of the law for guidance in applying Prop 47.¹⁸⁹

2. Proposition 36

In general, the basic structure of Prop 47 is strikingly similar to Proposition 36 (Prop 36), "The Three Strikes Reform Act of 2012," enacted in November 2012.¹⁹⁰ Therefore, several cases interpreting Prop 36 may aid

185. *Id.* at 917–18 ("The plain language of section 1170.18, subdivision (k) reflects the voters intended the redesignated misdemeanor offense should be treated exactly like any other misdemeanor offense, except for firearm restrictions. Because the statute explicitly addresses what, if any, exceptions should be afforded to the otherwise all-encompassing misdemeanor treatment of the offense, and because only the firearm restriction was included as an exception, the enactors effectively directed the courts not to carve out other exceptions to the misdemeanor treatment of the reclassified offense absent some reasoned statutory or constitutional basis for doing so.").

186. 201 Cal. Rptr. 3d 731, 739 (Ct. App. 2016) ("Bill No. 1492 has the effect of abrogating the holding of *Alejandro N.* by precluding the expungement of DNA records in connection with sentence recall under section 1170.18.").

187. See AB 1492, *supra* note 141; see also *supra* notes 141–44 and accompanying text.

188. While these cases relate only to juveniles seeking to have their low-level felony convictions reduced to misdemeanors under Prop 47, the precedent set in this case could affect a much larger population of offenders down the road. See Kristina Davis, *High Court Declines to Hear Prop 47 DNA Case*, SAN DIEGO TRIB. (Oct. 15, 2015, 11:18 AM), <http://www.sandiegouniontribune.com/sdut-prop-47-dna-juvenile-petition-denied-2015oct15-story.html> ("The juvenile issue could also come back to the Supreme Court for consideration if another appeals court makes a conflicting ruling in a similar case.").

189. See *id.* ("Prosecutors estimate the fate of some 500,000 DNA samples in the state database are potentially affected.").

190. CAL. PENAL CODE § 1170.18 (West 2004) (codifying the resentencing provisions of Prop

in understanding the application of Prop 47.¹⁹¹ The two propositions have many parallel provisions, including a reduction in penalties for certain crimes and a resentencing process for individuals who would be entitled to lesser punishment had the crime been committed after the enactment of the new law.¹⁹² However, it is possible that Prop 47 may affect Prop 36 in a number of ways, creating several more questions for courts to address.¹⁹³ Nonetheless, until appellate courts weigh in on the specifics of Prop 47, trial courts and counsel will have to design functional solutions to the anticipated cases.¹⁹⁴ DNA collection laws of other states may guide courts in considering the constitutionality of California's DNA collection law and in applying Prop 47 to California's DNA database.¹⁹⁵

47); *id.* § 1170.126 (codifying the resentencing provisions of Prop 36); *see also* COUZENS ET AL., *supra* note 86, § 25:1.

191. *See, e.g.*, *People v. Canty*, 32 Cal. 4th 1266 (2004) (defining the court's role in interpreting a voter initiative such as Prop 36); *People v. Yearwood*, 151 Cal. Rptr. 3d 901 (Ct. App. 2013) (holding that the resentencing process under Prop 36 cannot be utilized while a case is on appeal); *People v. Superior Court*, 155 Cal. Rptr. 856 (Ct. App. 2013) (waiving original sentencing judge in Prop 36 case). Because section 1170.18 does not specify a time of hearing, the hearing should be set within a "reasonable time." *See People v. Manning*, 172 Cal. Rptr. 3d 560 (Ct. App. 2014).

192. PENAL §§ 1170.18, 1170.126. Additionally, the resentencing provisions of Prop 47 use some of the same language as in Prop 36. *Id.* §§ 1170.18, 1170.126. For examples of how the court has interpreted these aspects of Prop 36, *see supra* note 191.

193. *See* COUZENS ET AL., *supra* note 86, § 25:16 ("First, persons serving second strike sentences for crimes that are made misdemeanors under [Prop 47] may petition for resentencing. In contrast, Proposition 36 limits its resentencing provisions to persons serving third strike sentences. . . . Second, Proposition 47 allows qualified third strike offenders to be resentenced as misdemeanants. While Proposition 36 only permits resentencing as a second strike offender, Proposition 47 requires qualified persons to receive a misdemeanor sentence, without any consideration of a further prison term either as a second strike or non-strike offender."). Additionally, there is a question whether Prop 47 amends Prop 36 by allowing a greater number of third-strike offenders to be resentenced as second-strike offenders. For a more detailed discussion on this potential effect, *see id.* (discussing *People v. Valencia*, 181 Cal. Rptr. 3d 229 (Ct. App. 2014)).

