

DANGEROUSNESS, DISABILITY, AND DNA

*Christopher Slobogin**

I. THE ROLE OF DANGEROUSNESS IN CRIMINAL JUSTICE.....	150
II. THE ROLE OF MENTAL ILLNESS IN CRIMINAL JUSTICE.....	154
III. THE ROLE OF DNA IN CRIMINAL JUSTICE	157

This Article honors three of Professor Arnold Loewy’s articles. The first, published over thirty years ago, is entitled *Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law is Predicated*,¹ and the second is his 2009 article, *The Two Faces of Insanity*.² In addition to commenting on these two articles about substantive criminal law, I can’t resist also saying something about one of Professor Loewy’s procedural pieces, *A Proposal for the Universal Collection of DNA*, published in 2015.³

A theme that unites all three of these articles is that they appear to be quite radical, at least on first impression. In *Culpability, Dangerousness, and Harm*, Professor Loewy (Arnie) argues that dangerousness is the predominant explanation for many of our well-accepted criminal law doctrines, despite the fact that in theory “[t]here is virtually no support . . . for convicting a dangerous but not culpable offender.”⁴ In *The Two Faces of Insanity*, he essentially calls for abolition of the insanity defense, despite recognizing that his proposal “would allow for the conviction of seriously psychotic people, such as Andrea Yates”⁵—a position directly contrary to accepted wisdom about the role of mental disability in the criminal justice system.⁶ And his proposal for a universal DNA database, when presented at a previous *Texas Tech Law Review* Criminal Law Symposium, received an extremely hostile reaction from an audience that appeared to associate it with a police state, a reaction consistent with how most people view the idea.⁷

* Milton Underwood Professor of Law, Vanderbilt University.

1. Arnold Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated*, 66 N.C. L. REV. 283 (1988).

2. Arnold Loewy, *The Two Faces of Insanity*, 42 TEX. TECH L. REV. 513 (2009).

3. Arnold Loewy, *A Proposal for the Universal Collection of DNA*, 48 TEX. TECH L. REV. 261 (2015).

4. Loewy, *supra* note 1, at 287.

5. Loewy, *supra* note 2, at 522.

6. See GARY MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 202 (3d ed. 2007) (describing the debate and noting that “the clear majority [of commentators], have just as vigorously rejected the abolitionist stance”).

7. See Loewy, *supra* note 3, at 266 (“I am quite certain I have not persuaded my colleagues on this panel.”). I was at the Symposium, and one member of the audience after another, including some former

So, all three articles are controversial. In this short essay, however, I endorse much of what they say. Dangerousness permeates our criminal justice doctrines, whether we want it to or not, and we have to look that issue squarely in the face.⁸ I have long argued for an integrationist approach to the insanity defense, which is very similar to the approach Arnie has taken.⁹ And the time may have come for a universal DNA database, not only because of its power to convict the guilty and absolve the innocent, but also for a host of reasons having to do with limiting—not expanding—police power.

I. THE ROLE OF DANGEROUSNESS IN CRIMINAL JUSTICE

To ensure that juries base their verdicts on guilt for the crime charged, American trials are distinguished by their avoidance of information about the defendant's character.¹⁰ The evidence, the instructions, and the arguments at trial are all supposed to focus on *actus reus* and *mens rea*—harm and culpability—not on whether the defendant has a propensity to engage in antisocial conduct.¹¹ That doctrine has led to rules barring the prosecution from presenting character evidence unless the defendant opens the door to it,¹² and prohibiting the admission of prior crimes unless they can somehow be made relevant to the crime charged or unless the defendant takes the stand.¹³

In *Culpability, Dangerousness, and Harm*, however, Arnie notes that, despite this country's traditional focus on *actus reus* and *mens rea*, dangerousness in fact plays a very significant role in how American courts define crime—sometimes to the point that culpability becomes irrelevant, at least if it is defined subjectively.¹⁴ For example, Arnie argues that the reason most jurisdictions do not recognize a defense for an unreasonable but provably honest belief that deadly force is necessary in homicide cases or that a woman is consenting to intercourse in rape cases is because such beliefs, even if not culpable to a true-blue retributivist, signal that the defendant is violence-prone.¹⁵ To Arnie, similar concerns explain why people who are provoked to kill have their charge reduced only to manslaughter even when

students and faculty colleagues, castigated Arnie for his position; his fellow panelists were not enamored of the idea either. For the reaction of others, see *infra* text accompanying notes 88–91.

8. See Loewy, *supra* note 1, at 283.

9. See Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1244 (2000).

10. See Barrett J. Anderson, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1912, 1928–29 (2012) (discussing the use of character evidence).

