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# PEOPLE V. BUZA: A STEP IN THE WRONG DIRECTION

Emily R. Pincin\*

## I. INTRODUCTION

The use of deoxyribonucleic acid (DNA) in criminal investigations is a relatively recent development.<sup>1</sup> Originally, DNA profiling was developed as a means to establish paternity.<sup>2</sup> DNA profiling only made its way into criminal courts in 1986, when a molecular biologist used DNA evidence to prove that a teenager was not in fact the perpetrator of two murders.<sup>3</sup> In 1987, a Florida rapist became the first person in the United States to be convicted as a result of DNA evidence.<sup>4</sup>

Now, forensic DNA is used increasingly as a crime-solving weapon.<sup>5</sup> For example, in 2018, California law enforcement officials arrested the notorious Golden State Killer, i.e., Joseph James DeAngelo, who was responsible for a series of rapes and burglaries in the 1970s and 1980s.<sup>6</sup> Authorities were able to track down DeAngelo by creatively providing his DNA (which was left at old crime scenes) to the free, open-source DNA analysis company GEDmatch, which confirmed a DNA match to a family member that had previously

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1. See Kathryn Zunno, *United States v. Kincaid and the Constitutionality of the Federal DNA Act: Why We'll Need a New Pair of Genes to Wear Down the Slippery Slope*, 79 ST. JOHN'S L. REV. 769, 769–70 (2005).

2. Lisa Calandro et al., *Evolution of DNA Evidence for Crime Solving – A Judicial and Legislative History*, FORENSIC MAG. (Jan. 6, 2005, 3:00 AM), <https://www.forensicmag.com/article/2005/01/evolution-dna-evidence-crime-solving-judicial-and-legislative-history>.

3. *Id.*

4. Randy James, *A Brief History of DNA Testing*, TIME (June 19, 2009), <http://content.time.com/time/nation/article/0,8599,1905706,00.html>.

5. *Id.*

6. Thomas Fuller & Christine Hauser, *Search for 'Golden State Killer' Leads to Arrest of Ex-Cop*, N.Y. TIMES (Apr. 25, 2018), <https://www.nytimes.com/2018/04/25/us/golden-state-killer-serial.html>.

submitted his or her DNA for genetic testing.<sup>7</sup> This is not the first time police were able to track down a criminal with the creative use of an individual's DNA.<sup>8</sup>

As the use of DNA in investigations continues to grow, so does the number of ethical and legal controversies. One such controversy is whether laws requiring the collection of DNA from every person arrested for a felony (and some misdemeanors) is lawful under either the Fourth Amendment of the United States Constitution or under a respective state's constitution.

Article I, section 13 of the California Constitution guarantees the "right of the people to be secure . . . against unreasonable searches and seizures."<sup>9</sup> The constitutional right to privacy is a cornerstone in both the Federal and California Constitutions. The right to privacy has historically been the focal point in the debate over how the state should balance the security of the people with individual civil liberty. In order to bolster California's goal to increase state security and substantially reduce the number of unsolved crimes, the electorate included Proposition 69 (the DNA Fingerprint, Unsolved Crime, and Innocence Protection Act) on the November 2, 2004, general election ballot.<sup>10</sup>

In 2004, California voters passed Proposition 69, often referred to as the "DNA Fingerprint, Unsolved Crime and Innocence Protection Act" (the "DNA Act" or the "Act").<sup>11</sup> Prior to the passage of the DNA Act, California law allowed for DNA collection from only convicted felons.<sup>12</sup> The DNA Act allows for collection of DNA samples of anyone arrested (for a non-exhaustive list of crimes), even if that individual is wrongfully arrested or among the thousands of

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7. Avi Selk, *The Ingenious and "Dystopian" DNA Technique Police Used to Hunt the "Golden State Killer" Suspect*, WASH. POST, (Apr. 28, 2018), [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/?noredirect=on&utm\\_term=.8b2710ec48d9](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/?noredirect=on&utm_term=.8b2710ec48d9).

8. In 2005, police arrested the Kansas-based killer, "BTK," after successfully obtaining a familial DNA match from a tissue sample from a Pap smear recently performed on his daughter. Mark Hansen, *How the Cops Caught BTK: Playing to a Serial Killer's Ego Helped Crack the Case*, A.B.A. J. (May 1, 2006), [http://www.abajournal.com/magazine/article/how\\_the\\_cops\\_caught\\_btk](http://www.abajournal.com/magazine/article/how_the_cops_caught_btk).

9. CAL. CONST. art. I, § 13.

10. *DNA Samples. Collection. Database. Funding.*, U.C. HASTINGS SCHOLARSHIP REPOSITORY 9 (2004), [https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2230&context=ca\\_ballot\\_props](https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2230&context=ca_ballot_props).

11. The DNA Act was approved by 62 percent of voters and took effect in 2009. *Proposition 69*, INST. OF GOVERNMENTAL STUD., U.C. BERKELEY, (Nov. 2, 2004), <https://igs.berkeley.edu/library/elections/proposition-69>; *Proposition 69 (DNA)*, ST. OF CAL. DEP'T OF JUST., <https://oag.ca.gov/bfs/prop69> (last visited Nov. 17, 2019).

12. *DNA Samples. Collection. Database. Funding.*, *supra* note 10, at 62.

people that are arrested every year and never charged with a crime.<sup>13</sup> Further, the Act allows for an arrestee's DNA to be submitted to the state DNA database *and* analyzed before the arrestee is convicted or even charged with a crime.<sup>14</sup>

Proponents of the DNA Act rely on the argument that the Act protects the innocent, helps solve crime, and frees those wrongly accused.<sup>15</sup> Courts have upheld the constitutionality of similar DNA collection statutes on the grounds that the law is intended to be used for the purpose of identifying arrestees upon booking and is thus constitutional.<sup>16</sup> Nevertheless, the very first subsection under Proposition 69's Declaration of Purpose reads, "Our communities have a compelling interest in protecting themselves from crime."<sup>17</sup> Based upon the language of this subsection, opponents of the Act opine that the Act was not designed for the purpose of quickly and efficiently identifying arrestees but for crime-solving purposes by extracting DNA without a warrant or individualized suspicion.<sup>18</sup>

Recently, the California Supreme Court weighed in on California's DNA Act in *People v. Buza*.<sup>19</sup> On April 2, 2018, the court affirmed Buza's misdemeanor conviction for refusing to provide a DNA sample when he was arrested for felony arson.<sup>20</sup> At the time Buza refused to provide a cheek swab, he had neither been found guilty of a crime, nor had a magistrate judge determined that there had been probable cause for his arrest.<sup>21</sup> It is well established that, at the time of Buza's arrest, he was presumed innocent in the eyes of the law; however, the DNA Act required Buza to submit a cheek swab prior to being charged or convicted.

In a 4-3 decision, the California Supreme Court upheld California's DNA Act under both the Fourth Amendment to the United States Constitution and the California Constitution.<sup>22</sup> The *Buza*

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13. *Id.*

14. *Id.* at 61.

15. *Id.* at 9.

16. *See, e.g.,* *Maryland v. King*, 569 U.S. 435, 465–66 (2013).

17. CAL. SEC'Y OF STATE, *Text of Proposed Laws*, 135 [https://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/sec\\_state\\_full\\_version\\_prop69.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/sec_state_full_version_prop69.pdf). Based upon the plain language of the proposed proposition, it is clear that the true legislative purpose of this initiative is crime-solving, not for identifying arrestees.

18. *DNA Samples. Collection. Database. Funding., supra* note 10, at 62–63.

19. 413 P.3d 1132, 1135 (Cal. 2018).

20. *Id.* at 1155.

21. *See id.*

22. *Id.*

majority missed a rare opportunity to reassert the independence and importance of California's Constitution, which is discussed at length in both Justice Liu's and Justice Cuéllar's dissents. As discussed below, the California Constitution protects individual rights beyond the bounds of the United States Constitution. By failing to reassert the independent force of California's Constitution, which affords arrestees greater rights than those provided by the United States Constitution, the *Buza* majority took a step in the wrong direction for criminal procedural rights. This decision signals an uphill battle to restore precedent that appropriately reflects the core values of the California Constitution.