194. *See* COUZENS ET AL., *supra* note 86, § 25:1.

195. *See* discussion *infra* Section IV.C.

C. Other DNA Collection Laws

In the United States, the groups of persons eligible for compulsory DNA sampling by law enforcement authorities continue to expand.¹⁹⁶ Every state—along with the District of Columbia and the federal government—collects and tests DNA from individuals convicted of certain crimes.¹⁹⁷ “[Forty-eight] states require the collection of DNA for any felony conviction, and [forty-two] states require the collection of DNA for at least some misdemeanor convictions.”¹⁹⁸ Also, many states have arrestee DNA collection laws that authorize the collection of DNA samples from individuals arrested or charged, but not convicted, of certain crimes.¹⁹⁹ Currently, at least thirty states and the federal government have implemented some arrestee-DNA-collection law.²⁰⁰

1. Convicted Offender DNA Collection

In New York, the DNA collection law has been amended and expanded five times, and each expansion has enhanced the effectiveness of the DNA database.²⁰¹ In 2012, New York became the first “all crimes” state, requiring the collection of DNA samples from those convicted of nearly every criminal offense.²⁰² Governor Andrew M. Cuomo introduced this expansion

196. See discussion *supra* Sections II.B–C.

197. NAT’L CONF. ST. LEGISLATURES, CONVICTED OFFENDERS REQUIRED TO SUBMIT DNA SAMPLES (2013), <http://www.ncsl.org/Documents/cj/ConvictedOffendersDNALaws.pdf>.

198. *Id.*

199. NAT’L CONF. ST. LEGISLATURES, DNA ARRESTEE LAWS 1 (2013), <http://www.ncsl.org/Documents/cj/ArresteeDNALaws.pdf> (“Arrestee law provisions include: which crimes qualify for sample collection, whether probable cause hearings are required prior to testing, whether the sample can be analyzed upon charge or arrest, expungement procedures and whether or not juveniles are subject to testing.”).

200. *Id.*

201. See *New York State’s DNA Databank: A Powerful Law Enforcement Tool*, NAT’L CTR. FOR VICTIMS OF CRIME (July 30, 2013), <https://www.victimsofcrime.org/our-programs/dna-resource-center/training/archived-webinars/2013/07/30/default-calendar/new-york-state-s-dna-databank-a-powerful-law-enforcement-tool> [hereinafter *New York DNA Databank*].

202. See Press Release, Andrew M. Cuomo, Governor of New York, Governor Cuomo Signs Law to Expand New York’s DNA Databank (Mar. 19, 2012), http://www.criminaljustice.ny.gov/pio/press_releases/2012-03-19_pressrelease.html [hereinafter *Governor Cuomo Press Release*] (requiring “DNA samples be collected from anyone convicted of a felony or Penal Law misdemeanor”). Prior to the enactment of this bill in 2012,

to “not only help solve and prevent crimes but also exonerate the innocent.”²⁰³ Supporters of the legislation explained “this is a tool that works, and will make the state safer for all New Yorkers.”²⁰⁴ Further, in support of the legislation, Senator Steve Saland said:

The DNA databank expansion is particularly critical when studies show that persons who commit serious crimes have also often committed other crimes including lower-level misdemeanors. This law provides a powerful tool to bring closure to unsolved crimes and prevent further crimes from taking place, while providing a means by which a wrongfully convicted person can be exonerated, or a suspect eliminated.²⁰⁵

This expansion was enacted because “[n]othing is more important than ensuring the safety and security of [New York] citizens.”²⁰⁶ In California, Prop 47 had a similar goal—to ensure the safety and security of California citizens.²⁰⁷ However, the aftermath of Prop 47 demonstrated that the initiative does not further this goal; in fact, Prop 47 actually reduced the safety and security of California citizens by nearly eliminating one of the most powerful law enforcement tools in solving serious, violent crimes: DNA collection.²⁰⁸ By following New York’s lead and expanding its DNA

state law only permitted DNA to be collected from [forty-eight] percent of offenders convicted of a Penal Law crime. Among the exclusions were numerous crimes that statistics have shown to be precursors to violent offenses. As a result, New York State missed important opportunities to prevent needless suffering of crime victims and failed to use a powerful tool that could be used to exonerate the innocent.

