

# DNA DRAGNETS—A CONSTITUTIONAL CATCH?

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## I. INTRODUCTION

During the past twenty years, analysis of deoxyribonucleic acid (DNA) evidence<sup>1</sup> has played an important role in law enforcement,<sup>2</sup> both to exonerate those who have been wrongly accused of a crime,<sup>3</sup> as well as to solve crimes.<sup>4</sup> In conjunction with this development, forensic databases

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### 1. In layman's terms, DNA

is the fundamental building block for an individual's entire genetic makeup—our hereditary blueprint passed on to us by our parents. It is a component of virtually every cell in the human body. A person's DNA is the same in each cell and it does not change throughout a person's lifetime. For example, the DNA in a person's blood is the same as the DNA found in that person's saliva. DNA also is found in skin tissue, sweat, bone, the root and shaft of hair, earwax, mucus, urine, semen, and vaginal or rectal cells.

KATHRYN M. TURMAN, *UNDERSTANDING DNA EVIDENCE: A GUIDE FOR VICTIM SERVICE PROVIDERS* 1 (2001), [http://www.ojp.usdoj.gov/ovc/publications/bulletins/dna\\_4\\_2001/NCJ185690.pdf](http://www.ojp.usdoj.gov/ovc/publications/bulletins/dna_4_2001/NCJ185690.pdf). See generally Steven C. Henricks, *A Fourth Amendment Privacy Analysis of the Department of Defense's DNA Repository for the Identification of Human Remains: The Law of Fingerprints Can Show Us the Way*, 181 MIL. L. REV. 69, 72–75 (2004) (discussing the molecular biology of DNA); Robert W. Schumacher II, Note, *Expanding New York's DNA Database: The Future of Law Enforcement*, 26 FORDHAM URB. L.J. 1635, 1638–39 (1999) (same).

2. See Manning A. Connors, III, Comment, *DNA Databases: The Case for the Combined DNA Index System*, 29 WAKE FOREST L. REV. 889, 889 (1994) (“The use of DNA for investigatory purposes is perhaps the most discriminating and efficient prosecutorial device to be developed since the advent of fingerprinting.”) (footnote omitted); Leigh M. Harlan, Note, *When Privacy Fails: Invoking a Property Paradigm to Mandate the Destruction of DNA Samples*, 54 DUKE L.J. 179, 185 (2004) (“DNA profiling and identification have become fundamental techniques in law enforcement investigation and prosecution.”).

3. See, e.g., Associated Press, *DNA Helps Exonerate Prisoner After 17 Years*, WASH. POST, Aug. 27, 2002, at A2 (reporting on conviction overturned after seventeen years when DNA tests showed defendant could not have killed victim); see also Holly Schaffter, Note, *Postconviction DNA Evidence: A 500 Pound Gorilla in State Courts*, 50 DRAKE L. REV. 695, 697 (2002) (“[As of 2002], postconviction DNA testing has exonerated one hundred prisoners in the United States alone.” (citing The Innocence Project, *Case Files*, [http://innocenceproject.org/case/display\\_profile.php?id=101](http://innocenceproject.org/case/display_profile.php?id=101) (last visited Oct. 18, 2005))).

4. See, e.g., Associated Press, *Man Arrested for '65 Murders*, GRAND RAPIDS PRESS, Oct. 30, 2002, at A2, available at 2002 WLNR 11940431 (“DNA evidence from a licked envelope led to the arrest . . . of an Arkansas man accused of killing two people in Southern California nearly four decades ago.”). See generally Jean Coleman Blackerby, Note, *Life After Death Row: Preventing Wrongful Capital Convictions and Restoring Innocence After Exoneration*, 56 VAND. L. REV. 1179, 1193 (2003) (“DNA evidence has become increasingly effective at simultaneously exonerating innocent individuals and helping to identify the guilty.”).

containing human DNA profiles have become important government tools in the fight against crime.<sup>5</sup> All fifty states have enacted laws authorizing the use of DNA databases to store the genetic profiles of those convicted of certain criminal offenses.<sup>6</sup> Under the DNA Identification Act of 1994,<sup>7</sup> the FBI established the Combined DNA Index System (CODIS), allowing local and state forensic laboratories to exchange and compare DNA profiles electronically to determine if a match can be made between the sample of a convicted offender on file in the system and a sample retrieved from the scene of the crime.<sup>8</sup> Then, under the DNA Analysis Backlog Elimination Act of 2000 (DNA Act),<sup>9</sup> federal government officials were granted the authority to collect DNA samples<sup>10</sup> from persons convicted of certain federal offenses for inclusion in CODIS.<sup>11</sup> The DNA Act allows the

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5. See, e.g., Aaron P. Stevens, Note, *Arresting Crime: Expanding the Scope of DNA Databases in America*, 79 TEX. L. REV. 921, 922 (2001) (“Forensic DNA databases are fast becoming one of the most important tools in the arsenal of United States law enforcement.”).

6. See Mark A. Rothstein & Sandra Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 BROOK. L. REV. 127, 128 (2002) (“After Congress appropriated funds to develop both a federal system . . . and state systems, every state enacted the necessary enabling legislation to develop a linked system of DNA data banks.”) (footnote omitted); see also Schumacher, *supra* note 1, at 1645 (“As of June 1998, all fifty states ha[d] passed legislation to create state DNA databases. Generally, these laws require designated offenders to provide a genetic sample for inclusion in the state DNA bank.”) (footnotes omitted). See generally Jonathan Kimmelman, *Risking Ethical Insolvency: A Survey of Trends in Criminal DNA Databanking*, 28 J.L. MED. & ETHICS 209, 210–13 (2000) (discussing the scope of various statutes, expungement and sample storage policies, sample and profile use, and unauthorized disclosure provisions).

7. DNA Identification Act of 1994, Pub. L. No. 103-322, 108 Stat. 2069 (codified as amended at 42 U.S.C.A. §§ 14131–34 (West 1995 & Supp. 2005)).

8. H.R. REP. No. 106-900, pt. 1, at 8 (2000), reprinted in 2000 U.S.C.C.A.N. 2323, 2324; see also Harlan, *supra* note 2, at 189 (providing a brief description of the CODIS system). Presently, CODIS possesses an index of DNA samples either recovered from crime scenes or unidentified human remains, provided voluntarily by relatives of missing persons, or provided by persons convicted of criminal offenses. See 42 U.S.C.A. § 14132(a).

9. DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, 114 Stat. 2726 (codified as amended at 42 U.S.C.A. § 14135 (West 1998 & Supp. 2005), 42 U.S.C.A. §§ 14135, 14135a–14135e).

10. Under the DNA Act, a “DNA sample” means a tissue, fluid, or other bodily sample of an individual on which a DNA analysis can be carried out.” 42 U.S.C.A. § 14135b(c)(1). The term “DNA analysis” is defined as an “analysis of the deoxyribonucleic acid (DNA) identification information in a bodily sample.” *Id.* § 14135b(c)(2).

11. *Id.* §§ 14132(a), 14135a(b); see also United States v. Miles, 228 F. Supp.

disclosure of samples or analyses only “to criminal justice agencies for law enforcement identification,” to criminal defendants for “criminal defense purposes,” and in judicial proceedings.<sup>12</sup> Those who obtain or disclose DNA stored samples or analyses without authorization are subject to criminal penalties.<sup>13</sup>

In the past fifteen years, on close to twenty occasions, as a last-ditch effort to solve open murder or rape investigations, law enforcement authorities in the United States have engaged in so-called DNA sweeps or dragnets.<sup>14</sup> These dragnets, described as encounters “where the police ask a number of individuals to give voluntary DNA samples in an effort to identify the perpetrator of a crime or series of crimes,”<sup>15</sup> have not been very successful.<sup>16</sup> They have also been criticized by civil libertarians and privacy rights advocates.<sup>17</sup> More recently, in January 2005, in an effort to

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2d 1130, 1132 (E.D. Cal. 2002), *rev'd*, 130 F. App'x 108 (9th Cir. 2005) (“CODIS is a national index of DNA samples taken from convicted offenders, crime scenes and victims of crime, and unidentified human remains that ‘enables law enforcement officials to link DNA evidence found at a crime scene with a suspect whose DNA is already on file.’” (quoting 146 CONG. REC. 511645-02, S11647 (Dec. 6, 2000) (statement of Sen. Kohl))).

12. 42 U.S.C.A. §§ 14135e(a)–(b), 14132(b)(3)(A)–(C); *see also* Henricks, *supra* note 1, at 84 (“Exceptions to these ‘privacy protection standards’ (as the statute names them) are tests and results that assist in protocol development and quality control. Another exception allows use of the CODIS DNA analysis for a population statistics database and for identification research.”) (footnote omitted).

13. *Id.* § 14135e(c).

14. A September 2004 study by the University of Nebraska at Omaha found that since 1990 there have been eighteen reported DNA sweeps or dragnets in the United States, all involving investigations of murder, rape, or both. *See* POLICE PROFESSIONALISM INITIATIVE, POLICE DNA SWEEPS EXTREMELY UNPRODUCTIVE 3, 8 (2004) [hereinafter POLICE PROFESSIONALISM INITIATIVE].

15. *Id.* at 2; *see also* Fred W. Drobner, Comment, *DNA Dragnets: Constitutional Aspects of Mass DNA Identification Testing*, 28 CAP. U. L. REV. 479, 479–80 (2000) (defining dragnets as “warrantless searches administered *en masse* to large numbers of persons whose only known connection with a given crime is that authorities suspect that a particular class of individuals may have had the opportunity to commit it”); Stevens, *supra* note 5, at 956 (“A DNA ‘dragnet’ occurs when an entire class of individuals in an area (such as males in a certain age range) is subjected to DNA sampling after a crime is discovered.”).