## II. STATEMENT OF THE CASE

### A. *The Facts*

On January 21, 2009, a San Francisco police officer saw Mark Buza running away from a police car that had burning tires.<sup>23</sup> The police pursued Buza and, upon searching him, found matches in his pocket and a container of oil in his backpack.<sup>24</sup> Close to where Buza had been hiding, police also discovered a road flare and a bottle containing what smelled like gasoline.<sup>25</sup>

The police arrested Buza and took him to county jail.<sup>26</sup> Several hours after Buza's arrest, a sheriff's deputy asked Buza to swab the inside of his cheek to obtain a DNA sample.<sup>27</sup> The deputy informed Buza that he was required by law to provide the sample and warned Buza that refusal to provide the sample would result in a misdemeanor charge.<sup>28</sup> Defendant nevertheless refused.<sup>29</sup>

The day after Buza's arrest, a superior court judge found probable cause to support a valid arrest for felony arson.<sup>30</sup> The following day, the district attorney filed a complaint charging Buza with felony arson, as well as with misdemeanor refusal to provide a DNA specimen.<sup>31</sup>

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23. *Id.* at 1137.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

Buza was eventually tried by a jury.<sup>32</sup> Buza moved for a judgment of acquittal on the misdemeanor refusal charge on the grounds that the Fourth Amendment does not allow for forced DNA swabs from arrestees.<sup>33</sup> The court denied Buza's motion, and the jury convicted him of all charges.<sup>34</sup>

Upon Buza's sentencing, the court ordered him to provide a DNA sample, and Buza again refused.<sup>35</sup> The court thereafter authorized the sheriff's department to use reasonable force to obtain Buza's DNA sample.<sup>36</sup> Buza subsequently complied with the order to supply the sample and was sentenced to a prison term of over sixteen months.<sup>37</sup>

### B. Case Procedure

On appeal, the California Court of Appeal reversed Buza's misdemeanor conviction and held:

[T]he DNA Act, to the extent it requires felony arrestees to submit a DNA sample for law enforcement analysis and inclusion in the state and federal DNA databases, without independent suspicion, a warrant or even a judicial or grand jury determination of probable cause, unreasonably intrudes on such arrestees' expectation of privacy and is invalid under the Fourth Amendment of the United States Constitution.<sup>38</sup>

On September 7, 2011, the California Attorney General filed a petition for review by the California Supreme Court and presented the question of whether the collection of forensic DNA samples from felony arrestees violates the Fourth Amendment to the United States Constitution.<sup>39</sup> The Attorney General's argument that review should be granted essentially proceeded as follows: the California Court of Appeal opinion: (1) invalidated a state voter initiative proposition; (2) jeopardized public safety; (3) conflicted with the reasoning of state and federal cases nationwide upholding DNA sample collection from both arrestees and convicted offenders; and (4) was at odds with the

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 1137–38.

36. *Id.*

37. *Id.* at 1138.

38. *People v. Buza*, 129 Cal. Rptr. 3d 753, 783 (Ct. App. 2011), *review granted and opinion superseded* by 262 P.3d 854 (Cal. 2011).

39. *Petition for Review at 1, People v. Buza*, 262 P.3d 854 (Cal. 2011) (No. S196200), 2011 WL 5073104, at \*1.

legislative judgments of twenty-four states and Congress, which have enacted laws authorizing collection of DNA samples from some categories of arrestees.<sup>40</sup>

The California Supreme Court granted review.<sup>41</sup> While Buza's case was pending before the California Supreme Court, the United States Supreme Court decided *Maryland v. King*<sup>42</sup> (discussed in more detail below), upholding a similar DNA collection procedure in Maryland.<sup>43</sup> Following the Supreme Court's decision in *King*, the California Supreme Court transferred Buza's case back to the California Court of Appeal for reconsideration.<sup>44</sup>

The California Court of Appeal again reversed Buza's misdemeanor conviction, this time on the grounds that the forced DNA swab violated Buza's right to be free from unreasonable searches and seizures under article I, section 13 of the California Constitution.<sup>45</sup> The California Court of Appeal declined to decide whether the California DNA Act and the Maryland law were significantly different to warrant a separate Fourth Amendment analysis than that applied by the Court in *King*.<sup>46</sup>

The California Supreme Court again granted review, this time to decide whether the collection and analysis of forensic identification DNA samples from felony arrestees violates either article I, section 13 of the California Constitution or the Fourth Amendment to the United States Constitution.<sup>47</sup> In a sharply-divided, 4-3 decision, the California Supreme Court upheld California's DNA Act under both the United States and California Constitutions.<sup>48</sup>

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40. *Id.* at \*2.

41. *Buza*, 413 P.3d at 1138.

42. 569 U.S. 435 (2013).

43. *See generally id.* (holding that using buccal swabs to obtain defendant's DNA sample after arrest and analyzing that sample did not violate the Fourth Amendment).

44. *Buza*, 413 P.3d at 1138.

45. *People v. Buza*, 180 Cal. Rptr. 3d 753, 795–96 (Ct. App. 2014), *rev'd*, 413 P.3d 1132 (Cal. 2018).

46. *Id.* at 767.

47. *Buza*, 413 P.3d at 1138.

48. *See generally id.* at 1135, 1155.

### III. REASONING OF THE COURT

#### A. *The Majority*

Buza made a number of points in support of his argument that his misdemeanor conviction should be overturned. Buza argued that California's DNA Act differed from the Maryland collection law discussed in *Maryland v. King*, such that these differences should change the DNA Act's constitutional analysis under both the Fourth Amendment and the California Constitution.<sup>49</sup> For instance, the California DNA Act applies to a broader category of arrestees than the Maryland law.<sup>50</sup> Additionally, in California, collection *and* analysis of arrestee DNA samples is permitted before the arrest is deemed valid by a judicial determination.<sup>51</sup> Further, under the California law, DNA samples from exonerated arrestees (or arrestees that are never charged or convicted) are not automatically destroyed.<sup>52</sup> Finally, Buza argued that the Court in *King* misidentified the "legitimate" government interest of Maryland's DNA collection law and therefore incorrectly upheld the law.<sup>53</sup>

The majority's holding relied mostly on the United States Supreme Court's ruling in *Maryland v. King*.<sup>54</sup> Indeed, Justice Kreuger, the author of the *Buza* majority, noted that "*King*, which was issued while this appeal was pending, has significantly altered the terms of the debate" about whether the Fourth Amendment categorically forbids the mandatory collection of DNA from persons who have been arrested for, but not yet convicted of, felony offenses.<sup>55</sup> A brief discussion of *King* is therefore warranted.

#### 1. *Maryland v. King*

In *King*, defendant Alonzo Jay King, Jr. was arrested on first- and second-degree assault charges.<sup>56</sup> After King was arrested, but prior to conviction, his cheek was swabbed, and his DNA was logged into

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49. *Id.* at 1141, 1143.

50. *Id.* at 1141.

51. *Id.*

52. *Id.*

53. See Appellant's Answer Brief on the Merits at 52, *People v. Buza*, 413 P.3d 1132 (Cal. 2015) (No. S223698), 2015 WL 5090233, at \*52.

54. *Buza*, 413 P.3d at 1141, 1153.

55. *Id.* at 1139.

56. *Maryland v. King*, 569 U.S. 435, 440 (2013).



Maryland's DNA database.<sup>57</sup> When King's DNA was later analyzed after his arraignment, the database returned a "hit" linking King's DNA to a DNA sample taken from a rape cold case.<sup>58</sup> This evidence was presented to a grand jury, which called for an indictment.<sup>59</sup> As a result, a warrant was procured to obtain a second DNA sample that could be used as evidence in the rape case against King.<sup>60</sup> King filed a motion to suppress the DNA evidence on the grounds that it infringed upon his Fourth Amendment rights.<sup>61</sup>

The United States Supreme Court decision was close, but the result was a 5-4 ruling in favor of the State of Maryland.<sup>62</sup> The majority described Maryland's DNA law as follows: "The Act authorizes Maryland law enforcement authorities to collect DNA samples [in the form of a buccal cheek swab] from 'an individual who is charged with . . . a crime of violence or an attempt to commit a crime of violence; or . . . burglary or an attempt to commit burglary.'"<sup>63</sup> The Court found that the Maryland law did not violate the Fourth Amendment to the United States Constitution.<sup>64</sup>

The Court recognized that, though taking a cheek swab from an arrestee does constitute a "search" under the Fourth Amendment, such a search is reasonable because: (1) arrestees in custody for a crime supported by probable cause have a diminished expectation of privacy; (2) the swab involved minimal intrusion and is quick and painless; and (3) a legitimate government interest is served.<sup>65</sup> Writing for the majority, Justice Kennedy found that the government's interest in identifying and processing arrestees weighed strongly in favor of collecting DNA samples.<sup>66</sup>

The scathing dissent, written by the late Justice Antonin Scalia and joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, maintained that "categorically" and "without

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57. *Id.* at 441.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* The court denied his motion, but the Maryland Court of Appeals reversed. *Id.* The state of Maryland then appealed the ruling and requested that the issue be reviewed by the United States Supreme Court. *Id.* at 442.

62. *See id.* at 438.

63. *Id.* at 443 (alteration in original).

64. *Id.* at 465-66.

65. *See id.* at 465.

66. *Id.* at 449.

exception,” the “Fourth Amendment forbids searching a person for evidence of a crime where there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence.”<sup>67</sup> Justice Scalia even read his dissent from the bench, “signaling deep disagreement” with the majority’s decision.<sup>68</sup> In response to the majority’s argument that the cheek swab search is non-invasive, Justice Scalia noted, “No matter the degree of invasiveness, suspicionless searches are *never* allowed if their principal end is ordinary crime-solving.”<sup>69</sup>

Additionally, the dissent called out the majority’s argument that the Maryland law is reasonable because it served the special purpose of “identifying” arrestees.<sup>70</sup> The dissent rebutted that assertion and argued that “identification” was not the true goal of the Maryland law; instead, the purpose was to “search[] for evidence that [the arrestee] committed crimes unrelated to the crime of his arrest.”<sup>71</sup> Further, King’s DNA was not tested until he was arraigned, days after his arrest, because Maryland law forbids officials from doing so.<sup>72</sup> The dissent pointed out that officials likely did not wait until King’s arraignment to ask him his name or take his fingerprints.<sup>73</sup> Accordingly, Maryland’s law could not logically be understood merely as an “identification” tool.