11. See *id.*

12. See, e.g., FED. R. EVID. 404(a).

13. See, e.g., FED. R. EVID. 404(b) (providing that “evidence of other crimes, wrongs and acts is not admissible to prove [the] character” of a person but is admissible to show *actus reus* or *mens rea*, motive, and the like).

14. See Loewy, *supra* note 1, at 285–86.

15. *Id.* at 298–302.

their reaction to the provocation is “reasonable,” why unintentional killings that are the result of a “malignant heart” can constitute murder, and why even a killing that is the result of ordinary negligence is considered manslaughter in some jurisdictions.¹⁶ And Arnie also contends that the felony murder doctrine persists, despite its imposition of strict liability for homicide, because the felonies required as predicates for the doctrine are considered “potentially dangerous to human life.”¹⁷ In all of these cases, Arnie suggests that a desire to punish dangerousness drowns out qualms about miscalculating blameworthiness.¹⁸

A *lack* of dangerousness can also explain some criminal law doctrines. Most obviously, Arnie notes, the traditional law of attempt (requiring more than mere preparation) and of conspiracy (requiring a true meeting of the minds between co-conspirators) can be attributed to a concern that only when culpable thoughts come dangerously close to fruition should there be liability.¹⁹

In short, in *Culpability, Dangerousness, and Harm*, Arnie suggests that, under the traditional common law, the presence or absence of harm (*actus reus*) and culpability (*mens rea*) is not dispositive.²⁰ Rather, assumptions about dangerousness—i.e., what people who did what the defendant did are like—strongly inform the definition of some crimes.²¹ The question then becomes whether dangerousness *should* play such a role, and if so, under what circumstances. Arnie does not answer this question. Instead, he states that his main goal is to point out how dangerousness, culpability, and harm permeate the criminal law so that judges and legislatures can make more intelligent decisions regarding punishment.²² Taking up Arnie’s invitation, I want to offer a few thoughts about how dangerousness might be integrated into criminal law doctrine.

At the most basic level, one can imagine three distinct roles for dangerousness in the criminal justice system. First, it could be relevant both at trial and at sentencing. This is the most accurate description of traditional common law. As Arnie’s article demonstrates, not only were many common law crimes infused with assumptions about the types of conduct that are dangerous, but the preferred mode of sentencing through the 1970s was indeterminate sentencing, with dispositions based on an amalgam of assessments about culpability, dangerousness, treatability, and similar considerations.²³

16. *Id.* at 302–04.

17. *Id.* at 305.

18. *See id.* at 302–05.

19. *Id.* at 306–09.

20. *Id.* at 314.

21. *Id.* at 307–08.

22. *Id.* at 314.

23. *Id.* at 310.

The second basic position is to maintain dangerousness's relevance at sentencing but eliminate its influence at trial. This position best describes the approach of the original Model Penal Code (MPC), promulgated in 1962.²⁴ In contrast to the common law's approach to crime definition—which focuses at least as much, if not more, on harm and dangerousness than on culpability—the MPC's criminal liability provisions clearly prioritize culpability.²⁵ The MPC disfavors negligence as a basis for criminal liability, subjectifies *mens rea* and its defenses, rejects the felony murder doctrine, and requires much less *actus reus* than the common law for the inchoate crimes, so long as a purpose to the commit crime is shown.²⁶ The MPC thus rejects criminal provisions often found at common law that are based on assumptions about the sorts of criminal conduct that are dangerous; rather, its definition of crimes is decidedly retributivist in orientation.²⁷

However, the original MPC essentially endorsed the common law's approach to sentencing.²⁸ Its sentencing provisions called for extremely broad dispositional ranges, all starting at one year,²⁹ with sentence length to be determined by a parole board focused on character, propensity, and the like.³⁰ As Herbert Wechsler, a key figure in drafting the MPC put it, under the MPC's sentencing provisions, a particular offender's sentence would depend primarily on determination of “the period required for the process of

24. See MODEL PENAL CODE §§ 7.01–.09 (AM. L. INST. 1985).

25. See Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception*, 5 J. CONTEMP. LEGAL ISSUES 299, 321 (1994) (stating in the conclusion that “[m]any disputes about criminal law doctrine can be explained as conflicts between an objectivist view that harm and evil ought to be relevant to liability and a subjectivist view that it ought not” and noting that the MPC adopts the subjectivist view).