16. *See* POLICE PROFESSIONALISM INITIATIVE, *supra* note 14, at 4 (concluding that only one of the eighteen DNA sweep cases examined produced a suspected offender, which “suggests that DNA sweeps are extremely unproductive in identifying criminal suspects”).

17. *See, e.g.*, Drobner, *supra* note 15, at 480 (“Proponents of the practice claim it is ‘effective, lawful,’ and ‘minimally intrusive.’ Civil libertarians, on the other hand, call it ‘outrageous,’ ‘power grabbing,’ and ‘ripe for constitutional challenge.’”)

solve the murder of Christa Worthington, who three years earlier was found stabbed to death in her home with her infant daughter by her side, police in Truro, Massachusetts, began requesting samples from every man in the town.<sup>18</sup> In April 2005, the police arrested a suspect who had provided a sample in March 2004.<sup>19</sup>

This Article explores the extent to which the Fourth Amendment's proscription against unreasonable searches and seizures, the Fifth Amendment's privilege against self-incrimination, the Fifth and Fourteenth Amendment's right to due process, and the right to privacy may be implicated by the practice of DNA sweeps or dragnets.<sup>20</sup> First, and by way of background, Part II generally discusses DNA analysis and the history of DNA dragnets.<sup>21</sup> Then, Part III analyzes the impact of the previously mentioned constitutional doctrines in the case of a person who provides a sample and is then convicted because it ties him to the crime, or alternatively, the case where a person provides a sample, is eliminated as the perpetrator, and then seeks either the destruction or the return of the sample provided.<sup>22</sup>

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(footnote omitted); David M. Halbfinger, *Police Dragnets for DNA Tests Draw Criticism*, N.Y. TIMES, Jan. 4, 2003, at A1 ("The tests, supposedly voluntary, can still be coercive, critics say, not only harassing innocent people but also potentially violating suspects' constitutional protections against compelled self-incrimination and unreasonable search and seizure."); Marjory Sherman, *DNA Dragnets Raise Concerns*, EAGLE-TRIB. (Mass.), Jan. 16, 2005, at A1 ("Critics raise[] concerns that asking hundreds of people to volunteer their genetic fingerprints can be fruitless, coercive and violate their constitutional right to privacy."); Glynn Wilson, *In Louisiana, Debate Over a DNA Dragnet*, CHRISTIAN SCI. MONITOR, Feb. 21, 2003, at 3 ("Critics fear such sweeps could lead to coercion, as police persuade vast numbers to take these tests. That in turn, creates new quandaries: the possibility of harassing the innocent, and the potential to violate suspects' rights against search and seizure.").

18. Jonathan Finer, *Baffled Police Try DNA Sweep*, WASH. POST, Jan. 12, 2005, at A3. Semen, presumably belonging to the killer, was recovered from the crime scene. *Id.*

19. See Jonathan Finer, *Man Charged in Cape Cod Woman's Death*, WASH. POST, Apr. 16, 2005, at A3.

20. This Article analyzes the practice of DNA dragnets with respect to federal law. State laws, of course, may provide privileges and immunities which exceed those found in the United States Constitution. *See, e.g.*, Woods v. Candela, 921 F. Supp. 1140, 1143 (S.D.N.Y. 1996), *aff'd*, 104 F.3d 355 (2d Cir. 1996) ("The Fourth and Fifth Amendment of the United States Constitution set only the minimum that is required. States are free to enact or to create by judicial fiat provisions additional privileges and immunities going beyond requirements found in the United States Constitution.").

21. *See infra* Part II.

22. *See infra* Part III. At least one commentator has noted problems with sample retention. *See* Harlan, *supra* note 2, at 184 ("Sample retention is problematic

## II. DNA ANALYSIS AND SWEEPS

When discussing DNA analysis in the law enforcement context, it is important to understand the distinction between databanks and databases.<sup>23</sup> Databanks store DNA samples consisting of blood, saliva, tissue or fluid.<sup>24</sup> Databases, on the other hand, consist of portions of those samples which have been analyzed.<sup>25</sup> The analysis, which yields a genotype or “profile” expressed as a set of numbers, is what is entered into state or local databases.<sup>26</sup> Notably, the profiles are derived from “information that is no more intimate than the particular blood serum enzyme that an individual happens to have, the pattern of blood vessels in the retina of the eye, or the whorls and ridges in a fingerprint.”<sup>27</sup> Databases that contain

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not only because of these individuals’ innocence, but also because of the resulting availability of sensitive genetic information and the lack of legislative and jurisprudential protections guarding release of the information.”). In some instances, police have destroyed samples of those who are eliminated. *See Editorial, A Faulty Fishing Expedition*, USA TODAY, Jan. 19, 2005, at 10A (“Truro authorities say they’ll destroy samples and won’t keep names of non-suspects in a database for future probes. But that’s the exception. Law enforcement agencies generally retain blood and saliva samples for possible use in other investigations.”).

23. There are several sources that provide a discussion of databanks and databases. *See* D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORNELL J.L. & PUB. POL’Y 455, 462 (2001); Dan L. Burk & Jennifer A. Hess, *Genetic Privacy: Constitutional Considerations in Forensic DNA Testing*, 5 GEO. MASON U. CIV. RTS. L.J., Winter 1994, at 1, 10.

24. *See* Kaye, *supra* note 23, at 461 (“In the systems now in use, a sample of blood, saliva, or other tissue or fluid is collected, a portion is taken for analysis, and some of the remainder is preserved and stored.”).

25. *See id.* at 462 (“[T]here are the *databases* that contain the numerically coded, identifying genotypes, and *databanks* that simply store the original samples taken from offenders.”).

26. *See id.* (“These genotypes, expressed as a set of numbers, are entered into state and local databases.”); D.H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413, 431 (2003) (“The ‘profile’ of an individual’s DNA molecule that is stored in a properly constructed DNA identification database (like the FBI’s Combined DNA Index System (CODIS)) is a series of numbers.”); Harlan, *supra* note 2, at 188 (“[A]s a simple series of numbers, a DNA profile serves only identification purposes and can in no way indicate information concerning an individual’s personal traits.”) (footnote omitted); Schumacher, *supra* note 1, at 1644 (“A DNA database is a computerized collection of DNA profiles capable of being used for criminal identification purposes. DNA profiles are ideal for such storage because the information can be stored in numeric code, thereby requiring minimal technology.”) (footnote omitted)).

27. Kaye, *supra* note 23, at 461–62; *see also* Eric T. Juengst, *I-DNA-fication, Personal Privacy, and Social Justice*, 75 CHI.-KENT L. REV. 61, 65 (1999) (discussing

profiles from databank samples can be searched by computer to determine if there is a match with genotypes derived from samples recovered from the victim or the crime scene.<sup>28</sup>

The first recorded DNA dragnet occurred in 1986 in Narborough, England, following the rape and murder of two teenage girls.<sup>29</sup> The targeted pool comprised of 4,500 men in the area surrounding the village

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how markers to be used by state laboratories contributing DNA profiles to what is now CODIS emanate from noncoding regions which “will not disclose any biologically significant information”); Kaye & Smith, *supra* note 26, at 431 (“The numbers have no meaning except as a representation of molecular sequences at DNA loci that are not indicative of an individual’s personal traits or propensities. . . . In itself, the series of numbers can tell nothing about a person.”) (footnote omitted); Jeffrey S. Grand, Note, *The Bleeding of America: Privacy and the DNA Dragnet*, 23 CARDozo L. REV. 2277, 2320 (2002) (“[T]he CODIS system used by the FBI limits the number of markers (identifying characteristics of a DNA profile) that may be entered into the system. By limiting the amount of genetic information included in a profile, the CODIS database is practical for identification purposes only.”) (footnote omitted); Veronica Valdivieso, Note, *DNA Warrants: A Panacea for Old, Cold Rape Cases?*, 90 GEO. L.J. 1009, 1027 (2002) (noting that “information included in the profiles can be restricted to particular loci that are relevant only for identification”); Jonathan F. Will, Comment, *DNA as Property: Implications on the Constitutionality of DNA Dragnets*, 65 U. PITTS. L. REV. 129, 131 (2003) (“[F]orensic DNA tests do not actually ‘read’ the genetic code itself, they simply measure the length of restriction fragments for comparison.”). One commentator makes the point that assigning diminished privacy interest to “junk” or noncoding DNA regions “attempts to split a hair that should not be split.” Henricks, *supra* note 1, at 77. He maintains:

Science cannot yet explain junk DNA’s purpose. Sometime in the future, however, science will likely know the answer to this riddle. Two current theories are junk DNA shows the history of human and individual evolution (that is, some junk DNA sequences are ‘fossils’ of extinct genes humans no longer need), and other junk DNA sequences affect in unknown ways our cellular protein synthesis. The potential to discover an individual’s complete evolutionary history and know and understand a synthesis that affects our body’s genetic traits is just as compelling a privacy interest as that which we have in code producing DNA sequences (that is, our genes).

*Id.* (footnote omitted).

28. See Kaye, *supra* note 23, at 462 (“All the genotypes from the *databank samples* that comprise the database can be searched by computer to determine whether any match the genotypes from the *trace evidence samples* associated with the crime or the victim.”); Schumacher, *supra* note 1, at 1644 (“Essentially, a DNA test result derived from a crime scene sample can be checked against the digital profiles stored in the database. Any matches made with database profiles can then be used as probable cause to obtain a sample from a suspect for further testing.”) (footnote omitted).