Id.

203. *See id.* This legislation also expanded certain criminal defendant’s access to DNA testing and comparison prior to trial to demonstrate their innocence. *Id.*

204. *Id.*

205. *Id.*; *see also* NAT’L INST. JUST., DNA IN “MINOR” CRIMES YIELDS MAJOR BENEFITS IN PUBLIC SAFETY 1 (Nov. 2004) <https://www.ncjrs.gov/pdffiles1/nij/207203.pdf> (“The Miami-Dade Police Department (MDPD), Palm Beach County Sheriff’s Office, and New York City Police Department (NYPD) are solving high-volume property crimes (like burglary and auto theft) and violent crimes (like sexual assault and murder) using DNA They are discovering that analyzing DNA from property crimes can have major public safety benefits.”).

206. *See* Governor Cuomo Press Release, *supra* note 202.

207. *See* PROP 47, *supra* note 83 (arguing Prop 47 will “improve public safety”).

208. *See* discussion *supra* Section III.B; *see also* Kristina Davis, *Prop 47 Could Purge DNA Database*, SAN DIEGO TRIBUNE (Sept. 27, 2015, 3:00 PM), <http://www.sandiegouniontribune.com/>

database, California would better ensure the safety of its citizens.²⁰⁹ While AB 16 does not include all crimes like New York's statute, AB 16 must be passed to help restore law enforcement's ability to solve serious, violent crimes in California.²¹⁰

2. Arrestee DNA Collection

Each state's arrestee DNA collection law specifies certain crimes for collection.²¹¹ Twenty-nine states collect DNA from arrestees for at least some felonies, while eight states have laws that collect DNA from arrestees for both felonies and certain misdemeanors.²¹² As discussed throughout this Comment, arrestee DNA collection has effectively helped law enforcement solve serious, violent crimes in California.²¹³ Additionally, several other states have revealed the effectiveness of arrestee DNA collection in solving and preventing serious, violent crimes.²¹⁴ For example, Chicago's study on

news/2015/sep/27/prop-47-dna-database-supreme-court/ ("Prosecutors argue that wiping out so many DNA specimens would hinder law enforcement's ability to solve crimes and goes against the intent of voters who passed Proposition 47.").

209. See *New York DNA Databank*, *supra* note 201. Research shows that offenders who commit serious crimes often also commit minor crimes. *Id.* ("For example: Petit larceny became a[] DNA-eligible offense in 2006. Since that time, individuals convicted of that misdemeanor have been linked to 1,078 crimes, including: 457 burglaries, 238 sexual assaults, 137 robberies and 57 homicides.").

210. See discussion *supra* Section IV.A.

211. See, e.g., *DNA Arrestee Laws*, *supra* note 199 ("Oklahoma only collects DNA from arrestees who are unauthorized immigrants under federal immigration law. Eight states apply their arrestee laws to juveniles.").

212. See *id.* Several other states, which currently do not have arrestee DNA collection laws, are considering similar legislation to expand their DNA collection laws to include arrestees. See, e.g., H.B. 1015, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016) (requiring DNA collection from all felony arrestees in Indiana); L.B. 1054, 114th Legis., 2d Sess. (Neb. 2016) (requiring DNA collection upon arrest for violent crimes in Nebraska); S.B. 824, 2015 Leg., 28th Sess. (Haw. 2015) (requiring DNA collection from those arrested of a violent felony in Hawaii).

213. See, e.g., *supra* Sections II.B.3 & III.B.1.

214. See, e.g., *DNA Arrestee Laws*, *supra* note 199. In every case, the offender had committed previously unsolved serious, violent crimes that could have been solved immediately through a DNA match; unfortunately, DNA collection was not required at arrest. See, e.g., *Denver's Study on Preventable Crimes*, DENVER DISTRICT ATTORNEY'S OFF., http://www.denverda.org/DNA_Documents/Denver's%20Preventable%20Crimes%20Study.pdf (last visited Apr. 12, 2017) [hereinafter *Denver's Preventable Crimes*] ("The Denver District Attorney's Office examined the criminal activities of five individuals and has identified [fifty-two] violent crimes, including [three] murders and [nineteen] sexual assaults, which could have been prevented if DNA had taken at the