26. See, e.g., MODEL PENAL CODE § 210.4 (recognizing negligent homicide); MODEL PENAL CODE § 211.1(b) (recognizing negligent simple assault); MODEL PENAL CODE § 2.02(2)(c) (defining recklessness as requiring an awareness of the risk); MODEL PENAL CODE § 3.09(2) (providing that non-reckless mistakes as to the presence of justifying circumstances is an excuse for crimes involving the use of force); MODEL PENAL CODE § 4.02 (permitting evidence of mental disability to negate *mens rea*); MODEL PENAL CODE § 210.2 (recognizing a presumption in favor of murder for homicides that occur during a felony, but making that presumption rebuttable); MODEL PENAL CODE § 5.01(2) (requiring only a “substantial step” for attempt liability plus a “criminal purpose”); MODEL PENAL CODE § 5.03(1) (requiring for conspiracy liability a belief that an agreement to commit a crime exists, plus a criminal purpose).

27. But see Michael Tonry, *Can Twenty-first Century Punishment Policies Be Justified in Principle?*, in *RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE?* 1, 7 (Michael Tonry ed., Oxford Univ. Press 2011) (stating that “[r]etributive ideas were almost absent” from the MPC). But Tonry, like most others who make this type of statement, was focused on the MPC's sentencing provisions. The MPC explicitly states that safeguarding “conduct that is without fault” is an important goal of crime definition. MODEL PENAL CODE § 1.02. Additionally, the comments state that “it was believed to be unjust to measure liability for serious criminal offenses on the basis of what the defendant should have believed or what most people would have intended.” MODEL PENAL CODE § 2.02, cmt. 2.

28. See MODEL PENAL CODE §§ 7.01–.09.

29. MODEL PENAL CODE § 6.06 (providing for sentences of one year to life for first-degree felonies, one year to ten years for second-degree felonies, and one year to five years for third-degree felonies).

30. See MODEL PENAL CODE § 7.01(i) (authorizing the sentencing court to take into account “the character and attitudes of the defendant [that] indicate that he is unlikely to commit another crime”).

correction to realize its optimum potentiality or for the risk of further criminality to reach a level where release of the offender appears reasonably safe.”³¹

The third position on the role of dangerousness is that it should be considered irrelevant not only at trial but also at sentencing. This comes close to describing the newly revised MPC. While the substantive, retributively-oriented criminal law provisions of the original MPC have remained essentially unchanged since their promulgation in 1962, the new version formally adopted in 2017 completely revamps the original MPC’s sentencing provisions and abandons the indeterminate sentencing scheme.³² Under the MPC’s revised sentencing standards, dangerousness plays a much-diminished role. Sentences are to be based primarily on the nature of the defendant’s criminal behavior, within a relatively narrow range based on retributive (just deserts) considerations.³³ Although an offender’s risk can theoretically be considered in fashioning a sentence, it is relegated to a minor consideration and is relevant only at the front-end, where the judge imposes a determinate disposition.³⁴ Thus, if dangerousness has any effect at all under the new MPC, its impact ends at the sentencing hearing.³⁵ Parole boards have no power to alter the sentence or make release decisions.³⁶

So which of these three positions is the right one? To my mind, the second position, exemplified by the original MPC, makes the most sense. As others have argued, the determination of whether a defendant may be punished at all should be focused entirely on an analysis of blameworthiness.³⁷ Thus, contrary to the traditional common law approach that Arnie describes, the adjudication stage should be about *actus reus* and about *mens rea* subjectively defined; concerns about dangerousness should not influence the contours of a particular crime or the evidence the factfinder considers.³⁸ But as I have developed at length elsewhere, the most sensible way of attacking our mass incarceration problem while still protecting the public is a sentencing regime that explicitly and continuously considers relative risk within broad, retributively defined boundaries.³⁹

31. Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 476 (1961).

32. See MODEL PENAL CODE: SENTENCING § 1.02(2) (AM. L. INST., Proposed Final Draft 2017).

33. See MODEL PENAL CODE: SENTENCING § 1.02(a)(i). The overriding goal of the new provisions is retributive proportionality. *Id.* (stating that the first purpose of sentencing is “to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders”).

34. See MODEL PENAL CODE: SENTENCING § 6.06(2)(a).

35. See MODEL PENAL CODE: SENTENCING § 6.06(2)(a).

36. See MODEL PENAL CODE: SENTENCING § 6.06(10) (abolishing parole boards).

37. See, e.g., Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 637 (1963).

38. See Loewy, *supra* note 3.

39. Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases*, 48 SAN DIEGO L. REV. 1127 (2011); Christopher Slobogin,

These latter assertions are best elaborated upon elsewhere, however. The important point for now is that Arnie's article provides significant insight into the role of dangerousness in the criminal law.⁴⁰ In the course of doing so, Arnie helps us understand how the two dominant approaches to criminal law doctrine, the common law and the MPC, differ from one another.⁴¹ Even though *Culpability, Dangerousness, and Harm* was written over thirty years ago, it is still highly relevant to modern debates about criminal law.