29. Will, *supra* note 27, at 133.

where the crimes occurred.<sup>30</sup> The practice then moved to other parts of Europe,<sup>31</sup> with the largest mass sweep taking place in 1998 when samples were taken from 16,400 persons in Strecklingen, Germany, in connection with the murder and rape of an eleven-year-old girl.<sup>32</sup>

In the United States there have reportedly been nineteen DNA dragnets since 1990, all prompted by unsolved murder and rape cases.<sup>33</sup> The most publicized of these dragnets have taken place in Miami, Florida; San Diego, California; Ann Arbor, Michigan; Cheverly, Maryland; and Lawrence, Massachusetts.<sup>34</sup> As mentioned previously, the most recent sweep receiving press attention took place in Truro, Massachusetts, in early 2005.<sup>35</sup> To date, only the sweep in Lawrence, Massachusetts, has resulted directly in the identification of the perpetrator.<sup>36</sup>

### III. CONSTITUTIONAL DOCTRINES

The provision and retention of DNA samples following a sweep potentially implicates four constitutional doctrines: the Fourth Amendment's proscription against unreasonable searches and seizures, the Fifth Amendment's privilege against self-incrimination, the Fifth and Fourteenth Amendments' right to due process, and the right to privacy. This Article analyzes each of these doctrines in turn.

#### A. *The Fourth Amendment*

During the typical dragnet, DNA samples from the targeted group will be obtained one of two ways—voluntarily or through court orders.<sup>37</sup>

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30. *Id.* The perpetrator ultimately was apprehended after the police discovered that he had asked a co-worker to provide a DNA sample for him. *Id.*; see also Richard Willing, *La. Case Triggers Battle Over DNA*, USA TODAY, May 29, 2003, at 3A.

31. See Laurie Stroum Yeshulas, Note, *DNA Drag net Practices: Are They Constitutional?*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 133, 134 (2003) ("The practice of conducting DNA dragnets is a fast-growing evidentiary tool that has received wide acceptance abroad in countries such as England, Germany, and France.").

32. Drobner, *supra* note 15, at 481.

33. POLICE PROFESSIONALISM INITIATIVE, *supra* note 14, at 3; Finer, *supra* note 18.

34. See Grand, *supra* note 27, at 2278–79, 2282 n.22 (discussing the particulars of these sweeps); Will, *supra* note 27, at 133–34 (same).

35. See *supra* notes 18–19 and accompanying text.

36. POLICE PROFESSIONALISM INITIATIVE, *supra* note 14, at 4; Grand, *supra* note 27, at 2284 n.29.

37. See *DNA Drag net*, 60 MINUTES, CBS NEWS, Sept. 12, 2004,

Typically, the police will obtain a sample through buccal swabbing.<sup>38</sup> Before analyzing these two scenarios, it is instructive first to obtain a general overview of the governing Fourth Amendment principles and the tests triggering searches and seizures.

### 1. Overview

Generally, a Fourth Amendment search or seizure<sup>39</sup> requires a warrant based on probable cause,<sup>40</sup> a reasonable level of individualized

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<http://www.cbsnews.com/stories/2004/09/10/60minutes/main642684.shtml> (reporting how, during a DNA dragnet in Oklahoma City relating to the rape and murder of a university student, the district attorney sought judicial compulsion when those asked to provide samples declined). On a macro level, “[n]othing in the Fourth Amendment prevents the police from approaching everyone in a community and asking for their cooperation. The ‘dragnet’ nature of the inquiry is no obstacle.” Edward J. Imwinkelried & D.H. Kaye, *DNA Typing: Emerging or Neglected Issues*, 76 WASH. L. REV. 413, 444 (2001). *But see* Juengst, *supra* note 27, at 78 (suggesting that “it seems implausible that such a sampling practice would be considered constitutionally sanctioned in the United States”).

38. *See* Rothstein & Carnahan, *supra* note 6, at 161 (“Current collection methods use both blood samples and buccal swabs. Using buccal swabs is less invasive, which minimizes sample source objections and legal challenges.”); *see also* Harlan, *supra* note 2, at 187 (“Most commonly, authorities use buccal swabbing, a procedure in which the inside of a suspect’s cheek is briefly and painlessly brushed with cotton.”).

39. The Fourth Amendment states:

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

U.S. CONST. amend. IV. The protections against unreasonable searches and seizures apply in both the criminal and the civil context. *See* *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 530 (1967) (“It is . . . anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.”).

40. In the criminal law, to the extent that searches and seizures are permitted without a warrant, they will be deemed reasonable if they are supported by probable cause. 2 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 3.1(a), at 5–7 (4th ed. 2004). For example, certain exigent circumstances will support a warrantless search and seizure, as long as there is probable cause for the intrusion. *See, e.g.*, *Ker v. California*, 374 U.S. 23, 41–42 (1963). Police also may arrest a person without first procuring a warrant, provided they have probable cause. *See, e.g.*, *Maryland v. Pringle*, 540 U.S. 366, 369 (2003). Also, a warrant is not necessary to search a car if the police have probable cause to believe that it contains evidence of a crime or contraband. *See, e.g.*, *Chambers v. Maroney*, 399 U.S. 42, 47–48 (1970). Even if the search or seizure in question is based on probable

suspicion,<sup>41</sup> or an exception to the warrant requirement.<sup>42</sup> Some warrantless searches and seizures, however, do not require probable cause or even individualized suspicion. For example, routine searches of persons and effects at the U.S. borders are not subject to the requirement of either a warrant, probable cause, or reasonable suspicion.<sup>43</sup> Similarly, a search incident to a valid arrest does not require probable cause or reasonable suspicion.<sup>44</sup> A search also may be conducted without a warrant or probable cause if the individual consents to it.<sup>45</sup> Finally, certain searches outside the traditional law enforcement setting, not predicated on any suspicion, have been held constitutional if the purpose of the policy or program serves “special needs, beyond the normal need for law enforcement.”<sup>46</sup> In those

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cause, the Fourth Amendment requires a balancing of all relevant factors when either is conducted in an “extraordinary manner.” *Whren v. United States*, 517 U.S. 806, 817–18 (1996).

41. For example, the police may briefly detain and frisk a person for investigative purposes, without a warrant or probable cause, if they have a reasonable suspicion that “criminal activity may be afoot” and that the person “may be armed and presently dangerous.” *Terry v. Ohio*, 392 U.S. 1, 30 (1968). *See generally Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (noting the differences between reasonable suspicion and probable cause).

42. *See Katz v. United States*, 389 U.S. 347, 357 (1967) (“[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”) footnote omitted); *Dixon v. Lowery*, 302 F.3d 857, 862 (8th Cir. 2002) (“It is well settled that a seizure carried out without judicial authorization is *per se* unreasonable unless it falls within a well-defined exception to this requirement.” (citing *Coolidge v. New Hampshire*, 403 U.S. 443 (1971))).

43. *See, e.g., United States v. Flores-Montano*, 541 U.S. 149, 152 (2004) (reasoning that “[t]he Government’s interest in preventing the entry of unwanted persons and effects is at its zenith at the international border”); *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).

44. *See, e.g., United States v. Robinson*, 414 U.S. 218, 235 (1973) (“A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.”).

45. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (“It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.” (citing *Davis v. United States*, 328 U.S. 582, 593–94 (1946))).

46. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985)). There are several examples of governmental activities the Court has determined are sufficiently unrelated to the enforcement of criminal laws to qualify as special needs, including searches and seizures designed to maintain security and order in schools, regulated industries, and

instances, neither individualized suspicion, nor probable cause, nor a warrant will be necessary to support the search, and a court must balance the government's interest against the individual's privacy expectations.<sup>47</sup> If the primary purpose of the law or policy under consideration is general crime control, however, the search violates the Fourth Amendment absent individualized suspicion.<sup>48</sup> With this overview completed, we now consider what constitutes a search and seizure under the Fourth Amendment.

## 2. *Searches and Seizures*

The seminal case addressing when conduct by the government intrudes upon an individual's privacy and thereby constitutes a search is *Katz v. United States*.<sup>49</sup> In *Katz*, the defendant was convicted of the interstate transmission of wagering information by telephone.<sup>50</sup> The evidence used to convict *Katz* was obtained by placing a listening device

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government agencies. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–65 (1995) (finding constitutional the random drug testing of high school athletes as a condition of participation in sports); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 609, 633–34 (1989) (upholding railway regulations authorizing mandatory post-accident drug testing of railroad employees); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 (1989) (holding drug testing of United States Customs Service employees who applied for transfer or promotion to positions involving drug interdiction or the carrying of firearms constitutional).

47. *See Von Raab*, 489 U.S. at 665 (recognizing that the special needs doctrine “reaffirms the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance” (citing *Skinner*, 489 U.S. at 618–24 (1989))).

48. *Edmond*, 531 U.S. at 47.