## 2. The Differences Between California’s DNA Act and Maryland’s DNA Collection Law Do Not Change the Fourth Amendment Analysis

The *Buza* majority, whose opinion was written by Justice Kruger, held that California’s DNA Act violates neither the United States Constitution nor the California Constitution.

As previously mentioned, *Buza* highlighted three features of California’s DNA Act that distinguished his case from *King*: (1) the DNA Act applies to a broader category of arrestees than the Maryland law; (2) the DNA Act authorizes both collection *and* testing of DNA

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67. *Id.* at 466 (Scalia, J., dissenting).

68. Adam Liptak, *Justices Allow DNA Collection After an Arrest*, N.Y. TIMES (June 3, 2013), <https://www.nytimes.com/2013/06/04/us/supreme-court-says-police-can-take-dna-samples.html>.

69. *King*, 569 U.S. at 469.

70. *Id.* at 469–70.

71. *Id.* at 470.

72. *See id.* at 471; *see also* MD. CODE ANN., PUB. SAFETY § 2-504(d)(1) (West 2019).

73. *King*, 569 U.S. at 471.

samples before a judicial determination has been made that an arrestee's charges are valid; and (3) the DNA Act does not provide for automatic destruction of the DNA sample if the arrestee is cleared of felony charges.<sup>74</sup>

The California Supreme Court addressed each of these differences in turn. The court first addressed the scope of the DNA Act's collection requirement.<sup>75</sup> The court disregarded the first difference identified by Buza and held that he cannot reasonably "attack a statute on grounds that are not shown to be applicable to himself."<sup>76</sup> Because Buza was arrested for a "serious felony" (arson), he could not attack California's DNA Act based on its potential application to other, differently-situated individuals.<sup>77</sup>

Next, the court addressed Buza's concern that California's DNA Act, unlike Maryland's law, allows officials to load an arrestee's DNA sample into a state-wide database *and* analyze it before the arrestee has been arraigned or before there has been a judicial determination that the arrest was valid.<sup>78</sup> The court determined that any differences between the California law and the Maryland law regarding the timing of the *collection* of DNA would not change the constitutional analysis in this case because DNA collection upon booking is a "legitimate police booking procedure."<sup>79</sup>

Nevertheless, Buza argued that it was the second step (the testing and recording of his DNA) that represented a great privacy intrusion.<sup>80</sup> The court observed that the reasoning of the majority in *King* did not lend support to Buza's argument that the analysis and recording of his DNA should be delayed until a probable cause finding has been made.<sup>81</sup> Buza argued that there would be no burden on law enforcement to delay such testing and recording until a probable cause determination had been made since it takes, on average, approximately

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74. *People v. Buza*, 413 P.3d 1132, 1141 (Cal. 2018).

75. *Id.*

76. *Id.* at 1142 (quoting *In re Cregler*, 363 P.2d 305, 308 (Cal. 1961)).

77. *See id.* at 1142.

78. *Id.* at 1142–43.

79. *Id.* at 1143. Nevertheless, California's DNA Act allows for collection of DNA "immediately following arrest." *Id.* ("As to the timing of collection, there is no reason to believe that the differences between California's law and Maryland's change the Fourth Amendment balance applicable in this case.")

80. *Id.*

81. *Id.*

thirty days to generate an identification profile from an arrestee's DNA sample.<sup>82</sup>

The court eventually concluded that it “[could not] proceed on the assumption that a rule delaying the collection or processing of samples until after a judicial probable cause finding or arraignment would pose no meaningful risk of interference with the central interest identified in *King*: the accurate identification of arrestees who are taken into police custody.”<sup>83</sup>

Finally, the court acknowledged Buza's concern that some arrestees who provide DNA samples may never be charged with a crime or—if charged—convicted.<sup>84</sup> Buza contended that California's DNA Act allows the state to retain an arrestee's DNA sample and associated records for an extended period of time and argued, essentially, that the DNA Act's expungement provisions are insufficient.<sup>85</sup> Regardless, the court deferred to the *King* ruling, where the majority attached no significance to Maryland's expungement procedures in the constitutional analysis.<sup>86</sup> The court refused to address the question of whether the Fourth Amendment requires automatic expungement of DNA samples for those that are exonerated or wrongfully arrested “because defendant in this case [was] neither.”<sup>87</sup>

In sum, the court found that any differences between California's and Maryland's DNA collection laws did not affect the Fourth Amendment analysis, and as such, Buza's misdemeanor refusal conviction did not violate his federal constitutional rights.<sup>88</sup>

### 3. The DNA Act Does Not Violate the California Constitution

Buza also argued, and the California Court of Appeal held, that even if requiring him to furnish a DNA sample as part of his arrest booking procedure did not violate his Fourth Amendment rights, it violated article I, section 13 of the California Constitution, which affords arrestees greater rights than those provided by the United

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82. *Id.* at 1144.

83. *Id.*

84. *Id.* at 1145.

85. *See id.* at 1146.

86. *Id.*

87. *Id.*

88. *Id.* at 1148.

States Constitution.<sup>89</sup> The California Supreme Court reviewed the constitutionality of the search under the California Constitution by weighing the gravity of the governmental interest or public concern served against the degree to which the government conduct interferes with individual liberty.<sup>90</sup>

The court thus presented the question of whether adequate reasons existed to conclude, despite the high court's ruling in *King*, that California voters exceeded constitutional bounds in mandating the collection of a DNA sample from arrestees.<sup>91</sup> Buza argued that there were several reasons to depart from the Supreme Court's ruling in *King*. Buza asserted that the Supreme Court's balancing test in *King* was flawed because the "legitimate governmental interest" was misidentified.<sup>92</sup> Though the *King* Court concluded that collecting DNA from people arrested for serious offenses serves the "legitimate governmental interest" in safely and accurately identifying the person in custody, Buza argued that arrestee DNA information is not used for identification purposes, but solely for investigation of possible other crimes.<sup>93</sup> Much like Justice Scalia's dissent in *King*, Buza's argument was that gathering information for such a purpose is unreasonable in the absence of a warrant or individualized suspicion.<sup>94</sup>

The court briefly acknowledged Buza's argument that DNA samples could be misused for investigative purposes; nevertheless, the court cited and deferred to its earlier decision in *People v. Robinson*,<sup>95</sup> where the court held that DNA collection from those convicted of dangerous felonies was constitutional because of its ability to accurately identify criminal offenders.<sup>96</sup> The court reminded Buza that DNA samples, such as cheek swabs, function as an identification tool in the same way as fingerprinting, which has been upheld as reasonable.<sup>97</sup>

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89. *Id.*

90. *See id.* (citing *Hill v. Nat'l Collegiate Athletic Ass'n.*, 865 P.2d 633, 650 (1994)).

91. *Id.* at 1150.

92. *See* Appellant's Answer Brief on the Merits, *supra* note 53, at 88.

93. *Id.*

94. *Buza*, 413 P.3d at 1150.

95. *People v. Robinson*, 224 P.3d 55 (Cal. 2010).

96. *Buza*, 413 P.3d at 1150–51 (citing *Robinson*, 224 P.3d at 65). The court cited to this case to support the constitutionality of the DNA Act, despite the significance in the difference of circumstances between *Robinson* and Buza's case.

97. *Id.* at 1151 (citing *Maryland v. King*, 569 U.S. 435, 451 (2013)).

The court rejected Buza's claim that *King* ignored the highly sensitive nature of genetic data revealed by an individual's DNA.<sup>98</sup> The court argued that DNA profiles are created by the non-coding sections of DNA and thus do not reveal any sensitive genetic data.<sup>99</sup> Further, the court acknowledged that the DNA Act forbids the use of DNA information for nonidentification purposes and, thus, does not implicate a privacy interest.<sup>100</sup>

Finally, in addressing Buza's argument that article I, section 13 of the California Constitution gives arrestees greater privacy rights than those afforded under the Fourth Amendment, the court offered a lengthy "reaffirmation" about the deference and respect that should be provided to decisions of the high court.<sup>101</sup> The court recognized that state constitutional law is independent from federal constitutional law and that decisions of the United States Supreme Court interpreting parallel federal text are not binding.<sup>102</sup> Nonetheless, the court said that "this court ordinarily resolve[s] questions about the legality of searches and seizures by construing the Fourth Amendment and article I, section 13 in tandem."<sup>103</sup>

The court held, "[T]he United States Supreme Court has resolved the question before us under the Fourth Amendment."<sup>104</sup> Buza's attempt to argue that the differences between the DNA Act and the law at issue in *King* should alter the state constitutional analysis was futile.<sup>105</sup> For reasons noted above, the court refused to reassess the constitutionality of the DNA Act as it applied to Buza's case.<sup>106</sup> Because the court found no reasons to justify rejecting the Supreme Court's guidance, Buza's misdemeanor conviction was upheld under the California Constitution.<sup>107</sup>

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98. *Id.* at 1152.