preventable crimes details how sixty violent crimes, including fifty-three murders and rapes, committed by eight offenders would have been prevented had DNA samples been required upon arrest.²¹⁵ “The eight offenders in Chicago accumulated a total of [twenty-one] felony arrests”—most of which were for nonviolent felonies—“before finally being identified in the violent crimes.”²¹⁶ These “missed opportunities” to prevent crime reveal the potential of requiring DNA upon arrest, and the real-life stories verify the troubling effect Prop 47 will have in California.²¹⁷ Additionally, while AB 16 proposes to restore DNA collection upon conviction for specified misdemeanors, the success of arrestee DNA collection²¹⁸ provides convincing arguments for amending California’s DNA collection law to include misdemeanor arrestees.²¹⁹

3. Misdemeanor Arrestee DNA Collection

“Is it ethically acceptable to allow a serial rapist (not yet linked to his crimes) to return to the streets because he was merely arrested for a misdemeanor?”²²⁰ While New York’s DNA collection law requires collection of DNA samples from those convicted of almost all criminal offenses, it is possible that New York, or any other state, may become an “all arrest state,” collecting DNA samples from everyone *arrested* for a criminal offense, regardless of the severity of the crime.²²¹ Although most

time the individual was arrested on a felony, like fingerprints.”); *Maryland Study on Preventable Crimes*, MD. GOVERNOR’S OFF. CRIME CONTROL & PREVENTION, http://www.denverda.org/DNA_Documents/MarylandDNAarrestestudy.pdf (last visited Apr. 12, 2017) [hereinafter *Maryland’s Preventable Crimes*] (“If DNA samples had been required upon arrest for these three individuals, [twenty] crimes could have been prevented.”).

215. See City of Chicago, *Chicago’s Study on Preventable Crimes*, DNA SAVES (2005), <http://www.dnasaves.org/files/ChicagoPreventableCrimes.pdf> [hereinafter *Chicago’s Preventable Crimes*].

216. See *Chicago’s Preventable Crimes*, *supra* note 215.

217. See *id.*

218. See discussion *supra* Sections II.B & III.B.1.

219. See discussion *infra* Section IV.C.3.

220. Jay Siegel & Susan D. Narveson, *Why Arrestee DNA Legislation Can Save Indiana Taxpayers over \$60 Million per Year*, DNA SAVES 9 (Jan. 2009), http://dnasaves.org/files/IN_DNA_Cost_Savings_Study.pdf.

221. See discussion *supra* Section IV.C.1; see also Elizabeth E. Joh, *Should Arrestee DNA Databases Extend to Misdemeanors?*, 8 J. RECENT ADVANCES DNA & GENE SEQUENCES 59, 59

states do not collect DNA samples from misdemeanor arrestees, “it seems likely some will consider expanding their existing DNA databases to include them.”²²² These proposals are consistent with historical trends towards DNA database expansion and would fall within the existing justifications for increasing the number of profiles in the national DNA database.²²³

Two forensic science experts, Jay Siegel and Susan Narveson, caution lawmakers that “legislation which would only collect DNA from a subset of arrestees (felony arrests for example) rather than from all arrestees . . . would be a serious mistake.”²²⁴ Further, in response to the question about the serial rapist, Siegel and Narveson argue, “[a] system that eventually identifies [the serial rapist] only once he commits a sufficient number of additional rapes to finally be convicted of a felony offers little comfort to the interim victims.”²²⁵ Siegel and Narveson conclude, “[i]t is inconsistent and illogical, therefore, to prevent a DNA match from providing the same public safety benefit” as a fingerprint match.²²⁶

Arrestee databases have been justified in part on the grounds that many arrestees have committed other crimes, but have not yet been convicted of an offense qualifying them for DNA collection.²²⁷ Siegel and Narveson acknowledged that “[o]ne might legitimately argue to limit DNA collection to only ‘major’ arrests if it were true that ‘minor’ offenders never commit major crimes,” but they found “this is far from the truth.”²²⁸ As the

(2015).

222. See Joh, *supra* note 221, at 59.

223. See *id.* Additionally, federal law already permits required DNA collection from misdemeanor arrestees. *Id.* at 2. For a more detailed discussion on arrestee DNA collection, see Julie E. Samuels et al., *Collecting DNA at Arrest: Policies, Practices, and Implications*, URBAN INST. (2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/242812.pdf>.