49. *Katz v. United States*, 389 U.S. 347 (1967). Prior to *Katz*, the test for a Fourth Amendment search was formulated in terms of whether there had been a government intrusion of “a constitutionally protected area.” *Silverman v. United States*, 365 U.S. 505, 512 (1961); *see also Schmerber v. California*, 384 U.S. 757, 770 (1966) (“Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned.”); *Beck v. Ohio*, 379 U.S. 89, 90–91 (1964) (holding that the “limits to the permissible scope of a warrantless search incident to a lawful arrest” are not exceeded when police officers search a suspect’s clothing); *Stoner v. California*, 376 U.S. 483, 486 (1964) (extending Fourth Amendment protections to a suspect’s hotel room); *Preston v. United States*, 376 U.S. 364, 368 (1964) (recognizing that “searches of motorcars must meet the test of reasonableness under the Fourth Amendment”). *See generally* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1(a), at 423–31 (4th ed. 2004) (discussing Fourth Amendment protections before the *Katz* decision).

50. *Katz*, 389 U.S. at 348.

outside the telephone booth from which he made his calls.<sup>51</sup>

Abandoning earlier formulations of the Fourth Amendment which had defined the scope of its protection by reference to the law of trespass,<sup>52</sup> the Supreme Court held that the actions of the government agents had “violated the privacy upon which [Katz] justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”<sup>53</sup> The Court distinguished between the more general right of privacy and those privacy interests protected by the Fourth Amendment.<sup>54</sup> Regarding the former, the Court held that “the protection of a person’s *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.”<sup>55</sup> As to the latter, the Court found that the interests protected by the Fourth Amendment went beyond privacy.<sup>56</sup> In his concurrence, Justice Harlan articulated the rule which emanated from *Katz* as requiring “first that a person have exhibited an actual (subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”<sup>57</sup> Following

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51. *Id.*

52. See *Goldman v. United States*, 316 U.S. 129, 134 (1942) (holding that the government’s “use of the detectaphone was not made illegal by trespass or unlawful entry”); *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (finding intercepted phone messages were not obtained in violation of the Fourth Amendment because officers did not physically enter the defendant’s house). In abandoning the reliance on the law of trespass, the Court in *Katz* observed that “once it is recognized that the Fourth Amendment protects people—and not simply ‘areas’—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.” *Katz*, 389 U.S. at 353; see also Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1305 (2002) (“*Katz* actually stands for more than a mere repudiation of the trespass doctrine; rather than merely holding that the *location* of law enforcement agents (or their devices) is irrelevant, *Katz* stands for the broader proposition that the *method used* by the law enforcement agents is irrelevant.”).

53. *Katz*, 389 U.S. at 353 (“One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.”).

54. See *id.* at 350–51.

55. *Id.* (footnote omitted).

56. *Id.* at 350.

57. *Id.* at 361 (Harlan, J., concurring); see also *Bond v. United States*, 529 U.S. 334, 338 (2000) (noting that the Fourth Amendment analysis embraces two questions); *Minnesota v. Olson*, 495 U.S. 91, 95–96 (1990) (noting that “[a] subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable”

*Katz*, a search for Fourth Amendment purposes is triggered “when the government violates a subjective expectation of privacy that society recognizes as reasonable.”<sup>58</sup>

What about seizures? The Fourth Amendment refers to “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>59</sup> As in the case of searches, two categories are affected: persons and property. With respect to persons, there are three types of police-citizen encounters.<sup>60</sup> First, there are consensual encounters, which do not implicate the Fourth Amendment.<sup>61</sup> The test governing that type of interaction is “whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ request or otherwise terminate the encounter.”<sup>62</sup> Next are investigative detentions of limited duration and scope.<sup>63</sup> They are deemed Fourth Amendment seizures and must be supported by reasonable suspicion of criminal activity.<sup>64</sup> The final type of

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(internal quotation omitted)); *O’Connor v. Ortega*, 480 U.S. 709, 715 (1987) (“[C]ases establish that . . . Fourth Amendment rights are implicated only if the conduct of . . . officials at issue . . . infringed an ‘expectation of privacy that society is prepared to consider reasonable.’” (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984))).

58. *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *Katz*, 389 U.S. at 353). *See generally Whalen v. Roe*, 429 U.S. 589, 599 n.24 (1977) (noting that the facet of privacy “directly protected by the Fourth Amendment” pertains to ““the right of the individual to be free in his private affairs from governmental surveillance and intrusion” (quoting Philip Kurland, *The Private I*, U. CHI. MAG., Autumn 1976, at 7, 8)).

59. U.S. CONST. amend. IV.

60. *E.g.*, *United States v. Weaver*, 282 F.3d 302, 309 (4th Cir. 2002); *United States v. Waldon*, 206 F.3d 597, 602 (6th Cir. 2000); *United States v. Scheets*, 188 F.3d 829, 836 (7th Cir. 1999).

61. *E.g., Weaver*, 282 F.3d at 309; *Waldon*, 206 F.3d at 602; *Scheets*, 188 F.3d at 836.

62. *Florida v. Bostik*, 501 U.S. 429, 439 (1991); *see also INS v. Delgado*, 466 U.S. 210, 216 (1984) (“Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment.”). Factors to consider include: (1) whether the suspect was advised that he was not under arrest; (2) whether the suspect consented or refused to talk to the police; (3) whether the encounter took place in a public or private place; and (4) whether there was threatening conduct or a display of weapons. *E.g., Scheets*, 188 F.3d at 836–37.

63. *E.g., Scheets*, 188 F.3d at 836. These detentions are often called “*Terry* stop[s]” or “*Terry* investigatory stop[s].” *Id.* at 837–38; *see supra* note 41 and accompanying text.

64. *E.g., Weaver*, 282 F.3d at 309.

encounter along the seizure continuum is the arrest, which must be supported by probable cause.<sup>65</sup>

Turning to property, a seizure “occurs when there is some meaningful interference with an individual’s possessory interests in [the individual’s] property.”<sup>66</sup> In *Soldal v. Cook County*,<sup>67</sup> the Court rejected the contention that, following *Katz* and other cases, “the Fourth Amendment is only marginally concerned with property rights” by clarifying that “the message of those cases [wa]s that property rights [we]re not the sole measure of Fourth Amendment violations.”<sup>68</sup> The Court further noted that its jurisprudence did not “support[] the view that the Fourth Amendment protects against unreasonable seizures of property only where privacy or liberty is also implicated.”<sup>69</sup> In other words, “the Amendment protects property as well as privacy.”<sup>70</sup> With this background about searches and seizures in place, we now turn to the legal analysis of DNA dragnets.

### 3. The Legal Mechanics of a Dragnet

It is well established that the police may approach individuals to elicit their assistance in solving a crime.<sup>71</sup> In the context of DNA dragnets,

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65. *E.g.*, *Waldon*, 206 F.3d at 602 (quoting *United States v. Avery*, 137 F.3d 343, 352 (6th Cir. 1997)); *see also* *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (“A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer’s presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause.” (citing *United States v. Watson*, 423 U.S. 411, 424 (1976))).

66. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The *Jacobsen* Court reasoned that “[w]hile the concept of a ‘seizure’ of property is not much discussed in our cases, this definition follows from our oft-repeated definition of the ‘seizure’ of a person within the meaning of the Fourth Amendment—meaningful interference, however brief, with an individual’s freedom of movement.” *Id.* at 112 n.5; *see also* *Horton v. California*, 496 U.S. 128, 133 (1990) (“A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property.” (citing *Jacobsen*, 466 U.S. at 113)).

67. *Soldal v. Cook County*, 506 U.S. 56 (1992).

68. *Id.* at 64.

69. *Id.* at 65.

70. *Id.* at 62; *see also* *Texas v. Brown*, 460 U.S. 730, 747 (1983) (Stevens, J., concurring) (“The [Fourth] Amendment protects two different interests of the citizen—the interest in retaining possession of property and the interest in maintaining personal privacy.”); *Altman v. City of High Point*, 330 F.3d 194, 203 (4th Cir. 2003) (“[A]fter *Soldal*, it is clear that there need be no nexus between a privacy or liberty interest and the possessory interest for Fourth Amendment protection to attach.”).

71. *See, e.g.*, *Illinois v. Lidster*, 540 U.S. 419, 425 (2004) (“[T]he law ordinarily permits police to seek the voluntary cooperation of members of the public in the

assuming the encounters between the police and the members of the targeted group involve no more than a request for assistance, the Fourth Amendment is not implicated.<sup>72</sup> Then the question presented is the extent to which the Fourth Amendment's protections play a role when the sample provided during the encounter leads to the prosecution of the person who provided it or the elimination of that person as the perpetrator of the offense.<sup>73</sup> Before addressing that question, this Article will address the two methods by which the police typically obtain samples in the course of a DNA sweep.<sup>74</sup>

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investigation of a crime.”).

72. See *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 185 (2004) (“Asking questions is an essential part of police investigations. In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment.”); *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion) (“[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen . . .”).

73. See *United States v. Drayton*, 536 U.S. 194, 204–08 (2002) (framing the analysis as a question of whether respondents had been seized at the time of the encounter with the police, and then whether their consent to the suspicionless search was voluntary (i.e., was the search reasonable)); *United States v. Dionisio*, 410 U.S. 1, 8 (1973) (“[T]he obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels—the ‘seizure’ of the ‘person’ necessary to bring him into contact with government agents and the subsequent search for and seizure of the evidence.” (citation omitted)).