99. *Id.*

100. *Id.*

101. *See id.* at 1148–49.

102. *Id.* at 1148.

103. *Id.* at 1149.

104. *Id.* at 1150.

105. *Id.* at 1151.

106. *Id.* at 1135, 1149 ("[T]his court ordinarily resolve[s] questions about the legality of searches and seizure by construing the Fourth Amendment and article I, section 13 in tandem.").

107. *Id.*

### B. *The Liu Dissent*

Justice Goodwin Liu wrote the first dissent, stating that the DNA Act should not require an arrest to be judicially validated before an arrestee is required to provide a DNA sample.<sup>108</sup> Justice Liu further argued that the Act's failure to provide for automatic expungement of DNA samples of individuals who were exonerated, acquitted, or not even charged is "troubling" for both practical reasons and constitutional reasons.<sup>109</sup>

Finally, Justice Liu argued that the majority failed to respect the independence of California's Constitution by adopting essentially a rebuttable "presumption of correctness."<sup>110</sup> Justice Liu rejected the majority's approach and, instead, asked, "whether we should reject the high court's Fourth Amendment guidance."<sup>111</sup> Humbly citing his own law review article, Justice Liu discussed the importance of judicial federalism and the importance of interpreting the guarantees of California's Constitution without according a presumption of correctness to high court precedent.<sup>112</sup>

Justice Liu concluded that Buza's conviction for refusing to comply with the DNA Act was invalid under the California Constitution.<sup>113</sup> He did not reach the question of whether Buza's conviction would also be invalid under the Fourth Amendment.<sup>114</sup>

### C. *The Cuéllar Dissent*

Justice Mariano-Florentino Cuéllar wrote the second, sixteen-page dissent and was joined by Justice Dennis Perluss.<sup>115</sup> Justice Cuéllar's dissent expressed agreement with Justice Liu's remarks and

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108. *Id.* at 1156 (Liu, J., dissenting). Justice Liu believed quite the opposite: the fact that Buza was found "validly arrested on probable cause . . . and was promptly charged with" that offense has "[no] bearing on whether it was lawful to require him to provide his DNA *before any of those determinations were made.*" *Id.*

109. *Id.* at 1158–59. Justice Liu documents the copious leaps and bounds an individual must overcome in order to get his DNA sample expunged: "The extensive documentation, notice to multiple parties, judicial hearing, and additional steps required for expungement place a significant burden on eligible persons, assuming they are even aware of the process." *Id.* at 1157. Further, the statute also reads, "The court has the discretion to grant or deny the request for expungement. The denial of a request for expungement is a nonappealable order . . ." *Id.*; CAL. PENAL CODE § 299 (West 2014).

110. *Buza*, 413 P.3d at 1161.

111. *Id.*

112. *Id.*

113. *Id.* at 1163.

114. *Id.*

115. *Id.* at 1163–78 (Cuéllar, J., dissenting).

offered individualized arguments as well. In its most relevant part, Justice Cuéllar’s dissent rejected the majority’s holding because it failed to consider what role the California Constitution plays in determining whether the rights of a California citizen have been violated; essentially, the majority “contends that the scope of the legitimate privacy rights of persons arrested is no different under [the California] constitution than under the Fourth Amendment.”<sup>116</sup>

Despite its identical wording to the Fourth Amendment, Justice Cuéllar asserted that article I, section 13 of the California Constitution provided heightened protections for the privacy rights of individuals, including those that have been arrested.<sup>117</sup> Justice Cuéllar, though acknowledging that Supreme Court decisions deserve “respectful consideration,” argued that the California Supreme Court was “*obligated*” to perform an independent analysis regarding whether the California Constitution provided protection against the search at issue.<sup>118</sup>

Justice Cuéllar referred to the court’s summary in *Raven v. Deukmejian*,<sup>119</sup> which lists the “numerous decisions” from the California Supreme Court where the court interpreted the state constitution as extending protections to California citizens beyond those assured by the United States Supreme Court under the United States Constitution.<sup>120</sup> Further, he recognized that within the context of search and seizure of arrestees, California has been explicit in holding that the state constitution provides greater protection than the Fourth Amendment of the United States Constitution.<sup>121</sup> Justice Cuéllar cited to a California Supreme Court case that held that, even upon full custodial arrest, booking, and incarceration, police may not search an arrestee in the hope of discovering evidence of a more serious crime, making clear that arrestees in California enjoy greater protections against searches and seizures under the state constitution.<sup>122</sup>

To offer more support for his argument that the California Constitution garners broader privacy protections than the United

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116. *Id.*

117. *Id.*

118. *Id.* at 1164 (emphasis added).

119. 801 P.2d 1077 (Cal. 1990).

120. *Buza*, 413 P.3d at 1165 (citing *Raven*, 801 P.2d at 1088).

121. *Id.*

122. *Id.*



States Constitution, Justice Cuéllar cited to article I, section 1 of the California Constitution: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”<sup>123</sup> Justice Cuéllar noted that article I does not create a separate class of privacy rights but argued that, at a minimum, it “underscores how certain infringements of personal privacy deserve heightened scrutiny in our search and seizure analysis relative to what the federal analysis requires.”<sup>124</sup>

After “assign[ing] proper weight and meaning to the California Constitution,” Justice Cuéllar argued that the search in question was not reasonable.<sup>125</sup> First, Justice Cuéllar criticized the governmental “need” to create a DNA profile of an arrestee for the purpose of “identification.”<sup>126</sup> Justice Cuéllar discussed that fingerprinting is a much quicker and less-intrusive means of providing identification information.<sup>127</sup> Therefore, Justice Cuéllar found it unlikely that “identification” was truly the interest the government sought to further.<sup>128</sup> Instead, Justice Cuéllar said, “[T]he most plausible justification for the present DNA collection is that it aids in identifying arrestees who may have been perpetrators of unsolved crimes.”<sup>129</sup>

Though solving crimes can certainly constitute a legitimate government interest, that interest is not sufficient to overcome the privacy rights of arrestees.<sup>130</sup> Citing to *Ingersoll v. Palmer*,<sup>131</sup> Justice Cuéllar noted that the law requires the government to have individualized suspicion that an individual has committed a specific offense for the search or seizure to be valid.<sup>132</sup>

Justice Cuéllar also disapproved of the majority’s assertion that Buza did not have a right to challenge the scope of the collection

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123. *Id.* at 1167; *see also* CAL. CONST. art. I, § 1 (“All people are by nature free and independent and have inalienable rights.”).

124. *Buza*, 413 P.3d at 1167.

125. *Id.* at 1178.

126. *Id.* at 1169.

127. On average, a DNA profile takes about thirty days to complete. On the contrary, law enforcement officials can collect fingerprints, compare them against a database, and obtain a response as to any identification “hits” within approximately twenty-seven minutes. *Id.*

128. *See id.*

129. *Id.* at 1170.

130. *See id.* at 1169.

131. 743 P.2d 1299 (Cal. 1987).

132. *Buza*, 413 P.3d at 1170 (citing *Ingersoll*, 743 P.2d at 1303–04).

requirement in the DNA Act.<sup>133</sup> At the time Buza refused to provide a DNA sample, he (should have) “enjoyed the presumption of innocence” because the disposition of his felony charges were uncertain; as such, Buza had every right to challenge the DNA Act as an arrestee who could eventually be acquitted of felony charges.<sup>134</sup> Justice Cuéllar warned that failure to reach this issue meant that a “future plaintiff [would] suffer irreversible adverse consequences.”<sup>135</sup>

Finally, Justice Cuéllar argued that the DNA Act merited a different constitutional analysis than what was required for the Maryland law in *King*.<sup>136</sup> Unlike the Maryland law, the DNA Act does not require that a *lawful* arrest have occurred before DNA collection.<sup>137</sup> Additionally, though the Maryland DNA collection law provides for automatic expungement and destruction of DNA if the individual is not convicted of a felony, the California DNA Act does not.<sup>138</sup>

In conclusion, Justice Cuéllar argued that, under the California Constitution, arrestees are accorded a higher expectation of privacy than under the United States Constitution.<sup>139</sup> “[W]hen weighed against the State’s generalized interest in identifying arrestees and solving crimes, an arrestee’s reasonable privacy interest in his or her genetic information—uniquely protected under the California Constitution—must win.”<sup>140</sup>

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133. *See id.*

134. *Id.*

135. *Id.* Indeed, the majority recognized that “we must leave for another day” the question of whether automatic expungement is constitutionally required for the wrongly arrested or exonerated. *Id.* at 1146 (majority opinion).

136. *See id.* at 1176 (Cuéllar, J., dissenting).