224. Siegel & Narveson, *supra* note 220, at 9 (arguing “[t]his would be a serious mistake for two reasons”: efficacy and efficiency).

225. *Id.* at 9–10.

226. *Id.* at 10 (“If a misdemeanant were matched to other crimes based on his fingerprints, probable cause would exist to hold him in custody under our current system.”).

227. See Joh, *supra* note 221, at 2 (“Taking a sample at arrest permits the police to see if a ‘hit’ occurs with a forensic sample at an earlier stage in the criminal process. Finding individuals who have committed other crimes but have not yet been convicted of them can ensure they are not released into the community to commit future crimes. In this view, expanding the range of eligible arrest offenses to misdemeanors will expand the pool of those who have not yet been apprehended but may be connected to other crimes.”).

228. Siegel & Narveson, *supra* note 220, at 10 (illustrating the major crimes that were solved in Virginia once DNA samples from offenders convicted of nonviolent crimes were uploaded into

California Department of Justice statistics show, the prevalence of violent crimes committed by these low-level offenders highlights the importance of collecting DNA from all arrestees.²²⁹ However, even if the inclusion of all or nearly all misdemeanor arrests for DNA collection is both a foreseeable legislative proposal and a benefit to law enforcement, the possibility may raise some concerns.²³⁰

While AB 16 does not expand DNA collection to include misdemeanor arrestees,²³¹ the arguments made by Siegel and Narveson are very captivating and may guide future DNA collection laws in California or other states.²³² Although arguments can be made both in favor of and in opposition to further expansion of DNA databases, the decreased deterrent effect and rising crime rates across California reveal Prop 47's harmful impact on the safety of California citizens.²³³

V. IMPACT AND SIGNIFICANCE

Theories of criminal punishment have existed for hundreds of years;²³⁴ while some aspects of these theories may have changed over the years, their foundations have remained the same.²³⁵ Utilitarian theories of punishment stem from the belief that punishment should only be administered if it results

CODIS).

229. See *supra* Section III.B.1.

230. See Joh, *supra* note 221, at 2 (“The first potential obstacle is whether misdemeanor expansion is consistent with the United States Supreme Court’s recent decision in *Maryland v. King*. A second concern is the extent to which misdemeanor inclusion would introduce a troubling degree of police discretion into the composition of DNA databases. Third, the availability of statutory expungement may be of limited practical relevance as a check on law enforcement accountability. Finally, increasing the numbers of profiles added to CODIS may not yield sufficient benefits in light of the costs such expansions would impose on states.”).

231. See *supra* Section IV.A.

232. See Siegel & Narveson, *supra* note 220.

233. See *infra* Part V.

234. See generally NORA V. DEMLEITNER ET AL., SENT’G L. & POL’Y 2 (2d ed. 2013). For a more detailed discussion of the two primary theories of punishment, see Matthew Haist, *Deterrence in a Sea of “Just Deserts”: Are Utilitarian Goals Achievable in a World of “Limiting Retributivism”?*, 99 J. CRIM. L. & CRIMINOLOGY 789, 792 (2009) (positing that the two main theories are utilitarianism and retributivism).

235. See Haist, *supra* note 234, at 794–95 (“Retributivism has always been concerned with punishing criminals as simple punishment for their crimes, while utilitarianism has valued the punishment of criminals because of the benefit society may reap as a result of such punishment.”).

in an overall benefit to society.²³⁶ “[P]unishment can benefit society through *deterrence* of potential offenders from committing future crimes, through *incapacitation* to render the current offender unable to commit future crimes, or through *rehabilitation* of the offender to prevent any further wrongdoing.”²³⁷ As a result of Prop 47, criminals are not being deterred,²³⁸ not being incapacitated,²³⁹ and not being rehabilitated.²⁴⁰

“When the incentives to engage in or refrain from a particular behavior change [in some way], the number of people who choose to engage in that behavior also changes”—this effect is deterrence.²⁴¹ While there will always be some people that cannot be deterred and some people that do not need to be deterred, there is a significant portion of people who are “detractable.”²⁴² The number of people that are detractable depends on the severity of the punishment;²⁴³ more severe penalties have an increased deterrent effect because they “rais[e] the ‘cost’ of committing crime to would-be

236. See DEMLEITNER ET AL., *supra* note 234, at 2; see generally Haist, *supra* note 234, at 794–95.

237. DEMLEITNER, ET AL., *supra* note 234, at 2. Deterrence, incapacitation, and rehabilitation are three common purposes of sentencing. See, e.g., *id.* at 12–17.