74. In the context of prisoners, or those who have been conditionally released by way of probation, parole, or supervised release and whose privacy expectations differ from those of the general public, some federal courts have ruled that the DNA Act’s creation of a more complete database qualifies under the special needs doctrine, and that the government’s interest in filling the CODIS database outweighs the privacy interest of an inmate or one on supervised release in the compelled production of a DNA sample. See *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003), *cert. denied*, 540 U.S. 1083 (2003) (“The DNA Act, while implicating the Fourth Amendment, is a reasonable search and seizure under the special needs exception to the Fourth Amendment’s warrant requirement because the desire to build a DNA database goes beyond the ordinary law enforcement need.” (citing *Shaffer v. Saffle*, 148 F.3d 1180, 1181 (10th Cir. 1998))); *Vore v. U.S. Dep’t of Justice*, 281 F. Supp. 2d 1129, 1136–37 (D. Ariz. 2003) (holding that the primary purpose of the DNA Act is beyond the basic interest in crime control and concerns completing the CODIS database, creating a more accurate criminal justice system, and using a more complete database to assist in solving future crimes and minimizing intrusion); *Miller v. U.S. Parole Comm’n*, 259 F. Supp. 2d 1166, 1176 (D. Kan. 2003) (“[The DNA Act] creates a database for solving crimes that have not yet occurred or crimes that have occurred but are not specifically being looked at when taking any one individual’s blood sample. Thus, the primary purpose is not investigating ‘some specific wrongdoing.’” (quoting

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Nicholas v. Goord, No. 01Civ. 7891(RCC)(GWG), 2003 WL 256774, at \*13 (S.D.N.Y. Feb. 6, 2003)); United States v. Sczubelek, 255 F. Supp. 2d 315, 322 (D. Del. 2003), *aff'd*, 402 F.3d 175 (3d Cir. 2005) ("The DNA Act . . . was enacted to fill the CODIS system with DNA samples from qualifying federal offenders. This purpose is distinct from the regular needs of law enforcement."); United States v. Reynard, 220 F. Supp. 2d 1142, 1167 (S.D. Cal. 2002) ("[T]he plain text of the DNA Act indicates that Congress's immediate purpose in authorizing DNA 'searches' was to permit probation officers to fill the CODIS database with the DNA fingerprints of all qualifying supervisees."). State DNA statutes requiring those convicted of certain crimes to provide DNA samples also have been found to fall within the special needs doctrine. *See, e.g.*, Green v. Berge, 354 F.3d 675, 678–79 (7th Cir. 2004) (upholding Wisconsin statute requiring all felons serving prison terms to provide DNA samples for analysis and storage in the state's databank); Roe v. Marcotte, 193 F.3d 72, 76–79 (2d Cir. 1999) (upholding a Connecticut statute requiring convicted sex offenders incarcerated at the time of the statute's effective date to submit blood for inclusion in a DNA databank); *Nicholas*, 2003 WL 256774, at \*19 (upholding a New York statute requiring all convicted felons in New York prisons to provide a DNA sample to be retained as part of a DNA index); Shelton v. Gudmanson, 934 F. Supp. 1048, 1050–51 (W.D. Wis. 1996) (upholding a Wisconsin statute requiring state prison inmates convicted of sexual assault offenses to provide biological specimen samples for DNA analysis and inclusion in state DNA databank). *But see* Sandra J. Carnahan, *The Supreme Court's Primary Purpose Test: A Roadblock to the National Law Enforcement DNA Database*, 83 NEB. L. REV. 1, 3 (2004) ("[T]he primary purpose of CODIS is simply to solve crime—an impermissible primary purpose under *Edmond* and *Ferguson*. The various state and federal statutes that authorize the suspicionless searches that stock CODIS with DNA identifiers are, therefore, without constitutional justification.").

In upholding the constitutionality of the DNA Act against Fourth Amendment challenges, some courts have applied a balancing test, which considers the totality of the circumstances, including the person's status as a probationer or inmate, without any determination of special needs. *See* United States v. Kincade, 379 F.3d 813, 832 (9th Cir. 2004) (en banc), *cert. denied*, 125 S. Ct. 1638 (2005) (applying "totality of the circumstances analysis to uphold compulsory DNA profiling of convicted offenders"); Groceman v. U.S. Dep't. of Justice, 354 F.3d 411, 413 (5th Cir. 2004) ("Courts may consider the totality of circumstances, including a person's status as an inmate or probationer, in determining whether his reasonable expectation of privacy is outweighed by other factors." (citing United States v. Knights, 534 U.S. 112, 119 (2001))); United States v. Meier, CR No. 97-72 HA, 2002 U.S. Dist. LEXIS 25755, at \*12–13 (D. Or. Aug. 6, 2002) (holding that the DNA Act does not violate the Fourth Amendment given "1) the reduced expectations of privacy held by certain classes of convicted offenders, 2) the minimal intrusion constituted by blood extraction, 3) the public's incontestable interest in accurately identifying and prosecuting offenders as well as in preventing recidivism, and 4) the likelihood that a DNA data bank would advance this interest" (citing *Rise v. Oregon*, 59 F.3d 1556, 1562 (9th Cir. 1995)); United States v. Lujan, CR No. 98-480-02 HA, 2002 U.S. Dist. LEXIS 25754, at \*12–13 (D. Or. July 9, 2002). A similar balancing analysis has been applied to uphold state DNA statutes. *See, e.g.*, Velasquez v. Woods, 329 F.3d 420, 421 (5th Cir. 2003) (Texas); Shaffer v. Saffle, 148 F.3d 1180, 1181 (10th Cir. 1998) (Oklahoma); Schlicher v. (NFN) Peters I & I, 103 F.3d 940, 943 (10th Cir. 1996) (Kansas); Boling v. Romer, 101 F.3d

a. *Acquisition of Sample Through Consent.* While government-compelled bodily intrusions for the purpose of obtaining blood or saliva samples are considered searches for Fourth Amendment purposes,<sup>75</sup> it is also well established “that a search conducted pursuant to a valid consent is constitutionally permissible.”<sup>76</sup> The government bears the burden<sup>77</sup> of establishing that consent was voluntarily given—in other words, that it was “the product of an essentially free and unconstrained choice by its maker”

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1336, 1340 (10th Cir. 1996) (Colorado); *Rise v. Oregon*, 59 F.3d 1556, 1559–62 (9th Cir. 1995) (Oregon); *Jones v. Murray*, 962 F.2d 302, 307–08 (4th Cir. 1992) (Virginia); *Padgett v. Ferrero*, 294 F. Supp. 2d 1338, 1342 (D. Ga. 2003) (Georgia).

75. See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989) (“We have long recognized that a ‘compelled intrusio[n] into the body for blood’ . . . must be deemed a Fourth Amendment search.” (quoting *Schmerber v. California*, 384 U.S. 757, 768 (1966))); *Padgett*, 294 F. Supp. 2d at 1342 (“A compelled intrusion into the body for a blood or saliva sample is a Fourth Amendment search.” (citing *Skinner*, 489 U.S. at 616)); *In re Shabazz*, 200 F. Supp. 2d 578, 582 (D.S.C. 2002) (“[R]equiring Petitioner to submit a saliva sample for the purpose of DNA testing invades a ‘legitimate expectation of privacy’ and is therefore a ‘search’ within the meaning of the Fourth Amendment.”); *United States v. Nicolosi*, 885 F. Supp. 50, 56 (E.D.N.Y. 1995) (“[T]he identity information contained within [a saliva] sample implicates the subject’s privacy interests.”). But see *Shelton*, 934 F. Supp. at 1050 (noting that during arrest, “a cheek swab to obtain DNA information could be analyzed like fingerprinting and be held not to constitute a search but rather simply part of the routine identification process that takes place” (citing *Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963))). See generally *Kaye, supra* note 23, at 476–81 (discussing that taking of blood, saliva, buccal cells, or epidermal cells should be considered Fourth Amendment searches).

76. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). Discussing the importance of consent when it provides justification for a search, the Court in *United States v. Drayton* observed:

In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.

*Drayton*, 536 U.S. at 207.

77. See *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968) (“When [the government] seeks to rely upon consent to justify the lawfulness of a search, [it] has the burden of proving that the consent was, in fact, freely and voluntarily given.”); *United States v. Melendez*, 301 F.3d 27, 32 (1st Cir. 2002) (“Because a consensual search falls within an established exception to the warrant requirement of the Fourth Amendment, the government bears the burden of proving that the search was within the scope of the consent.” (citing *United States v. Turner*, 169 F.3d 84, 87 n.3 (1st Cir. 1999))).

rather than “the product of duress or coercion, express or implied.”<sup>78</sup> This test entails “a question of fact to be determined from all the circumstances.”<sup>79</sup> Factors to consider include, but are not limited to: (1) the age of the person; (2) the person’s general intelligence; (3) whether the person was under the influence of drugs; (4) whether the person was advised of the right not to consent; and (5) whether the person was in custody or under arrest at the time consent was given.<sup>80</sup> Significantly, no “presumption of invalidity attaches if a citizen consented without explicit notification that he or she was free to refuse to cooperate.”<sup>81</sup>

In addition to the determination of whether the consent was given voluntarily, the scope of the consent with respect to the use of the DNA sample also may play a role in a subsequent Fourth Amendment challenge regarding it.<sup>82</sup> This is because a person “may of course delimit as he chooses the scope of the search to which he consents.”<sup>83</sup> The scope of a particular consent is measured by a test of objective reasonableness which asks: “what would the typical reasonable person have understood by the exchange between the officer and the subject?”<sup>84</sup> In general, the object of the search defines the scope of the search.<sup>85</sup>

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78. *Schneckloth*, 412 U.S. at 225, 227.

79. *Id.* at 248–49; *United States v. Becker*, 333 F.3d 858, 861 (8th Cir. 2003) (in determining whether consent was voluntary, courts look “at the totality of the circumstances” (citing *United States v. Smith*, 260 F.3d 922, 924 (8th Cir. 2001))).