137. To the contrary, the DNA Act allows for retrieval and processing of a DNA sample before a judicial officer has determined that the arrest was valid. *Id.* In Maryland, a DNA sample may not be taken until the arrestee has been arraigned. *Id.* at 1142 (majority opinion). Additionally, nearly one in five felony arrestees are released prior to a judicial determination of probable cause; however, such arrestees are still required to allow their DNA to be collected and retained for at least 180 days. *Id.* at 1176 (Cuéllar, J., dissenting) (“[T]he Department of Justice shall destroy a specimen and sample and expunge the searchable DNA database profile pertaining to the person who has no present or past qualifying offense of record upon receipt of order that verifies the applicant has made the necessary showing at a noticed hearing, and that includes . . . [a] court order verifying that no retrial or appeal of the case is pending, that it has been at least 180 days . . . .”); *see also* CAL. PENAL CODE § 299(c)(2)(D) (West 2014).

138. *Buza*, 413 P.3d at 1145 (majority opinion).

139. *See id.* at 1163, 1165 (Cuéllar, J., dissenting).

140. *Id.* at 1177.

## IV. HISTORICAL FRAMEWORK

A. *California Constitutionalism and Criminal Procedure*

The California Constitution is one of the longest in the world.<sup>141</sup> The length of California's Constitution is largely due to additions by California ballot propositions and voter initiatives.<sup>142</sup> A number of the provisions of the California Constitution are identical to those of the United States Constitution.<sup>143</sup> Nevertheless, an interpretation by the United States Supreme Court of a provision of the United States Constitution does not mean that a similarly—or identically—worded provision of the California Constitution must necessarily be interpreted in the same manner, particularly where the history, past interpretation, or intent of the state constitutional provision supports a more expansive reading.<sup>144</sup> For example, in his dissent in *Michigan v. Mosley*,<sup>145</sup> Justice Brennan observed that “[e]ach [s]tate has power to impose higher standards governing police practices under state law than is required by the United States Constitution.”<sup>146</sup>

In combination, Justice Liu's and Justice Cuéllar's dissents argue that the California Constitution protects individual rights broadly and beyond those rights provided by the United States Constitution. This doctrine, state constitutionalism, has also been referred to as the “new judicial federalism.”<sup>147</sup> During the Warren Court years, both the federal and California high courts expanded criminal procedure rights.<sup>148</sup> State constitutionalism emerged during the early 1970s when the Warren Court gave way to that of Chief Justice Burger, and was

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141. BRIAN P. JANISKEE & KEN MASUGI, *DEMOCRACY IN CALIFORNIA: POLITICS AND GOVERNMENT IN THE GOLDEN STATE* 27 (2d ed. 2008).

142. Tani Cantil-Sakauye, *Foreword* to JOSEPH R. GRODIN, ET AL., *THE CALIFORNIA STATE CONSTITUTION* xxiii, xxv–xxvi (G. Alan Tarr ed., 2nd ed. 2016) (“Many commentators have observed the relative ease by which the California Constitution can be amended through the initiative process and have accurately highlighted how this unusual attribute of our state constitutional structure has expanded our state constitution.”).

143. *Compare* CAL. CONST. (laying out the legislative, executive, and judicial branches of the state government in articles IV–VI), *with* U.S. CONST. (similarly laying out the legislative, executive, and judicial branches of the federal government in articles I–III).

144. Cantil-Sakauye, *supra* note 142, at xxv.

145. 423 U.S. 96 (1975).

146. *Id.* at 120 (Brennan, J., dissenting).

147. G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 161 (1998).

148. David Aram Kaiser & David A. Carrillo, *California Constitutional Law, Reanimating Criminal Procedure Rights After the “Other” Proposition 8*, 56 SANTA CLARA L. REV. 33, 34 (2016).

vehemently supported by Justice Brennan.<sup>149</sup> In fact, Justice Brennan wrote in 1986, “Rediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitution . . . is probably the most important development in constitutional jurisprudence in our time.”<sup>150</sup>

When Chief Justice Burger’s tenure on the Supreme Court began, Justice Brennan called on state high courts to hold onto the steps taken to broaden criminal procedure jurisprudence by basing constitutional rulings on state constitutions, which could potentially provide broader protections than those provided by the United States Constitution.<sup>151</sup> Historically, California was a progressive leader in developing individual rights under the California Constitution.<sup>152</sup> In particular, the California Supreme Court was a frontrunner in expanding rights regarding state criminal procedure.<sup>153</sup>

In 1955, the California Supreme Court applied the exclusionary rule to evidence that had been illegally obtained by the government.<sup>154</sup> In *People v. Wheeler*,<sup>155</sup> the California Supreme Court held that a prosecutor’s racially-biased use of peremptory strikes of potential jurors violated the state constitutional right to be tried by a fair and impartial jury.<sup>156</sup> In *Wheeler*, the court refused to follow the contrary federal rule set forth in *Swain v. Alabama*.<sup>157</sup> In other cases, the

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149. *Id.*; see also William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (“Every believer in our concept of federalism, and I am a devout believer, must salute this development in our state courts.”).

150. Robert F. Williams, *Justice Brennan, The New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763, 763 (1998).

151. Kaiser & Carrillo, *supra* note 148, at 34.

152. DAVID A. CARRILLO, *GOVERNING CALIFORNIA: POLITICS, GOVERNMENT, AND PUBLIC POLICY IN THE GOLDEN STATE* 301–02 (Ethan Rarick ed., 3d ed. 2013).

153. See Kevin M. Mulcahy, *Modeling the Garden: How New Jersey Built the Most Progressive State Supreme Court and What California Can Learn*, 40 SANTA CLARA L. REV. 863, 884–87 (2000).

154. *People v. Cahan*, 282 P.2d 905, 911 (Cal. 1955). This California Supreme Court decision came six years before the United States Supreme Court applied the federal exclusionary rule against the states in *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

155. 583 P.2d 748 (Cal. 1978).

156. *Id.* at 766.

157. 380 U.S. 202 (1965); see *Wheeler*, 583 P.2d at 767–77; see also *Swain v. Alabama*, 380 U.S. 202 (1965) (The court stated it saw “no reason, except for blind application of a proof standard developed in a context where there is no question of state responsibility for the alleged exclusion, why the defendant attacking the prosecutor’s systematic use of challenges against Negroes should not be required to establish on the record the prosecutor’s conduct in this regard, especially where the same prosecutor for many years is said to be responsible for this practice and is quite available for questioning on this matter.”).

California Supreme Court continued to expand the protections afforded to individuals against warrantless searches and seizures in ways that went far beyond what was required by the United States Constitution.<sup>158</sup>

In each of the above cases, the California Supreme Court interpreted the guarantees of the California Constitution “without according any deference or presumption of correctness to high court precedent.”<sup>159</sup> In his dissent, Justice Liu noted that “on each of these issues, the high court eventually overruled its precedent and adopted as a matter of federal law the rule we had adopted as a matter of state law.”<sup>160</sup> However, in 1982, California’s historical “progressiveness” was dismantled, and the scale of criminal procedural law tilted toward crime control.<sup>161</sup>

### B. *The End of California Constitutionalism*

California’s progressive approach to criminal procedure has drawn extensive criticism and calls for reform.<sup>162</sup> Additionally, not all California courts agreed with the high court’s use of the independent state grounds doctrine to avoid the United States Supreme Court rulings.<sup>163</sup> As a result, opponents of California’s broad criminal procedure protections turned to the California Constitution, article II, section 8 to remove individual rights by initiative. Because of these initiatives, California is now unique for providing no state

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158. See generally *People v. Brisendine*, 531 P.2d 1009, 1009 (Cal. 1975) (holding that police officers cannot subject a motorist to a full body and vehicle search unless the officer has articulable reasons to suspect other illegal conduct); *People v. Norman*, 538 P.2d 237, 238 (Cal. 1975) (holding that where defendant’s arrest could only have been for violation of traffic laws and there was no evidence providing probable cause, seizure was unlawful); *Burrows v. Superior Court*, 529 P.2d 590, 590 (Cal. 1974) (ruling that examination of one’s bank records violates the state constitutional right to privacy).

159. *People v. Buza*, 413 P.3d 1132, 1162 (Cal. 2018) (Liu, J., dissenting).

160. *Id.*

161. Kaiser & Carrillo, *supra* note 148, at 37.

162. See, e.g., John K. Van de Kamp & Richard W. Gerry, *Reforming the Exclusionary Rule: An Analysis of Two Proposed Amendments to the California Constitution*, 33 HASTINGS L.J. 1109, 1110–11 (1982).

163. See *People v. Lance W.* (*In re Lance W.*), 197 Cal. Rptr. 331, 335 (1983) (stating that there is a “history of the decades long debate that has focused on the efficacy of . . . state’s use of the doctrine of independent state grounds to avoid the impact of federal high court decisions in the Fourth Amendment area”), *vacated*, 694 P.2d 744 (Cal. 1985); see also *People v. Norman*, 538 P.2d 237, 246 (Cal. 1975) (“A sudden switch to a California ground to avoid the impact of federal high court decisions invites the successful use of the initiative process to overrule the California decision with its concomitant harm to the prestige, influence, and function of the judicial branch of state government.”).

constitutional protection to its citizens, beyond that required by the United States Constitution, in the majority of the areas of constitutional criminal procedure.