238. See discussion *infra* notes 241–63 and accompanying text.

239. See discussion *infra* notes 251–63 and accompanying text.

240. See discussion *infra* notes 246–58 and accompanying text. Los Angeles County Sheriff Jim McDonnell, and many others, believe treatment is the most important thing for drug offenders, but without the potential for felony conviction, offenders no longer feel compelled to go into treatment. See *Sheriff Jim McDonnell: Thanks to Prop. 47, Californians are Less Safe than They Were a Year Ago*, L.A. TIMES (Nov. 4, 2015, 1:27 PM), <http://www.latimes.com/opinion/la-ol-1104-prop-47-revolution-sheriff-jim-mcdonnell-20151104-htmstory.html> [hereinafter *Sheriff Jim McDonnell Interview*]; see also Cindy Chang et al., *Unintended Consequences*, L.A. TIMES (Nov. 6, 2016, 3:00 AM), <http://www.latimes.com/local/crime/la-me-prop47-anniversary-20151106-story.html> [hereinafter Chang et al., *Unintended Consequences of Prop. 47 Pose Challenge for Criminal Justice System*] (“We’ve removed the disincentive, but we haven’t created a meaningful incentive. . . . We’re putting the people we’re trying to help in a position where we can’t help them.”).

241. DEMLEITNER ET AL., *supra* note 234, at 571 (supporting the idea that increased incarceration of criminals will reduce the rate of crime).

242. *Id.* at 571–72 (“There will always be some people who cannot be deterred because they act without thinking. There will always be some people who do not need to be deterred because their character and conscience would prevent them from committing crimes even if they could do so with impunity. Between the wild beasts and the saints, though, there will always be a large segment of the population that refrains from crime out of fear of the consequences, i.e., that is detractable . . .”).

243. *Id.* at 571–72 (“[T]he size of that [detractable] segment naturally depends on the severity of the consequences.”).

offenders.”²⁴⁴

The effect of deterrence—or lack of deterrence in this case—is evident in the aftermath of Prop 47.²⁴⁵ One year after the enactment of Prop 47, “The Safe Neighborhoods and Schools Act,” the results clearly show that Californians are far from being safer in their neighborhoods.²⁴⁶ “The deceitfully named Safe Neighborhoods and Schools Act is having a substantial negative impact on society throughout the City and County of Los Angeles in both the associated costs of crime and its psychological costs.”²⁴⁷ Crime rates noticeably increased in several parts of California in 2015,²⁴⁸ and it is clear that Prop 47 does not create any apparent benefits to society at large, but rather only benefits drug addicts and thieves.²⁴⁹ This

244. *Id.* at 106 (“According to the Department of Justice, sentencing reforms in the 1980s, including the enactment and enhancement of many mandatory minimum penalties, helped reduce crime rates.”).

245. *See infra* notes 246–63 and accompanying text.

246. *See Sheriff Jim McDonnell Interview, supra* note 240. Los Angeles County Sheriff Jim McDonnell thinks Californians are more at risk today than they were prior to the passage of Prop 47. *Id.* Additionally, a Manhattan Beach-based criminal defense attorney who has clients in drug court recently said, “Proposition 47 was good and bad The good part is we have people who shouldn’t be spending time in jail not spending time in jail. The bad part of Proposition 47 was there was no hammer to force people who needed treatment to get it.” *See Chang et al., Unintended Consequences, supra* note 240.

247. Marc Debbaudt, *The Public and Private Deception of Prop 47*, L.A. ASS’N DEPUTY DISTRICT ATTORNEYS (Dec. 9, 2015), <https://www.laadda.com/the-public-and-private-deception-of-prop-47/> (“The ignored costs range from a spike in violent crime and property crimes, increased rates of recidivism, and an abrupt decrease in the population of participants in drug and mental health treatment facilities throughout Southern California. The physical and psychological costs of the increase in property and violent crimes on citizens, store owners, and victims have no price tag.”).