II. THE ROLE OF MENTAL ILLNESS IN CRIMINAL JUSTICE

The insanity defense is maligned by much of the public.⁴² But it also has stout defenders, albeit most of them academics.⁴³ On the one side are those who insist that if a person does the crime, they should do the time.⁴⁴ On the other side are those who argue, based primarily on retributive considerations, that punishment of people who were seriously mentally ill at the time of their offense is immoral.⁴⁵ To date, the latter group has prevailed in most states.⁴⁶

However, even where it is recognized that the criminal law cannot justly convict defendants whose mental illness renders them blameless, there is serious disagreement over how to define who is blameless in this way. Some states prefer a broad exculpatory test, such as the MPC's formulation that excuses people who, by reason of mental disease or defect, manifest a substantial inability to appreciate the wrongfulness of their criminal conduct or to conform their conduct to the requirements of the law.⁴⁷ Many states today reject this test, however. Most states do not recognize the second part of the MPC's test (the so-called volitional prong),⁴⁸ both on the ground that it is impractical—as summarized in the observation that an irresistible impulse can only rarely be distinguished from an impulse that was not resisted⁴⁹—and in the belief that it is unnecessary—because a person who is truly out of control also will have significant cognitive impairment.⁵⁰ And

A Defence of Modern Risk-Based Sentencing, in PREDICTIVE SENTENCING: NORMATIVE AND EMPIRICAL PERSPECTIVES 107, 116–18 (Jan W. de Keijser et al. eds., Hart Publishing 2019).

40. See Loewy, *supra* note 1.

41. *Id.*

42. Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 603 (1990) (“[T]he public continues to endorse a substantive test for insanity that approximates the ‘wild beast’ test of 1724.”).

43. See MELTON ET AL., *supra* note 6, at 202.

44. See *id.*

45. See, e.g., Richard J. Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 194–95 (1983).

46. See MELTON ET AL., *supra* note 6, at 204 (noting that only four states have abolished the defense but recounting the various other limitations that states have imposed on the insanity defense).

47. *Id.* at 208.

48. *Id.* at 216.

49. See AM. PSYCHIATRIC ASS'N, STATEMENT ON THE INSANITY DEFENSE 11 (1982).

50. See Stephen J. Morse, *Rationality and Responsibility*, 74 S. CAL. L. REV. 251, 257 (2000) (“[D]isorders of desire should excuse only in those cases in which the desire is so strong and

among those states that adopt this first, cognitive-impairment-only test, some adhere to the nineteenth-century *M'Naghten* language that limits the defense to when a person does not know the charged offense was a crime,⁵¹ while others provide that it should also apply when a person does not appreciate the enormity of the crime or in some other way behaves irrationally despite knowing their acts are prohibited by law.⁵²

And then there is Arnie. In *The Two Faces of Insanity*, Arnie argues that people with mental illness should never or almost never be entitled to a special defense of insanity.⁵³ Rather, they should only have a defense when people who are not mentally ill would have a defense.⁵⁴ So on the one hand—or to follow the article's title, on one face—Arnie contends that courts must permit evidence of mental illness that negates the *mens rea* for the crime, just like courts permit introduction of any other evidence that disputes the prosecution's contention that the defendant intended the act.⁵⁵ Consistent with that view, Arnie disagrees with the Supreme Court's decision in *Clark v. Arizona*, in which the Court disallowed expert testimony to the effect that Clark's schizophrenia led him to believe the police officer he killed was a space alien, not the human required for homicide.⁵⁶ On the other hand (or face), Arnie argues that a person who intentionally kills another in the delusional belief that God has so commanded should not have a defense, any more so than terrorists who believe Allah directed them to kill.⁵⁷ Nor, says Arnie, is a person whose mental illness causes him to believe that killing the President will cause an actress to fall for him—allegedly the case with John Hinckley—any less guilty than any other person who tries to impress another through audacious crimes.⁵⁸

Arnie's approach to the insanity defense would significantly narrow an already narrow defense. But I come pretty close to agreeing with him. In my book, *Minding Justice*,⁵⁹ as well as in the same law review issue in which Arnie published his article,⁶⁰ I argued that the MPC's insanity formulation is overbroad because, taken literally, it would exculpate psychopaths—who are incapable of emotionally appreciating their crimes—and pedophiles—who

overwhelming that the agent at least temporarily loses the capacity to be guided by reason. Thus, the problem would be irrationality and not compulsion.”).

51. See MELTON ET AL., *supra* note 6, at 204.

52. *Id.*

53. Loewy, *supra* note 2, at 513 (“[I]nsanity should rarely, if ever, exculpate.”).

54. *Id.* at 513–14.