In 1982, California advanced its war on crime when citizens passed into law Proposition 8's Right to Truth-in-Evidence provision.<sup>164</sup> Proposition 8, known also as the Victim's Bill of Rights, added section 28 to article I of the California Constitution and introduced a "Right to Truth-in-Evidence."<sup>165</sup> The Right to Truth-in-Evidence provision provided that, absent a few exceptions, "relevant evidence shall not be excluded in any criminal proceeding."<sup>166</sup> As a result, section 28 abrogated numerous judicially-created rules that previously excluded certain evidence seized as a violation of a defendant's constitutional rights.<sup>167</sup> Essentially, Proposition 8 severely limited an individual's search and seizure exclusionary rule rights under the California Constitution to no more than what is required by the federal government.<sup>168</sup>

In *In re Lance W.*,<sup>169</sup> the Truth-in-Evidence provision of Proposition 8 faced its first significant constitutional challenge regarding searches and seizures.<sup>170</sup> Prior to passing Proposition 8, California case decisions required the exclusion of evidence obtained in violation of the search and seizure provisions of the California Constitution "under circumstances in which the evidence would be admissible under federal constitutional principles."<sup>171</sup> One question

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164. See Hank M. Goldberg, *The Impact of Proposition 8 on Prior Misconduct Impeachment Evidence in California Criminal Cases*, 24 LOY. L.A. L. REV. 621, 621 (1991).

165. CAL. CONST. art. I, § 28(f)(2).

166. *Id.*

167. See *id.*; see also *In re Lance W.*, 694 P.2d at 747 ("Approaching Proposition 8 in that spirit, we conclude that Proposition 8 has abrogated both the 'vicarious exclusionary rule' under which a defendant had standing to object to the introduction of evidence seized in violation of the rights of a third person, and a defendant's right to object to and suppress evidence seized in violation of the California, but not the federal, Constitution.").

168. See generally *In re Lance W.*, 694 P.2d at 747 (holding that "[p]roposition 8 has abrogated both the 'vicarious exclusionary rule' under which a defendant has standing to object to the introduction of evidence seized in violation of the rights of a third person, and a defendant's right to object to and suppress evidence seized in violation of the California but not the federal, Constitution").

169. 694 P.2d 744 (Cal. 1985).

170. See *id.* at 747; see also Randall A. Cohen & Mark D. Klein, *Proposition 8: California Law After In re Lance W. and People v. Castro*, 12 PEPP. L. REV. 1059, 1080 (1985) ("The California Supreme Court has, for the first time, in the case of *In re Lance W.*, unequivocally recognized that the doctrine of independent state grounds as it relates to the admissibility of evidence in a criminal trial is no longer valid.").

171. *In re Lance W.*, 694 P.2d at 747.

posed in *In re Lance W.*, therefore, was whether any right to suppress evidence under the California Constitution survived beyond the minimum rights guaranteed by the United States Constitution.<sup>172</sup>

The court in *In re Lance W.* concluded that “Proposition 8 . . . eliminate[d] a judicially created *remedy* for violations of the search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled.”<sup>173</sup> This meant that illegally-obtained evidence that would have normally been excluded under the California Constitution would now be admissible evidence unless federal law dictated otherwise. This holding represented a significant departure from California’s broader exclusionary rule and general search and seizure protections.

After the ruling in *In re Lance W.*, the California legislature proposed another proposition that threatened California constitutionalism. In 1990, Californians approved Proposition 115, which read, “Amends state Constitution regarding criminal and juvenile cases: affords accused no greater constitutional rights than federal Constitution affords.”<sup>174</sup> The California Supreme Court abrogated Proposition 115 as an unconstitutional restriction on the court’s ability to interpret the California Constitution.<sup>175</sup> The court in *Raven* struck down this addition to article I, section 24 of the California Constitution as “a constitutional revision beyond the scope of the initiative process.”<sup>176</sup>

Effectively, the *Raven* court reaffirmed the role of state constitutionalism. Similar to the majority in *Buza*, the *Raven* court acknowledged that the California Supreme Court has often deferred to the United States Supreme Court when interpreting identical language found in the federal and state constitutions;<sup>177</sup> however, the court in *Raven* appropriately held that it would be improper for the California Supreme Court to mandate state courts’ “blind obedience” to United

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172. *Id.*

173. *Id.* at 752.

174. *California Proposition 115, the “Crime Victims Justice Reform Act” (1990)*, BALLOTPEdia, [https://ballotpedia.org/California\\_Proposition\\_115,\\_the\\_%22Crime\\_Victims\\_Justice\\_Reform\\_Act%22\\_\(1990\)](https://ballotpedia.org/California_Proposition_115,_the_%22Crime_Victims_Justice_Reform_Act%22_(1990)) (last visited Dec. 8, 2019); see CAL. CONST. art. I, § 30(b) (enacted by Proposition 115).

175. *Raven v. Deukmejian*, 801 P.2d 1077, 1078 (Cal. 1990).

176. *Id.* at 1086.

177. *Id.* at 1088.

States Supreme Court decisions, despite the existence of “cogent reasons,” “independent state interests,” or “strong countervailing circumstances” supporting a departure from the highest court’s rulings.<sup>178</sup>

## V. ANALYSIS

In *People v. Buza*, the majority failed to consider the “cogent reasons” and “independent state interests” that should have led the court to construe California’s identically-worded constitutional language differently from the United States Constitution. Despite the general rule that deference should be given to higher court rulings, California courts have the authority to adopt an independent interpretation of the California Constitution, even if its language is identical to that of the United States Constitution.<sup>179</sup>

The *Buza* majority failed to recognize the significant differences between the Maryland law and California’s DNA Act. By failing to recognize those differences, the court fell into a deferential trap, missed the opportunity to reassert California’s independent constitutionalism, and blindly relied upon the arguments provided by the Supreme Court in *Maryland v. King*.

### A. *The California DNA Act Warranted a Different Constitutional Analysis Than That Applied in King*

Because the Maryland DNA collection law substantially differs from California’s DNA Act, a different constitutional analysis was warranted when reviewing the constitutionality of the DNA Act. Considering the substantial differences between the Maryland law and the California law, California’s DNA Act violates *both* the United States Constitution and the California Constitution.

While California’s DNA collection statute is similar in many ways to the Maryland law that was upheld in *King*, there are three significant differences. First, the DNA Act applies to a broader category of arrestees than the Maryland law.<sup>180</sup> Second, unlike the Maryland law, the DNA Act authorizes both DNA collection *and* testing before charges are filed and before a finding of probable

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178. *Id.*

179. *Id.*

180. *People v. Buza*, 413 P.3d 1132, 1141 (Cal. 2018).



cause.<sup>181</sup> Finally, unlike the Maryland law, California's DNA Act does not provide for automatic destruction of the DNA sample if the arrestee is cleared of the crime.<sup>182</sup>

Of these three differences, the second is the most significant when analyzing the constitutionality of the DNA Act. The Maryland DNA Collection Act applies only to arrestees who are already in valid police custody for a serious offense supported by probable cause.<sup>183</sup> In contrast, California's DNA Act applies to all felony arrestees (and some misdemeanor arrestees), regardless of whether or not their arrest was supported by probable cause.<sup>184</sup> This raises a number of legal and ethical issues, the biggest issue being whether or not such a law violates an individual's right to be free from unreasonable searches and seizures.

### 1. California's DNA Act Violates the Fourth Amendment to the United States Constitution

The Fourth Amendment to the United States Constitution provides, in pertinent part: "The right of the people to be secure in their persons, papers, and effects, against unreasonable searches and seizures, shall not be violated."<sup>185</sup> It is well established that collection of DNA samples is a search within the meaning of the Fourth Amendment and that, as a general rule, a warrantless search or a search without individualized suspicion is *usually* unreasonable.<sup>186</sup> As the majority in both *King* and *Buza* recognize, the "touchstone of the Fourth Amendment is reasonableness."<sup>187</sup>

The *King* majority relied on *Illinois v. McArthur*,<sup>188</sup> which noted that individualized suspicion is not categorically required: "In some circumstances, such as '[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure

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181. *Id.*

182. *Id.*

183. *Maryland v. King*, 569 U.S. 435, 447–48 (2013).

184. *See generally* Appellant's Answer Brief on the Merits, *supra* note 53, at 71, 95 ("But, in California, both collection and submission of the DNA occurs immediately following arrest, prior to any judicial review of probable cause and even prior to any prosecutorial charging decision.").

185. U.S. CONST. amend. IV.

186. *Katz v. United States*, 389 U.S. 347, 357 (1967).

187. *King*, 569 U.S. at 448; *Buza*, 413 P.3d at 1140.