80. See *United States v. Patayan Soriano*, 361 F.3d 494, 502 (9th Cir. 2004) (discussing factors); *United States v. Mancias*, 350 F.3d 800, 805 (8th Cir. 2003) (same).

81. *Drayton*, 536 U.S. at 207.

82. See *Grand*, *supra* note 27, at 2307 (“In the context of the DNA dragnet, a consent to search operates on two distinct levels: first, consent to the initial retrieval of a biological sample for DNA comparison in a present investigation; second, consent to have this DNA profile used for comparisons in future criminal investigations.”).

83. *Florida v. Jimeno*, 500 U.S. 248, 252 (1991). In *Jimeno*, the Court held that the search of a container in a car had not exceeded the scope of the suspect’s consent to search “when, under the circumstances, it [wa]s objectively reasonable for the officer to believe that the scope of the suspect’s consent permitted him to open a particular container within the automobile.” *Id.* at 249. The Court also noted that absent an objection by the suspect, an officer would not exceed the scope of a suspect’s consent “if his consent would reasonably be understood to extend to a particular container.” *Id.* at 252.

84. *Id.* at 251 (citing *Florida v. Royer*, 460 U.S. 491, 501–02 (1983) (plurality opinion); *accord United States v. Melendez*, 301 F.3d 27, 32 (1st Cir. 2002) (“[Courts] look beyond the language of the consent itself, to the overall context, which necessarily encompasses contemporaneous police statements and actions.”) (quoting *United States v. Turner*, 169 F.3d 84, 87 (1st Cir. 1999))).

85. *Jimeno*, 500 U.S. at 251 (citing *United States v. Ross*, 456 U.S. 798 (1982)); *accord United States v. Brown*, 345 F.3d 574, 580 (8th Cir. 2003).

b. *Acquisition of Sample Through Court Order.* If a person declines to provide a DNA sample voluntarily, must the government procure a warrant based on probable cause, or may it obtain a sample (in order to get a profile) based on a lesser showing of reasonable suspicion? The Court's rulings in *Davis v. Mississippi*<sup>86</sup> and *Hayes v. Florida*<sup>87</sup> are instructive on this question.

In *Davis*, following a rape, police apprehended twenty-four potential suspects without warrants and brought them to the station where they were questioned, fingerprinted, and then released.<sup>88</sup> *Davis* was one of the suspects brought to the station.<sup>89</sup> Nine days later, with neither a warrant nor probable cause, the police arrested *Davis*.<sup>90</sup> During the course of that detention he was fingerprinted a second time, and those prints matched the prints left by the rapist on the windowsill of the victim's house.<sup>91</sup> *Davis* was tried and convicted, and thereafter appealed his conviction on the grounds that the fingerprint evidence had been obtained as a result of an unlawful detention.<sup>92</sup> The Supreme Court reversed the conviction.<sup>93</sup>

The Court found that *Davis* had been detained unlawfully without a warrant or probable cause, and that the fruit of that detention—his fingerprints—was therefore inadmissible.<sup>94</sup> While recognizing that a detention solely for the purpose of obtaining fingerprints is subject to Fourth Amendment constraints,<sup>95</sup> the Court left open the possibility that “the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest.”<sup>96</sup>

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86. *Davis v. Mississippi*, 394 U.S. 721 (1969).

87. *Hayes v. Florida*, 470 U.S. 811 (1985).

88. *Davis*, 394 U.S. at 722.

89. *Id.*

90. *Id.* at 723.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 726–28. Although it was the prints provided by *Davis* following his arrest that led to his conviction, the Court analyzed the issue from the perspective of *Davis*'s initial detention, when he first provided fingerprints to the police. *Id.* at 725–26.

95. *Id.* at 727.

96. *Id.* at 728. The Court observed:

It is arguable, however, that, because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be

The Court revisited the application of the exclusionary rule to fingerprint evidence in *Hayes*. In *Hayes*, during the course of an investigation of a series of burglary-rapes, the police went to the defendant's home for the purpose of obtaining his fingerprints.<sup>97</sup> When the defendant expressed reluctance, one of the officers told him that they would have to arrest him, after which the defendant agreed to accompany the officers.<sup>98</sup> The prints obtained from the defendant matched those recovered at one of the burglaries, and he was tried and convicted of burglary and sexual battery.<sup>99</sup> As in *Davis*, the defendant argued that the fingerprints should have been suppressed because they were the result of an illegal search and seizure.<sup>100</sup> The Supreme Court agreed with the defendant.<sup>101</sup>

Reaffirming the holding in *Davis*, the Court ruled that its developing jurisprudence made clear that a Fourth Amendment violation would be triggered by "the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes, whether for interrogation or fingerprinting, absent probable cause or judicial authorization."<sup>102</sup> The Court also noted, however, "that a brief detention in the field for the purpose of fingerprinting" may not necessarily be impermissible under the Fourth Amendment, provided it was based on

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found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense. Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions . . . . Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time.

*Id.* at 727 (citation omitted). In the context of a DNA sample, two commentators have noted that "[b]ecause the judicial order can limit the search to loci that are of strictly biometric interest, the analogy to *Davis* is apt." Imwinkelried & Kaye, *supra* note 37, at 423.

97. *Hayes v. Florida*, 470 U.S. 811, 812 (1985).

98. *Id.*

99. *Id.* at 813.

100. *Id.* at 813-15.

101. *Id.* at 813.

102. *Id.* at 815.

reasonable suspicion.<sup>103</sup> The Court also reiterated its suggestion in *Davis* “that under circumscribed procedures, the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station for the purpose of fingerprinting.”<sup>104</sup>

#### 4. Discussion

A member of a group targeted by a DNA sweep who provides a sample, either by consent or court order, which ties him to the crime, and as a result is prosecuted, may seek to suppress this evidence on the grounds that the seizure and search of the sample was unreasonable under the Fourth Amendment.<sup>105</sup> In the case of consent, judicial resolution of that

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103. *Id.* at 816. The Court also observed:

There is . . . support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch.

*Id.* at 817 (citing *United States v. Place*, 462 U.S. 696 (1983)).

104. *Id.* at 817. The Court recognized that, following its earlier suggestion in *Davis*, some states had enacted laws governing judicially authorized seizures for fingerprinting. *Id.*; see *In re Nontestimonial Identification Order Directed to R.H.*, 762 A.2d 1239, 1245 (Vt. 2000) (“In response to *Davis*, Vermont and eight other states adopted [nontestimonial identification order] procedures.”); see also Angus J. Dodson, Comment, *DNA “Line-Ups” Based on a Reasonable Suspicion Standard*, 71 U. COLO. L. REV. 221, 234–38 (2000) (discussing various state statutes and court rules authorizing searches under *Davis* terms); Michael P. Jewkes, Note, *Just Scratching the Surface: DNA Sampling Prior to Arrest and the Fourth Amendment*, 35 SUFFOLK U. L. REV. 125, 126 (2001) (“The increasing use of nontestimonial identification orders (NTOs) . . . has allowed law enforcement officers to extract physical evidence, including DNA samples, from suspects without obtaining a search warrant.”).

105. This hypothetical assumes, as noted earlier, that the contact between the police and the member of the targeted group did not implicate the Fourth Amendment. See *United States v. Pulliam*, 265 F.3d 736, 740–41 (8th Cir. 2001) (“An unlawful seizure does not occur just because an officer approaches an individual to ask some questions or request permission to conduct a search. This is true even if the officer has no reason to suspect the individual of unlawful activity.” (citing *United States v. White*, 81 F.3d 775, 779 (8th Cir. 1996))). See generally Imwinkelried & Kaye, *supra* note 37, at 445 (“As a legal matter, police may ask anyone to give DNA and, as long as they do not engage in coercion or misrepresentation, the police may collect voluntary samples for analysis.”). If the person gave consent during an illegal seizure, the taint from that seizure may invalidate the consent. See *United States v. Drayton*, 536 U.S. 194, 206 (2002). As the court observed in *United States v. Drayton*, “where the question of voluntariness pervades both the search and seizure inquiries, the respective

challenge will turn on an analysis of the factors discussed earlier to gauge whether the consent to search was voluntary<sup>106</sup> and whether the scope of the search exceeded the given consent.<sup>107</sup> If the person declined to provide a sample and the police had to procure a warrant or other judicial order,<sup>108</sup>

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analyses turn on very similar facts." *Id.*; *see* Florida v. Royer, 460 U.S. 491, 507-08 (1983) (holding that because the respondent was illegally detained his consent was ineffective to justify the search).

106. *See* cases cited *supra* notes 79-80; *see also* David H. Kaye, *Two Fallacies About DNA Data Banks for Law Enforcement*, 67 BROOK. L. REV. 179, 197 n.71 (2001) ("Although one might wish to argue that police requests for DNA are inherently coercive, the settled doctrine is that whether a particular contact involves coercion or misrepresentation is a matter of fact to be determined under the totality of the circumstances." (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973))).