55. *Id.* at 520. Arnie's example there is of a defendant who wants to present expert testimony opining that his eyesight was so bad he could not have seen that he was shooting at a person. *Id.*

56. *Clark v. Arizona*, 548 U.S. 735, 761–65 (2006).

57. Loewy, *supra* note 2, at 515.

58. *Id.* at 514.

59. See CHRISTOPHER SLOBOGIN, *MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY* 23–61 (2006).

60. Christopher Slobogin, *A Defense of the Integrationist Test as a Replacement for the Special Defense of Insanity*, 42 TEX. TECH L. REV. 523 (2009).

have very strong urges.⁶¹ Instead, I suggested an “integrationist” way of treating people with mental illness who commit crime; like Arnie, I argued that people with mental illness should be treated no differently than people who do not have mental illness.⁶²

So, Arnie has at least one supporter—me. In possible contrast with Arnie, however, my proposal is based on the assumption that integrationism is only justifiable if the applicable criminal law comes from the MPC, which as the previous section of this Article noted, is much more subjectively oriented than the common law.⁶³ This is true not only when it comes to *mens rea*, but also in connection with the affirmative defenses, which under the MPC are defined in terms of whether the defendant believed that justificatory circumstances were present regardless of whether those circumstances were in fact present.⁶⁴ Thus, consistent with the MPC, defendants, mentally ill or not, might have a defense to homicide not only if they lacked the requisite *mens rea* (as Arnie suggests) but also if they honestly believed that the victim was attacking them with deadly force (subjectively defined self defense), or that they would be killed unless they used deadly force against a third party (subjectively defined duress).⁶⁵ So while I agree that a defense should not be available to either the terrorist hypothesized above or to John Hinckley—because their motivating beliefs were not justificatory—I think, contrary to Arnie, that Andrea Yates should have a defense, at least if, as her experts contended, she believed that killing her children would send them to Heaven while not doing so would condemn them to Hell.⁶⁶

Further, while I agree with Arnie that people who do not think they are killing a human being should have a defense to murder, I also think they should have a defense to negligent homicide, because the MPC defines negligence as conduct that is unreasonable under “the circumstances known to [the actor]” at the time of the offense.⁶⁷ If Clark is to be believed, what he knew at the time of the offense was that he was committing alienicide, not killing a human.⁶⁸ Thus, under the MPC, he did not have the *mens rea* for

61. *Id.* at 524–26.

62. *Id.* at 528 (“I propose the elimination of the special defense of insanity and the integration of defenses for people with mental illness into the other standard defenses.”).

63. See Robinson, *supra* note 25, at 321–22 (explaining that conflicts arise dependent on whether there is an objective or subjective approach).

64. Slobogin, *supra* note 60, at 528 (describing §§ 3.02–.08 of the MPC, which adopts this position).

65. *Id.* at 528–29.

66. Compare *id.* at 542 (arguing terrorists that kill in the name of Allah should not have an insanity defense), and Slobogin, *supra* note 60, at 53–54 (explaining that an individual who kills because he believes it will lead to love would not have an insanity defense), with Loewy, *supra* note 2, at 522 (stating that this standard would support convicting Andrea Yates, an individual with serious psychosis), and Loewy, *supra* note 2, at 522 n.61 (explaining that Andrea Yates’ murders were essentially euthanasia killings and should have been considered manslaughter).

67. Slobogin, *supra* note 60, at 529 (emphasis omitted).

68. *Id.*

even the lowest level of homicide.⁶⁹

My proposal also has one further tweak that may differ from Arnie's. In defending his opposition to the decision in *Clark*, Arnie mentions that people who lack the requisite *mens rea* because of mental illness have done nothing to deserve the imputation of a more blameworthy state of mind.⁷⁰ I generally agree with that sentiment. But I also note that, consistent with the MPC, if a person with mental illness knowingly causes their exculpatory state—for instance, if they stop taking anti-psychotic medication knowing that doing so will cause homicidal thoughts—a different outcome might be necessary.⁷¹

Whatever one thinks of these disputes, Arnie's article clearly provides much food for thought. Indeed, during the oral argument in *Kahler v. Kansas* as to whether the insanity defense may be constitutionally abolished (a case that had not been decided at the time this Article went to press), the Justices of the Supreme Court took quite seriously Kansas's argument in favor of a position very similar to Arnie's.⁷² So once again, upon close examination, a seemingly radical proposal of Arnie's turns out to be not all that radical.