248. *See Ben Poston & Kate Mather, After a 12-Year Decline, Crime in L.A. Surges in First Half of 2015*, L.A. TIMES (July 8, 2015, 5:52 PM), <http://www.latimes.com/local/lanow/la-me-ln-garcetti-beck-crime-increase-20150708-story.html> (“Los Angeles recorded a 12.7% increase in overall crime Violent offenses rose 20.6%, propelled by increases in aggravated assaults and robberies. Property crime rose 10.9%, driven by across-the-board increases in burglaries, thefts and motor vehicle thefts.”); *see also* Debra Saunders, *In the Wake of Proposition 47, California Sees a Crime Wave*, REAL CLEAR POL. (Aug. 16, 2015), http://www.realclearpolitics.com/articles/2015/08/16/in_the_wake_of_proposition_47_california_sees_a_crime_wave_127780.html (“In San Francisco, theft from cars is up [forty-seven] percent this year over the same period in 2014. Auto theft is up by 17 percent. Robberies are up 23 percent. And aggravated assaults are up 2 percent . . .”).

249. *See Poston & Mather, supra* note 248; *see also* Harriet Fox, *What We Learned from California’s Prop 47 in 2015*, POLICEONE.COM (Dec. 23, 2015), <https://www.policeone.com/drug-interdiction-narcotics/articles/57282006-What-we-learned-from-Californias-Prop-47-in-2015/>.

lack of benefit to society, resulting in a risky decreased deterrent effect, would be of much concern to utilitarian theorists.²⁵⁰

“Inmates are fans of Prop 47 because it keeps them out of jail, allowing them to keep using illegal drugs and keep committing crime.”²⁵¹ Criminals view misdemeanors as “not a big deal,” so Prop 47 sends a message that it is not serious to commit these crimes because they are now classified as misdemeanors.²⁵² Also, Prop 47 has led to a significant decrease in arrests for these drug and theft crimes because law enforcement has “lost an important tool to deal with those offenders, who remain free to get high again or steal to support their habits.”²⁵³ Some criminals have joyfully told reporters that Prop 47 has incentivized them to continue committing crimes.²⁵⁴ For example, Semisi Sina, a thirty-year-old man who has been arrested sixteen times for theft or drug use,²⁵⁵ says Prop 47 has made it easier for him to commit these crimes.²⁵⁶ Sina, who didn’t start stealing until Prop

250. See *supra* notes 234–49 and accompanying text.

251. Fox, *supra* note 249.

252. *Id.* (“Criminals have a great way of decriminalizing and minimizing their crimes. With Prop 47, the state and the criminals both are doing just that.”).

253. See Cindy Chang et al., *Prop 47’s Effect on Jail Time, Drug Rehabilitation Is Mixed So Far*, L.A. TIMES (Feb. 21, 2015, 10:00 AM), <http://www.latimes.com/local/crime/la-me-adv-prop47-crime-20150221-story.html> [hereinafter Chang et al., *Prop 47’s Effect*] (“Narcotics arrests have dropped by 30% in the city of Los Angeles and 48% in areas patrolled by the L.A. County Sheriff’s Department, as busy police officers decide that the time needed to process a case is not worth it. Even when arrested, drug offenders are often issued a citation to appear in court and face little to no jail time if convicted. . . . Some drug addicts and their relatives agree, saying the new law allows troubled individuals to hurt themselves and steal with little consequence.”).

254. See *infra* notes 255–57 and accompanying text; see, e.g., Eli Saslow, *A ‘Virtual Get-out-of-Jail-Free Card,’* WASH. POST (Oct. 10, 2015), <http://www.washingtonpost.com/sf/national/2015/10/10/prop47/> (“There was the ‘Hoover Heister’ in Riverside, who was arrested for stealing vacuum cleaners and other appliances 13 different times over the course of three months, each misdemeanor charge followed by his quick release. There was also the known gang member near Palm Springs who had been caught with a stolen gun valued at \$625 and then reacted incredulously when the arresting officer explained that he would not be taken to jail but instead written a citation. ‘But I had a gun. What is wrong with this country?’ the offender said And then, in San Diego, there was Rabenberg, who just weeks after being released because of Prop 47 was caught breaking the law again. . . . [H]e had been arrested for six misdemeanors in less than four months and been released all six times.”).

255. See Chang et al., *Unintended Consequences*, *supra* note 240 (“The 30-year-old has stolen bicycles from his Hacienda Heights neighborhood. He has skipped out on drug treatment and kept up his meth habit. He has racked up [sixteen] arrests, earning himself a place near the top of the Los Angeles County Sheriff’s Department’s list of repeat offenders picked up for theft or drug use.”).