188. 531 U.S. 326 (2001).

reasonable.”<sup>189</sup> The *Buza* majority deferred to the reasoning in *King* that a cheek swab of an arrestee at the time of booking falls into the category of “routine searches” that is justified by “special law enforcement needs.”<sup>190</sup> Interestingly, the *King* Court failed to identify and explain what constitutes “special law enforcement needs.”<sup>191</sup> Special law enforcement needs, however, reflect that the need must *always* be justified by concerns “other than crime detection.”<sup>192</sup>

In *King*, the Court relied on a balancing test to decide whether or not the search was reasonable under the Fourth Amendment.<sup>193</sup> According to case precedent, such a balancing test is appropriate when “the need for a warrant is greatly diminished”—for instance, when an arrestee is already in valid police custody for a serious offense supported by probable cause.<sup>194</sup> Such an argument makes sense in *King*’s case, where the applicable Maryland DNA collection statute applies only to those that have been *charged* with serious crimes supported by *probable cause*.

In cases such as *Buza*’s, where the applicable California DNA statute is triggered “immediately following arrest” before probable cause is determined, the reasonableness balancing test is ineffectual. Of course, there is a legitimate government interest in identifying arrestees and protecting the safety of law enforcement officials that are tasked with processing and handling said arrestees. Regardless, that governmental interest should not open the door to invasive genetic testing when there are alternative methods for identification that are less of an intrusion of privacy. Even more troublesome is the State’s use of the arrestee’s DNA for crime-solving purposes. Though there is a “closely guarded category of constitutionally permissible suspicionless searches,”<sup>195</sup> that category has never included searches designed to serve “the normal need for law enforcement.”<sup>196</sup>

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189. *King*, 569 U.S. at 447 (quoting *McArthur*, 531 U.S. at 330).

190. *Buza*, 413 P.3d at 1140.

191. See *King*, 569 U.S. at 447 (“In some circumstances, such as ‘[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable.’”).

192. *Chandler v. Miller*, 520 U.S. 305, 313–14 (1997).

193. *King*, 569 U.S. at 448.

194. *Id.* at 436 (citing *Samson v. California*, 547 U.S. 843, 855 (2006)).

195. *Chandler*, 520 U.S. at 309.

196. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619 (1989).

The legislative purpose of California's DNA Act is clear: the Act serves as an investigative tool, *not* an identification tool.<sup>197</sup> Proponents of the DNA Act promised that it would help "solve crimes, free those wrongfully accused, and stop serial killers."<sup>198</sup> Likewise, the findings section of the proposed law declared that it would "solve crime[s]," "apprehend perpetrators," expand the number of "cold hits and criminal investigation links," and thereby "substantially reduce the number of unsolved crimes."<sup>199</sup> As previously mentioned, the very first subsection under Proposition 69's Declaration of Purpose reads, "Our communities have a compelling interest in protecting themselves from crime."<sup>200</sup> Though identification of arrestees is mentioned as *one* of the legislative purposes of Proposition 69, it is certainly not the end goal.<sup>201</sup>

It is unclear why the California Court of Appeal did not revisit the Fourth Amendment question when *Buza* was remanded to be reconsidered in light of *King*.<sup>202</sup> In its pre-remand opinion, the California Court of Appeal made convincing arguments that the DNA Act does in fact violate arrestees' Fourth Amendment rights.<sup>203</sup> The California Court of Appeal distinguished a number of cases in which the United States Supreme Court upheld warrantless searches and seizures, and emphasized that each of those cases involved defendants that had already been indicted or convicted.<sup>204</sup>

The California Court of Appeal fully appreciated the statutory scheme of the DNA Act and noted the high court's indifference to the

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197. *Proposition 69 (DNA)*, *supra* note 1.

198. CAL. SEC'Y OF STATE, VOTER INFORMATION GUIDE FOR 2004, GENERAL ELECTION 62 (2004), [https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2236&context=ca\\_ballot\\_props](https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2236&context=ca_ballot_props).

199. *Id.* at 135.

200. CAL. SEC'Y OF STATE, *supra* note 17.

201. Proposition 69's Declarations of Purpose later mentions that "[l]aw enforcement should be able to use the DNA Database and Data Bank Program to substantially reduce the number of unsolved crimes . . ." *Id.*

202. After the ruling in *King*, the California Court of Appeal arguably could have still distinguished *Buza*'s case on federal constitutional grounds based on the differences between the Maryland and California statutes. *See* *Maryland v. King*, 569 U.S. 435, 447–48 (2013); *People v. Buza*, 180 Cal. Rptr. 3d 753, 763 (Ct. App. 2014), *rev'd*, 413 P.3d 1132 (Cal. 2018).

203. *See generally Buza*, 180 Cal. Rptr. 3d at 795 ("It has been stated, with respect to the federal Constitution, that because '[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusion on the mere chance that desired evidence might be obtained' . . . 'the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.'").

204. *Id.* at 763.

“second search” that occurs under the DNA Act, when the DNA sample is analyzed and a profile is created for use in state and federal DNA databases.<sup>205</sup> This part, the court argued, should be the true focus of the Fourth Amendment analysis.<sup>206</sup> The California Court of Appeal rightfully found that there was no non-law enforcement reason for creating a DNA profile with an arrestee’s cheek swab.<sup>207</sup> Because the special needs exception to the warrant requirement did not apply, and because no other exception to the warrant requirement applied, individualized suspicion was required.<sup>208</sup> Because there was no individualized suspicion in Buza’s case, the search was unreasonable.<sup>209</sup>

## 2. California’s DNA Act Violates Article I, Section 13 of the California Constitution

Article I, section 13 of the California Constitution provides, in essentially identical language to the United States Constitution: “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated . . . .”<sup>210</sup> Regardless of its nearly identical language, “the California Constitution is, and has always been, ‘a document of independent force’ that sets forth rights that are in no way ‘dependent on those guaranteed by the United States Constitution.’ (Cal. Const., art. I, § 24).”<sup>211</sup> Though the *Buza* majority affirmed the independence of California’s Constitution, it failed to consider whether there existed any cogent reasons, independent state interests, or strong countervailing circumstances that would have supported a finding that California’s DNA Act violates the California Constitution.<sup>212</sup>

On various prior occasions, the California Supreme Court has decided questions pertaining to the legality of searches and seizures *solely* under article I, section 13 of the California Constitution when the United State Supreme Court had not yet decided the parallel question under the Fourth Amendment.<sup>213</sup> It is a plausible argument

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205. *Id.* at 762–63.

206. *Id.*

207. *Id.* at 766–68.

208. *Id.* at 775.

209. *Id.* 795–96.

210. CAL. CONST. art. I, § 13.

211. *People v. Buza*, 413 P.3d 1132, 1148 (Cal. 2018) (citations omitted).

212. *Id.*

213. *See, e.g., People v. Ruggles*, 702 P.2d 170, 175–76 (Cal. 1985).

that *King* and *Buza* presented similar, if not identical, legal questions as they pertained to the Fourth Amendment analysis.<sup>214</sup> Regardless, the *Buza* majority erred when it evaluated the “constitutionality of searches and seizures under our state Constitution by employing the same mode of analysis that the high court applied in *King*.”<sup>215</sup> The *Buza* court improperly relied on the reasoning of the *King* Court, which construed a different statute and a different constitution.<sup>216</sup>

The California Constitution extends protections to its citizens beyond those provided in the federal context.<sup>217</sup> The California Constitution provides heightened protections for the privacy rights of individuals, even arrestees.<sup>218</sup> For example, the California Supreme Court held that “the search of [an arrestee’s] person beyond the scope of a pat-down was unlawful under article I, section 13 of the California Constitution.”<sup>219</sup> In search and seizure cases, the California Supreme Court has “require[d] a more exacting standard” for cases arising in the state.<sup>220</sup> Even full custodial arrest, booking, and incarceration do not authorize a warrantless search of a person.<sup>221</sup>

Additionally, in contrast to the United States Constitution, the California Constitution contains an express statement about the importance of personal privacy: “All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining . . . privacy.”<sup>222</sup> Though courts have not found that article I, section 1 confers an independent right to privacy separate

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214. In both cases the issue was whether the Fourth Amendment prohibits the collection and analysis of a DNA sample from persons arrested for, but not yet convicted of, felony charges. See *Buza*, 413 P.3d at 1135; see also *Maryland v. King*, 569 U.S. 435 (2013) (holding that “when officers make an arrest supported by probable cause to hold for a serious offense and bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee’s DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment”).

215. *Buza*, 413 P.3d at 1148. Additionally, “[t]hrough the United States Supreme Court may have reached a different conclusion when evaluating another state’s DNA collection statute under the federal Constitution, the role of our state charter, the unique importance it assigns to privacy, and the differences between the statute[s]” suggest that the *Buza* court should have found the Act unconstitutional. *Id.* at 1164 (Cuéllar, J., dissenting).

216. *Id.*

217. *Raven v. Deukmejian*, 801 P.2d 1077, 1088 (Cal. 1990) (listing the “numerous decisions” from the California Supreme Court “interpreting the state Constitution as extending protection to our citizens beyond the limits imposed by the high court”).

218. *Buza*, 413 P.3d at 1163.