III. THE ROLE OF DNA IN CRIMINAL JUSTICE

That cannot be said about the third article of Arnie's that I want to discuss. In *A Proposal for a Universal Database*, written for the 2015 edition of *Texas Tech Law Review's* Criminal Law Symposium, Arnie suggests that DNA samples be taken from all newborns and that everyone else in the country be required to spit in a cup, all in an effort to construct a universal genetic database.⁷³ Arnie does not address how he would deal with foreigners who enter the country, who presumably also need to be genetically profiled if the database is to be truly universal. But because aliens are routinely required to give fingerprints, requesting a buccal swab from them would not be much of an additional imposition, and Arnie would probably view that requirement as a friendly amendment to his scheme.⁷⁴

Arnie defends this proposal primarily through the prism of the Fourth Amendment, perhaps because the topic of the symposium that year was: "The Fourth Amendment in the 21st Century."⁷⁵ Of course, Arnie's article makes much of the decision in *Maryland v. King*, a Fourth Amendment challenge of a statute permitting the state to maintain DNA profiles of people who were arrested for serious crimes.⁷⁶ After weighing the state's interest in accurately

69. *Id.* at 529–30.

70. Loewy, *supra* note 2, at 521.

71. Slobogin, *supra* note 60, at 530–31.

72. *Kahler v. Kansas*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/Kahler-v-Kansas/> (last visited Nov. 20, 2019).

73. Loewy, *supra* note 3, at 262.

74. 8 U.S.C. § 1302 (2012) (detailing the "Registration of Aliens").

75. Loewy, *supra* note 3, at 261.

76. *Maryland v. King*, 569 U.S. 435, 465 (2013).

identifying people it had arrested against the arrestee's interest in avoiding a buccal swab, the Court upheld the law,⁷⁷ a conclusion that provides partial support for Arnie's position.

But Arnie's proposal for a universal database obviously goes quite a bit further than the Court was willing to go in *King*. He defends his position using the same balancing analysis that the Court relied on in *King*.⁷⁸ With respect to the benefits of his proposal, Arnie points out that society's interest in DNA profiles goes well beyond the need to identify arrestees, to include solving crimes in an accurate way and absolving people who are wrongly accused.⁷⁹ The *King* majority presumably recognized both of these benefits, but disingenuously ignored them for doctrinal reasons too convoluted to discuss here.⁸⁰ Arnie sees no reason to be so opaque about the societal benefits of a DNA database, and points out that a *universal* database would provide considerably more benefit than one simply focused on arrestees.

On the individual side of the ledger, Arnie sees very little to worry about, not only because—consistent with *King*'s conclusion—obtaining a swab or spittle is a minor inconvenience⁸¹ but also because, under his plan, the database would be used only to identify “criminals, amnesiacs, and dead bodies.”⁸² Arnie recognizes the potential for abuse of such a database.⁸³ But he emphasizes that the genetic material needed to determine whether crime-scene DNA belongs to a particular person need not reveal any sensitive information.⁸⁴ More specifically, although Arnie does not go into detail on this score, profiles could consist merely of a few dozen short-tandem repeats (STRs), which are sufficient to match crime-scene DNA with database DNA without revealing information about health, proclivities, or ethnicity.⁸⁵

Despite this limitation, Arnie's proposal was not kindly received at the Symposium, with several audience members suggesting it was tantamount to endorsing a totalitarian state, and all of his fellow panel members criticizing

77. *Id.*

78. Loewy, *supra* note 3, at 266.

79. *Id.* at 263 (“In the world that I envision in this proposal, not only would the guilty be more likely to be convicted, but the innocent would be less likely to be hassled as a suspect.”).

80. *King*, 569 U.S. at 442. As Justice Scalia put it in his dissenting opinion, “[t]he Court’s assertion that DNA is being taken, not to solve crimes, but to *identify* those in the State’s custody, taxes the credulity of the credulous.” *Id.* at 466 (Scalia, J., dissenting) (emphasis in original). Had the majority admitted that the DNA samples were taken for the purpose of solving crimes, it probably would have had to strike down the statute, given that it permitted suspicionless seizures. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (“We decline to suspend the usual requirement of individualized suspicion where the police seek to [search or seize] for the ordinary enterprise of investigating crimes.”).

81. Loewy, *supra* note 3, at 262–63 (contending that providing a spit specimen is less arduous than being summoned for jury or military duty).

82. *Id.* at 266.

83. *Id.* at 264.

84. *Id.* at 263.