256. *Id.* (“Now, you can get away with it because of Proposition 47.”).

47 raised the threshold for felony theft, said, “Proposition 47, it’s cool I can go do a [commercial] burglary and know that if it’s not over \$900, they’ll just give me a ticket and let me go.”²⁵⁷ San Diego Police Chief Shelley Zimmerman said, “It’s a slap on the wrist the first time and the third time and the 30th time, so it’s a virtual get-out-of-jail-free card. . . . We’re catching and releasing the same people over and over.”²⁵⁸

Not only have crime rates increased for drug and property crimes, but also for serious, violent crimes.²⁵⁹ As discussed throughout this Comment, numerous serious, violent crimes, such as rapes, robberies, and murders, have been solved through the use of the DNA database and DNA samples collected from low-level offenders.²⁶⁰ Because of Prop 47, DNA samples are no longer collected from these low-level offenders, limiting law enforcement’s ability to solve serious, violent crimes.²⁶¹

Thus, as a result of Prop 47, criminals are not being deterred from committing property and drug offenses, and the increasing number of serious, violent crimes will also remain unsolved.²⁶² While some criminal justice experts may caution against drawing conclusions about the increase in crime rates,²⁶³ it is clear that Prop 47’s decreased deterrent effect will continue to have alarming effects if California does not restore DNA collection for these crimes.

257. *Id.*

258. Saslow, *supra* note 254; *see also* Chang et al., *Prop 47’s Effect*, *supra* note 253 (“I hate to look at it as a waste of time but, yeah, [arresting him] probably would be Nothing much would have come of it.”).

259. *See* Poston & Mather, *supra* note 248 (noting that violent offenses rose 20.6% and property crime rose by 10.9% in Los Angeles). The most notable increase was in the LAPD’s Central Division, violent crime rose 67% and property crime increased 26%. *Id.*

260. *See* discussion *supra* Sections III.B.1, IV.A, & IV.C.

261. *See* discussion *supra* Section III.B.1.

262. *See supra* notes 245–61 and accompanying text.

263. *See* Chang et al., *Prop 47’s Effect on Jail Time, Drug Rehabilitation*, *supra* note 253 (“Some criminal justice experts caution against drawing conclusions, warning that it is too soon to gauge the new law’s effect and that other factors could be responsible for the increase. But to Asst. Sheriff Michael Rothans . . . the connection is obvious: More petty criminals on the streets mean more crimes. ‘Why is property crime up? It’s because of this,’ said Rothans, who has urged deputies to continue making drug arrests. ‘The same people are arrested for narcotics and property crimes. We know the cycle is continuing because we know they should have been in jail.’”).

VI. CONCLUSION

Although its intentions may have been reasonable, Prop 47 has not lived up to its promises.²⁶⁴ Because the passage of Prop 47 reduced several low-level crimes to misdemeanors, which do not qualify for DNA sample collection, Prop 47 has severely limited law enforcement's ability to solve serious, violent crimes through California's DNA database.²⁶⁵ As the statistics prove, the DNA database is a vital tool that has benefited the people of California by solving countless serious, violent crimes.²⁶⁶ This powerful law enforcement tool must be preserved to prevent additional crimes from being committed, to exonerate the innocent, and to provide victims with closure when their offender is finally convicted after several years.²⁶⁷ Prop 47's unintended consequences have led to devastating costs in the first year alone, including a decreased deterrent effect, a rise in crime rates, and a lack of rehabilitation.²⁶⁸ The goal of ensuring the safety and security of citizens should remain at the forefront of future actions.²⁶⁹ By passing AB 16 and restoring DNA sample collection for these low-level crimes, California will begin to reverse the unintended consequences of Prop 47 and better ensure the safety of its citizens.²⁷⁰ Without any change, the future of the criminal justice system does not look bright for the citizens of California, who are far from being safer in their neighborhoods.²⁷¹

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264. See *supra* Sections III.B.1 & IV.A.

265. See *supra* Section III.B.1.

266. See *supra* notes 120–32 and accompanying text.

267. See *supra* Section II.B.3.

268. See discussion *supra* Part V.

269. See *supra* Sections III.B.1 & Part IV.

270. See *supra* Sections III.B.1 & IV.A.

271. See *supra* Sections III.B.1 & Parts IV–V.

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