107. The court's ruling in *State v. Binner*, 886 P.2d 1056 (Or. Ct. App. 1994), provides a good illustration of the role that the scope of consent may have in a search. In *Binner*, following an automobile accident, the defendant was transported to a hospital, where the police asked whether he would consent to providing a blood sample to be tested for alcohol. *Id.* at 1057. He complied and the police, in addition to testing his blood for alcohol, tested it for drugs. *Id.* The tests came back positive for marijuana. *Id.* In affirming the ruling of the trial court suppressing the results of the blood test, the Oregon Court of Appeals stated:

Having determined that defendant has a privacy interest in the contents of his blood, the next issue is to what extent, if any, he intended to protect that interest when he executed the consent. Defendant expressly refused to consent to a test of his urine for drugs. His written consent is expressly limited to a test for alcohol content. The scope of a consent to search is determined by the consenting person. The necessary implication of defendant's limitation on the authority of the police to test the contents of his blood is that he did not intend them to test the sample for drugs. Under the circumstances, defendant has manifested an intention to protect his privacy interest to that extent. Nor can it be said that defendant intended to abandon his privacy interest in the blood sample. Although he may not have intended that the sample be returned to him, and thus waived his possessory interest in the sample, his privacy interest in its contents continued despite the fact that the police were in possession of it.

*Id.* at 1059 (citations omitted); *see also* State v. Gerace, 437 S.E.2d 862, 863 (Ga. Ct. App. 1993) (consent to alcohol and drug testing in blood did not extend to DNA testing); *Transcript of Interview of David Kaye with Congressional Quarterly*, The College of Law at Arizona State University, Sept. 21, 2003, <http://www.law.asu.edu/?id=8608> [hereinafter *Kaye Interview*] ("A stronger argument might be that people assume that the police will destroy the [DNA] samples after the case is closed, so that indefinite retention results in a search that exceeds the scope of the consent.").

108. *See* Imwinkelried & Kaye, *supra* note 37, at 420 ("It . . . is likely that an order compelling a person to give a sample could be issued on something less than probable cause."); Kaye & Smith, *supra* note 26, at 424 ("DNA often can be acquired

a court will examine whether the warrant or order was based on the controlling standard (i.e., probable cause or something less), and other pertinent criteria.<sup>109</sup>

What if the person who provides the sample, either through consent or court order, is eliminated as the perpetrator and the consent or order was unclear as to the use of the sample following the particular investigation for which it was obtained? Does the retention of the sample—not the profile<sup>110</sup>—by the police violate that individual's Fourth

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by a court order based on probable cause or the lesser standard of 'reasonable suspicion.'"). *But see* Will, *supra* note 27, at 142–43 (arguing that using the dicta in *Davis*, "courts could allow police to subject individuals to DNA testing without a warrant, probable cause, reasonable suspicion, or any exception").

109. *Compare* *Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (holding that a warrant must be based on probable cause, be supported by affidavit, and describe with particularity the place to be searched and the person or things to be seized), *with In re Nontestimonial Identification Order Directed to R.H.*, 762 A.2d 1239, 1240 (Vt. 2000) (upholding an order of civil contempt entered against a defendant who refused to provide a saliva sample for DNA analysis despite being so directed by means of a nontestimonial identification order based on reasonable grounds). *See generally* *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978) (stating that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," he is entitled to a hearing).

110. *See* *Burk & Hess, supra* note 23, at 12 ("An entirely different and more substantial concern arises where the actual DNA sample, rather than simply a digitized banding pattern, is preserved by the law enforcement agency."); *Kimmelman, supra* note 6, at 211 ("In contrast to profiles, tissue samples could potentially be used to derive information about susceptibilities to various hereditary traits."). One commentator noted:

Standard DNA profiles, capable of being stored as a mere numeric code, will provide little information regarding inherited medical or physical traits. The privacy issues in databanking arise instead from retention of samples themselves, once identification information is entered into the database. These samples are where the wealth of genetic information is stored because further testing could be performed on them in the future.

*Schumacher, supra* note 1, at 1661 (footnotes omitted). Other commentators have observed:

Inasmuch as any invasion of bodily integrity and informational privacy is complete once the sample is collected and analyzed, a strong argument can be made that the state has the constitutional power to add such lawfully acquired profiles to the database for use in unrelated investigations—even when the typing of a suspect's or volunteer's DNA excludes him from further suspicion in the case.

*Kaye & Smith, supra* note 26, at 424.

Amendment rights?<sup>111</sup> In analyzing this question, one must first recognize that a majority of the states do not allow the addition of profiles to DNA databases unless there has been a conviction.<sup>112</sup> Four states—Vermont, Alaska, Wisconsin, and Michigan—prohibit storage of suspect samples in their state databases.<sup>113</sup> Thus, as a matter of state law, the police may not have the authority to retain the sample. But what if the police nonetheless keep the sample for identification purposes, just as if the person had been photographed or fingerprinted?<sup>114</sup> Would such action infringe on the

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111. See Harlan, *supra* note 2, at 192 (“[U]nless a court order or instrument of consent explicitly provides for sample retention—as opposed to the retention of the DNA profile—sample retention must survive an independent Fourth Amendment privacy analysis.”) (footnote omitted). Two commentators have noted:

[A] concern arises if the sample is not disposed of after it is used to generate the specific identification from the thirteen loci, but rather is retained so that it is still available if the technology changes or replication of the procedure is required. . . . [R]etention of samples by laboratories allows the creation of databases that contain the full genetic code of an individual and all corresponding health information, which otherwise would have remained private. This extends beyond the limited genetic fingerprint that is made from the thirteen loci, and even more so, beyond the use of traditional fingerprinting.

Samuel C. Seiden & Karine Morin, *The Physician as Gatekeeper to the Use of Genetic Information in the Criminal Justice System*, 30 J.L. MED. & ETHICS 88, 90 (2002). But see Burk & Hess, *supra* note 23, at 25 (“Wholesale genetic testing of samples might well be analogized to ‘rifling through personal files’ or as the functional equivalent of an illegal blanket warrant. Even so, however, such an analogy stands on a legal footing that is less than certain.”) (footnote omitted); Harlan, *supra* note 2, at 194–96 (noting that the nature of DNA and its availability through medical care providers or through inadvertent public abandonment render it unlikely that a person may be said to hold reasonable expectation of privacy in its contents).

112. See Bonnie Taylor, Comment, *Storing DNA Samples of Non-Convicted Persons & the Debate Over DNA Database Expansion*, 20 T.M. COOLEY L. REV. 509, 514 (2003) (“The majority of states . . . do not permit DNA information to be added as a profile to a DNA database until the individual has been convicted.”). Louisiana authorizes the storage of samples from those arrested. LA. REV. STAT. ANN. § 15:602 (2005) (“It is . . . in the best interest of the state to establish a DNA data bank containing DNA samples submitted by individuals arrested, convicted, or presently incarcerated . . .”); *see also* Taylor, *supra*, at 514.

113. ALASKA STAT. § 44.41.035 (2004); MICH. COMP. LAWS ANN. § 28.176(12) (West Supp. 2004); VT. STAT. ANN. tit. 20, § 1940(a) (2000); WIS. STAT. ANN. § 165.77 (West 1997 & Supp. 2004); *see also* Taylor, *supra* note 112, at 514.

114. For example, in *Smith v. State*, after being arrested and charged with rape, the defendant was ordered to provide blood and saliva samples. *Smith v. State*, 744 N.E.2d 437, 439 (Ind. 2001). The defendant was acquitted of that offense but subsequently charged and convicted of another rape after the police were notified by

Fourth Amendment rights of the person who provided the sample?

The Fourth Amendment talks about “[t]he right of the people to be secure in their persons, houses, papers, and effects.”<sup>115</sup> The term “effects” has been applied to personal property.<sup>116</sup> People eliminated as suspects who seek the return of their samples could make the argument that the sample constitutes personal property over which they still maintain an interest against further searches, and which they did not abandon merely by permitting the police to extract a profile.<sup>117</sup> Furthermore, it is a property interest that has a nexus to privacy interests.<sup>118</sup> But outside the framework of a DNA sweep, courts have ruled that if the police already lawfully have a suspect’s sample from another case, they are not obligated to obtain a warrant before analyzing it to acquire a DNA profile in connection with another investigation.<sup>119</sup> It also has been noted that there is no expectation

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the crime lab that his DNA profile matched the DNA left by the perpetrator. *Id.* On appeal, defendant argued that the inclusion of his profile in the state database was contrary to law since it only allowed the “records for convicted criminals, crime scene specimens, unidentified missing persons, and close biological relatives of missing persons” to be retained. *Id.* at 440 (quoting IND. CODE § 10-1-9-8(a) (1998)). Assuming that the state database was implicated, the Supreme Court of Indiana could not, on the basis of the record, “divine the relationship between the Crime Lab and the database,” and thus declined to exclude the evidence. *Id.* at 441–42. *See generally* *Kaye Interview*, *supra* note 107 (“It is possible to create a database of identifying DNA markers that are like fingerprints or license plate numbers. That is, the database could be limited to information that is only useful for identification purposes.”).

115. U.S. CONST. amend. IV.

116. *See* *Oliver v. United States*, 466 U.S. 170, 177 n.7 (1984) (“The Framers would have understood the term ‘effects’ to be limited to personal, rather than real, property.”).

117. A possible argument is that the interest a person possesses in a body sample is “certainly as great as the possessory interest a person has been held by the [Supreme] Court to enjoy today in illegal narcotics.” *Altman v. City of High Point*, 330 F.3d 194, 203 (4th Cir. 2003) (citing *United States v. Jacobsen*, 466 U.S. 109, 124–25 (1984)).

118. *Id.* (“[A]fter *Soldal*, it is clear that there need be no nexus between a privacy or liberty interest and the possessory interest for Fourth Amendment protection to attach.”).