85. See Jaehye Kim et al., *Statistical Detection of Relatives Typed with Disjoint Forensic and Biomedical Loci*, 175 CELL 848, 848–49 (2018).

it as well.⁸⁶ At the end of his article—perhaps with this outcry in mind—Arnie conjectures that regardless of its advantages, a universal database smacks too much of Orwell’s *1984* for most people.⁸⁷ Much of the rest of the world seems to agree.⁸⁸ In 2008, the European Court of Human Rights imposed severe limitations on arrestee-related databases,⁸⁹ prompting the United Kingdom to significantly scale back what had been one of the West’s largest DNA collection programs,⁹⁰ and in 2016, even the autocratic regime in Kuwait abandoned plans for a universal database after pushback from civil rights groups.⁹¹

Even so, I think the idea of a universal DNA database here in the United States is well worth considering, for a number of reasons besides those Arnie gives. First, police already delve into the genetic material of large segments of the population in ways that are minimally regulated.⁹² In the recent Golden State Killer case, law enforcement officers submitted crime-scene DNA to GEDMatch, a database of almost one million DNA profiles that is accessible by anyone who has had their DNA sequenced and has willingly submitted it to this repository (most often in an effort to discover relatives).⁹³ Not only did the police fail to tell GEDMatch that they were police or that the DNA came from a crime scene, they also carried out their ruse without a warrant or even a subpoena.⁹⁴ Rather, posing simply as someone with a profile who wanted to see who matched it, they obtained a DNA hit which turned out to be a relative of Joseph DeAngelo, the person who was eventually charged with scores of killings.⁹⁵ While this was a win for law enforcement, it also exposed the increasingly common practice of familial matching, whereby police find a perpetrator only after interviewing people (usually, but not always, relatives) whose profiles partially match crime-scene DNA.⁹⁶ The claim has been made that this methodology—or something like it—can

86. See Loewy, *supra* note 3, at 266 (“I am quite certain I have not persuaded my colleagues on this panel.”).

87. *Id.*

88. See J. W. Hazel et al., *Is It Time for a Universal Genetic Forensic Database?*, 362 SCI. 898, 899 (2018).

89. *S. & Marper v. the United Kingdom*, App. No. 30562/04, 30566/04 Eur. Ct. H.R. (2008).

90. See H. M. Wallace et al., *Forensic DNA Databases—Ethical and Legal Standards: A Global Review*, 4 EGYPTIAN J. FORENSIC SCI. 57, 58 (2014).

91. Glyn Moody, *Kuwait Backtracks on Mandatory DNA Database of All Citizens and Visitors*, TECHDIRT (Oct. 25, 2016, 11:23 PM) <https://www.techdirt.com/articles/20161023/03322035861/kuwait-backtracks-mandatory-dna-database-all-citizens-visitors.shtml>.

92. Avi Selk, *The Ingenious and Dystopian DNA Technique Police Used to Hunt Down the “Golden State Killer” Suspect*, WASH. POST (Apr. 28, 2018, 8:50 AM) <https://www.washingtonpost.com/news/true-crime/wp/2018/04/27/golden-state-killer-dna-website-gedmatch-was-used-to-identify-joseph-deangelo-as-suspect-police-say/>.

93. *Id.*

94. *Id.*

95. *Id.*

96. See Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 297–99 (2010) (arguing that such searches should not be permitted or should be strictly regulated).

identify a third cousin, or an even closer relative, of roughly 60% of people with European ancestry,⁹⁷ which means that once enhanced by familial matching, available databases are already on their way to providing universal coverage.

And this is not the only way police get DNA data.⁹⁸ They can also try to access DNA profiles maintained by private “direct-to-consumer” companies like Ancestry.com and 23andMe, which together are estimated to house the DNA of over 20 million people and usually retain much more genomic information than simple STRs.⁹⁹ While these companies claim that they will resist law enforcement requests in the absence of a court order, a mere subpoena might well suffice.¹⁰⁰ Even federally funded research databases, supposedly protected by Certificates of Confidentiality, may not be immune from a warrant or subpoena.¹⁰¹

A final way police access DNA, of course, is from their own databases. Now that *King* has sanctioned the process, over half the states routinely collect DNA samples from both convicted individuals and those who have merely been arrested.¹⁰² Some jurisdictions even engage in “stop-and-spit” practices designed to get samples from people detained on the street.¹⁰³ Not surprisingly, given the makeup of the prison population, the resulting government-maintained DNA databases are skewed toward the disadvantaged and people of color,¹⁰⁴ which explains why the police had to

97. Yaniv Erlich et al., *Identity Inference of Genomic Data Using Long-Range Familial Searches*, 362 SCI. 690, 690 (2018).

98. Leah Larkin, *Database Sizes—September 2018 Update*, DNA GEEK (Sept. 3, 2018), <https://thednageek.com/database-sizes-september-2018-update/>.