219. *People v. Maher*, 550 P.2d 1044, 1046 (1976).

220. *Buza*, 413 P.3d at 1165 (citing *People v. Brisendine*, 531 P.2d 1009, 1099 (Cal. 1975)).

221. *Id.* (citing *People v. Laiwa*, 669 P.2d 1278, 1278 (Cal. 1983)).

222. CAL. CONST. art. I, § 1.

from article I, section 13, courts have neither found that the language is devoid of meaning.<sup>223</sup> At a minimum, this addition to California's Constitution underscores the importance the state places on citizens' privacy rights.

Finally, in deciding whether the California Constitution provides protection against the search and seizure in *Buza*, the court was *obligated* to perform an independent analysis.<sup>224</sup> Instead, the *Buza* majority mistakenly relied on the holding in *King*, even for its analysis under the California Constitution.<sup>225</sup> Because of the California Supreme Court's precedent regarding the protections afforded to arrestees, and because of the California Constitution's explicit privacy protection, the *Buza* court should have engaged in an independent analysis of California's DNA Act.

### B. A Missed Opportunity

In the majority opinion, Justice Kruger conceded that California's DNA Act "may raise additional constitutional questions that will require resolution in other cases."<sup>226</sup> Nevertheless, the majority opted not to explore Buza's argument that the DNA Act is facially unconstitutional as applied to other arrestees.<sup>227</sup> The majority opinion, written by usually-liberal-voting Justice Kruger,<sup>228</sup> missed a huge opportunity to reassert California's seemingly-forgotten constitutionalism.

The *Buza* majority declined to address an issue that it could and should have: whether it is constitutional to require a DNA sample to be taken and analyzed after an arrest but before a finding of probable

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223. *Buza*, 413 P.3d at 1167.

224. *People v. Teresinski*, 640 P.2d 753, 760–761 (Cal. 1982) (“[T]he California courts, in interpreting the constitution of this state, are not bound by federal precedent construing the parallel federal text . . . [T]he ‘state courts, in interpreting constitutional guarantees contained in the constitutions, are “*independently responsible* for safeguarding the rights of their citizens.’””).

225. The court analyzed the constitutionality of searches and seizures under the California Constitution by employing the same mode of analysis that the high court applied in *King. Buza*, 413 P.3d at 1148 (majority opinion).

226. *Id.* at 1155.

227. *Id.* (citing *People v. Contreras*, 411 P.3d 445, 463 (Cal. 2018)) (“We accordingly abide by what has been called a ‘cardinal principle of judicial restraint—if it is not necessary to decide more, it is not necessary to decide more.’”).

228. Justice Kruger, who normally delivers a liberal-leaning vote, played the tie-breaking role in the *Buza* opinion. It was Justice Kruger who did not deliver the fourth liberal vote that would have gained the dissenting justices the majority. See David Aram Kaiser, *Opinion Analysis: People v. Buza*, SCOCA BLOG (Aug. 29, 2018), <http://scocablog.com/opinion-analysis-people-v-buza/>.

cause has been made.<sup>229</sup> As mentioned above, the most important distinction between California's DNA Act and the Maryland DNA Collection Act is that the DNA Act allows DNA to be taken and analyzed *prior* to a probable cause finding for the arrest, whereas the Maryland law applies only to arrestees who are already in custody for an offense supported by probable cause.<sup>230</sup> By refusing to reach the constitutional question posed above, the *Buza* majority essentially eliminated any significant difference between California's DNA Act and Maryland's DNA Collection Act. In doing so, the majority re-framed the constitutional issues of the case, which resulted in the majority and dissents disagreeing about crucial points and missing many of the arguments regarding California constitutionalism.

Both Justice Liu and Justice Cuéllar made arguments in their dissents that the majority opinion failed to respect California's constitutional independence.<sup>231</sup> Heavily focusing on California constitutionalism, Justice Cuéllar's dissent read like the majority that could have been. Justice Cuéllar outlined a state-specific history for a broader constitutional right to privacy under the California Constitution than is found in the United States Constitution.<sup>232</sup> He reminded the majority that the "core value" of article I, section 1 of the California Constitution was protecting so-called "informational privacy," meaning the privacy interest in sensitive and confidential personal information.<sup>233</sup> Based on this state-specific history, Justice Cuéllar argued that the majority failed "to do justice to the importance of state constitutional rights."<sup>234</sup>

The late Justice Stanley Mosk would have appreciated Justice Cuéllar's attempt to reassert and re-analyze California's independent constitutionalism. Justice Mosk used to be the strong voice on the

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229. *Buza*, 413 P.3d at 1145 ("[W]e again note that defendant raised no such argument in the trial court and we decline to decide the constitutional necessity of such a rule in a case in which probable cause have never been contested.").

230. *Maryland v. King*, 569 U.S. 435, 447–48 (2013).

231. *Buza*, 413 P.3d at 1163 (Cuéllar, J., dissenting).

232. Indeed, Justice Cuéllar provided a lengthy list of case law supporting his argument that California has "been quite explicit in holding that article I, section 13 provides greater protection than does the Fourth Amendment." *Id.* at 1165. Additionally, Justice Cuéllar noted that article I, section 1 of the California Constitution "grew out of the electorate's fears of 'increased surveillance and data collection activity in contemporary society,' and was intended to address the potential collection, stockpiling, and use of individual's most personal information in an arbitrary and unjustified fashion." *Id.* at 1168 (citations omitted).

233. *Id.* at 1168.

234. *Id.*

California Supreme Court for criminal procedure rights. As mentioned above, California's state constitutionalism has ebbed and flowed, depending on the political make-up of both the United States Supreme Court and the California Supreme Court. In addition to the political make-up of the courts, Justice Mosk also attributed losses in the field of state constitutionalism to "ill-conceived legislative measures designed to curtail judicial independence."<sup>235</sup> Indeed, he scathingly described ill-conceived legislative measures as "handcuffs on [his] court's wrists."<sup>236</sup>

In light of the now-conservative Supreme Court majority, it is more important than ever for California to reassert its independent state constitutionalism. The state-specific history giving rise to California's broader privacy rights and criminal procedural rights lends credence to an argument supporting a step in the right direction: a step toward independent state constitutionalism. The California Supreme Court should strive to provide case rulings consistent with article I, section 1 of the California Constitution and consistent with case precedent that provides the appropriate constitutional safeguards to California citizens.

### C. A Brief Suggestion

The *Buza* majority argued that the provisions of the DNA Act are reasonable because the Act provides for "identification of arrestees."<sup>237</sup> The court conceded that taking DNA serves the same purpose as asking an arrestee for his name or asking him to provide fingerprints.<sup>238</sup> If the true legislative purpose of Proposition 69 is the identification and expeditious booking of felony suspects, then why not just require felony arrestees to provide only fingerprints upon booking?

As Justice Cuéllar mentioned in his dissent, creating a DNA profile and analyzing an arrestee's DNA can take thirty days to

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235. Stanley Mosk, *State Constitutionalism After Warren: Avoiding the Potomac's Ebb and Flow*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 201, 201 (Bradley D. McGraw ed., 1985).

236. *Id.*

237. *Buza*, 413 P.3d at 1140 (majority opinion) (noting that expeditious identification of the individual arrested allows officers to obtain the suspect's criminal history and decide how to proceed based thereon, ensures that persons accused of crimes are available for trial, allows courts to assess whether the arrestee should be released on bail, and acts as a tool to free persons wrongfully accused for the same offense).

238. *Id.*



complete; on the other hand, law enforcement can collect an arrestee's fingerprints, compare them to an electronic database, and retrieve identifying information in approximately twenty-seven minutes.<sup>239</sup> Proposition 69 should be amended to reflect this science. An appropriate and simple amendment to Proposition 69 would be to require a DNA sample only if the felony arrestee refuses to provide his fingerprints. Such an amendment would incentivize arrestees to provide legitimate identifying information and would not dismantle the legislative purpose of Proposition 69.

## VI. CONCLUSION

*Buza* highlights the struggle to balance governmental interests and individual privacy expectations. "The tension between the two themes—due process and crime control—has never been resolved and perhaps never can be. A balance must always be struck. The word *balance* may be unfortunate; it implies stability."<sup>240</sup>

"The California Constitution is not some minor codicil to the United States Constitution."<sup>241</sup> The *Buza* majority, in failing to reassert California's constitutionalism, took a step in the wrong direction for criminal procedural laws and constitutional interpretation in general in California. The court refused an important opportunity to re-ignite the Mosk-era progressivity and instead rolled over and allowed the ruling of the emerging conservative-majority United States Supreme Court to take hold. The *Buza* court had an opportunity to put an end to the genetic fishing expeditions made possible by Proposition 69 and, unfortunately, missed that mark.

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239. *Id.* at 1169 (Cuéllar, J., dissenting).

240. Lawrence M. Friedman, *State Constitutions and Criminal Justice in the Late Nineteenth Century*, in TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 271, 278 (Paul Finkelman et al. eds., 1991).

241. *Buza*, 413 P.3d at 1164.