99. *Id.*

100. See Michael Balsamo, *Genetic Website Subpoenaed in California Serial Killer Probe*, ASSOCIATED PRESS (May 1, 2018), <https://www.apnews.com/7ed5154e100e4ed2b1ac391d2faea203>. Direct-to-consumer genetic companies like 23andMe all state that, while they seek to protect consumer privacy, they will submit to lawful court orders. See, e.g., *23andMe Guide for Law Enforcement*, 23ANDME, <https://www.23andme.com/law-enforcement-guide/> (last visited Nov. 20, 2019) (stating that 23andMe will answer “inquiries as defined in 18 USC § 2703(c)(2) related to [sic] a valid trial, grand jury or administrative subpoena, warrant, or order.”).

101. Laura M. Beskow, Lauren Dame & E. Jane Costello, *Certificates of Confidentiality and Compelled Disclosure of Data*, 322 SCI. 1054, 1054 (2008) (“Although Certificates are commonly believed to offer ‘nearly absolute privacy protection’ . . . there is a remarkable paucity of evidence on which to base such conclusions.”). Although these certificates are supposed to guarantee immunity from court process, see 42 U.S.C. § 241(d)(1)(E). It is not clear that they do so. *Id.*

102. See NAT’L CONF. OF ST. LEGISLATURES, DNA ARRESTEE LAWS 1, <http://www.ncsl.org/Documents/cj/ArresteeDNALaws.pdf>. According to the National Conference of State Legislatures, states allow DNA sampling of arrestees, with eight of those states allowing sampling of people arrested for misdemeanors. *Id.* at 2.

103. Lauren Kirchner, *DNA Dragnet: In Some Cities, Police Go From Stop-and-Frisk to Stop-and-Spit*, PROPUBLICA (Sept. 12, 2016, 8:00 AM), <https://www.propublica.org/article/dna-dragnet-in-some-cities-police-go-from-stop-and-frisk-to-stop-and-spit>.

104. See Andrea Roth, *Maryland v. King and the Wonderful, Horrible DNA Revolution in Law Enforcement*, 11 OHIO ST. J. CRIM. L. 295, 308 (2013) (footnotes omitted) (“[B]y 2011, African-Americans made up 40% of the CODIS database [containing the DNA of convicted individuals] and, according to a Duke University study, CODIS could be used to identify ‘up to 17% of the country’s entire African-American population.’ Adding arrestees makes matters worse. In California alone,

resort to GEDMatch to find DeAngelo, a white, middle class, retired police officer.¹⁰⁵ And as noted above, when the person of interest is not in the database, the police can still track a person down through relatives who are, which means innocent people become the focus of unwanted police attention simply because of their genes.¹⁰⁶

A universal database might not only be a more effective law enforcement tool than this haphazard regime, but in practice may also be less discriminatory and more protective of privacy. Because everyone in the country—including its most influential citizens—would be in the database, Congress could be counted on to make sure: (1) that only the narrow DNA profile necessary for law enforcement is extracted from samples; (2) that samples are then destroyed; (3) that the rules governing the security of, and police access to, the database would be tight; and (4) that serious penalties for breach of the rules would be imposed.¹⁰⁷ And because *everyone* is in the database, government DNA sampling would no longer be racially or socially lopsided, and stop-and-spit and familial matching practices would no longer be necessary. Nor would law enforcement need access to public or private databases, access which, for that reason, would likely be prohibited by law.

While all of this might still seem like a stretch from the Fourth Amendment perspective, note that courts could, and probably would, prohibit searches of a universal database for a match unless and until the police show probable cause that the DNA sought to be matched belongs to the perpetrator.¹⁰⁸ Such a showing is only possible when a DNA database is universal or close to it.¹⁰⁹ Under the current system, in contrast, a probable cause finding is much harder to come by because a match using a smaller database is most likely either not forthcoming at all or will only be to a relative of the perpetrator, not the actual perpetrator.¹¹⁰

So despite the controversy triggered by his universal DNA database proposal, Arnie may have been on to something. He usually is.

approximately 30% of people arrested for a felony are never convicted. And while African-Americans make up only 6.6% of California's population, they comprise over 22% of those arrested for felonies. . . . The disparity is surely worse in jurisdictions that allow familial searching and unofficial, 'offline' databases full of suspects who are stopped by police and who 'volunteer' DNA in return for not being arrested.'").

105. See Selk, *supra* note 92.

106. See Murphy, *supra* note 96, at 294.

107. See Hazel et al., *supra* note 88, at 899 (discussing the benefits of a universal DNA database).

108. *Id.* at 900 (discussing ways to limit misuse of universal DNA databases).

109. *Id.*

110. *Id.* at 898–99 (explaining that most U.S. jurisdictions merely require a showing of relevance to obtain a subpoena to force direct-to-consumer DNA providers to provide DNA matches).