119. *See* *Washington v. State*, 653 So. 2d 362, 364 (Fla. 1994) (“[O]nce the samples were validly obtained, albeit in an unrelated case, the police were not restrained from using the samples as evidence in the murder case.”); *Bickley v. State*, 489 S.E.2d 167, 169 (Ga. Ct. App. 1997) (holding that the DNA evidence should not be “suppressed on the basis that additional testing of defendant’s blood . . . required an independent warrant”); *Patterson v. State*, 744 N.E.2d 945, 947 (Ind. Ct. App. 2001) (“[U]nder the facts of this case, society is not prepared to recognize as reasonable an individual’s expectation of privacy in a blood sample lawfully obtained by police.”); *Wilson v. State*, 752 A.2d 1250, 1272 (Md. Ct. Spec. App. 2000) (“The police were not

of privacy associated with the sample, and its subsequent search to generate a DNA profile, given that DNA is routinely discarded in public places and the authorities could lawfully obtain samples from medical facilities.<sup>120</sup> Furthermore, there are difficulties with respect to the argument that the retention of the sample may constitute an unreasonable seizure of a property interest. Where an initial seizure of property is reasonable, and seizure by consent or court order meet the test, a failure to return the item does not give rise to a seizure claim under the Fourth Amendment.<sup>121</sup> Thus, given the temporal restriction of seizures under the

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required to obtain and execute a second warrant in 1998 for the testing of the appellant's blood samples already seized pursuant to the 1991 warrant. Any legitimate expectation of privacy that the appellant had in his blood disappeared when that blood was validly seized in 1991."); *People v. King*, 663 N.Y.S.2d 610, 614 (N.Y. App. Div. 1997) ("[O]nce a person's blood sample has been obtained lawfully, he can no longer assert either privacy claims or unreasonable search and seizure arguments with respect to the use of that sample."); *see also* *Kaye & Smith*, *supra* note 26, at 429 ("It seems fair to say that unless the suspect is explicit about the limited scope of his consent, he runs the risk that the police will use the sample in more than one investigation."). In a similar vein, the use of an existing DNA profile in an unrelated case does not violate the Fourth Amendment. *See People v. Baylor*, 118 Cal. Rptr. 2d 518, 521 (Cal. Ct. App. 2002) ("[T]here is no constitutional violation or infringement of privacy when the police in one case use a DNA profile, which was lawfully obtained in connection with another case."); *Smith*, 744 N.E.2d at 439 ("[O]nce DNA is used to create a profile, the profile becomes the property of the Crime Lab. Thus, [defendant] had no possessory or ownership interest in it. Nor does society recognize an expectation of privacy in records made for public purposes from legitimately obtained samples.").

120. *See Imwinkelried & Kaye*, *supra* note 37, at 427–40 (discussing how police may obtain DNA samples from preexisting medical collections and by abandonment); *Harlan*, *supra* note 2, at 194–96 (discussing how "[t]he public nature of DNA belies and discredits the expectation that it should remain solely within the access of the individual in whose body it originated" and also how DNA samples may be obtained from medical care providers). *But see Taylor*, *supra* note 112, at 540 ("Because DNA sampling constitutes a 'significant interference' with an individual's expectation of privacy in his genetic information, it should not automatically become eligible for storage in a database simply because it is out of the donor's possession and in the hands of the government.").

121. *See Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 187 (2d Cir. 2004) ("Where . . . an initial seizure of property was reasonable, defendants' failure to return the items does not, by itself, state a separate Fourth Amendment claim of unreasonable seizure."); *Lee v. City of Chicago*, 330 F.3d 456, 466 (7th Cir. 2003) ("Once an individual has been meaningfully dispossessed, the seizure of the property is complete, and once justified by probable cause, that seizure is reasonable. The amendment then cannot be invoked by the dispossessed owner to regain his property."); *Fox v. Van Oosterum*, 176 F.3d 342, 351 (6th Cir. 1999) ("[T]he Fourth Amendment protects an individual's interest in retaining possession of property but not the interest in regaining possession of property."). An argument can be made,

Fourth Amendment, what other remedy may be available?

It is well established that once criminal proceedings are completed, the government must return property that was seized “unless it is contraband or subject to forfeiture.”<sup>122</sup> One possible avenue may be a motion seeking the return of property under the state analogue to Federal Rule of Criminal Procedure 41(g).<sup>123</sup> This requires that a court accept the argument that the sample provided constitutes the personal property of the person who furnished it. Another alternative, discussed further below, would entail arguing that the retention of the sample violates the individual’s rights to procedural due process under the Fifth and Fourteenth Amendments.<sup>124</sup>

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however, that when a seizure is accomplished by consent, the temporal distinction does not apply in the same fashion. The cases support this view. For example, the Sixth Circuit in *Fox* explicitly stated that it was not deciding “whether a ‘seizure’ occurs when a person voluntarily gives a thing to state actor, then asks the state actor to return that thing, and the state actor refuses to do so.” *Fox*, 176 F.3d at 351. In a similar vein, the Seventh Circuit observed in *Lee* that when consent expires, “a limited detention becomes a full-blown seizure, which is either justified by probable cause or is unreasonable.” *Lee*, 330 F.3d at 465.

122. United States v. Bein, 214 F.3d 408, 411 (3d Cir. 2000) (citing United States v. Chambers, 192 F.3d 374, 376 (3d Cir. 1999)).

123. Federal Rule of Criminal Procedure 41(g) provides the following:

A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property’s return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

FED. R. CRIM. P. 41(g). A federal court has jurisdiction under Rule 41(g), even if state authorities seized the property, “if (1) federal authorities actually possess the property that the State first seized and then released to federal authorities; (2) federal authorities constructively possess the property that ‘was considered evidence in the federal prosecution;’ or (3) state officials acted upon directions from federal officials in seizing the property.” United States v. Rowzer, 201 F.R.D. 516, 518 (D. Kan. 2001) (quoting *Clymore v. United States*, 164 F.3d 569, 571 (10th Cir. 1999)).

124. See *Shaul*, 363 F.3d at 187 (“To the extent the Constitution affords [an aggrieved party] any right with respect to a government agency’s retention of lawfully seized property, it would appear to be procedural due process.” (citing United States v. David, 131 F.3d 55, 59 (2d Cir. 1997))); *Lee*, 330 F.3d at 466 (“[I]n conducting a due-process analysis to decide how, when, and under what terms the property may be returned, the Fifth and Fourteenth Amendments’ texts, histories, and judicial interpretations can better aid a court in balancing the competing interests at stake.” (citing *Miller v. City of Chicago*, 774 F.2d 188, 195–96 (7th Cir. 1985))).

### B. The Privilege Against Self-Incrimination and the Right to Due Process

The Fifth Amendment provides in part that “[n]o person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.”<sup>125</sup> The Fourteenth Amendment similarly provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”<sup>126</sup> Do these clauses afford relief to one who, through consent or court order, provides a DNA sample and is convicted? Alternatively, do the clauses provide relief to one who, after providing a DNA sample, is eliminated as the possible perpetrator and wants the sample returned or destroyed?

The privilege against self-incrimination “protects a person only against being incriminated by his own compelled testimonial communications.”<sup>127</sup> In other words, “the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.”<sup>128</sup> Thus, one may be compelled to put on a shirt,<sup>129</sup> make a voice recording,<sup>130</sup> provide a handwriting exemplar,<sup>131</sup> and, as discussed in detail later, a blood sample.<sup>132</sup>

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125. U.S. CONST. amend. V.

126. *Id.* amend. XIV § 1. *See generally* 2 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 664 (2d ed. 1998) (“[The due process] procedural safeguards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary government action.”).

127. *Fisher v. United States*, 425 U.S. 391, 409 (1976) (citing *Schmerber v. California*, 384 U.S. 757 (1966)); *see also* *United States v. Patane*, 542 U.S. 630, 637 (2004) (“[T]he core protection afforded by the Self-Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial.” (citations omitted)).

128. *Holt v. United States*, 218 U.S. 245, 252–53 (1910).

129. *Id.*

130. *See United States v. Dionisio*, 410 U.S. 1, 7 (1973) (reaffirming that compelled production of voice exemplars does not violate the Fifth Amendment); *Gilbert v. California*, 388 U.S. 263, 266–67 (1967); *United States v. Wade*, 388 U.S. 218, 222–23 (1967).

131. *See Gilbert*, 388 U.S. at 266–67 (“A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the Fifth Amendment privilege] protection.” (citing *Wade*, 388 U.S. at 222–23)).

132. *See United States v. Hubbell*, 530 U.S. 27, 35 (2000) (“[E]ven though the

For purposes of due process analysis, a court must first determine whether a party has a life, liberty, or property interest that is protected by either the Fifth or Fourteenth Amendment.<sup>133</sup> In the context of due process, liberty interests are implicated when the government physically takes away a person's freedom of action or "limit[s] someone's freedom of choice and action by making it impossible or illegal for that person to engage in certain types of activit[ies]."<sup>134</sup> With respect to property, the "interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money."<sup>135</sup> Generally, courts will "look to existing rules and understandings of property as embodied in federal and state statutes and the common law to determine what constitutes property for the purposes of constitutional law."<sup>136</sup> If the party

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act may provide incriminating evidence, a criminal suspect may be compelled to put on a shirt, to provide a blood sample or handwriting exemplar, or to make a recording of his voice." (footnotes omitted)). As the Court explained in *Hubbell*:

The act of exhibiting such physical characteristics is not the same as a sworn communication by a witness that relates either express or implied assertions of fact or belief. Similarly, the fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement, such as filing an income tax return, maintaining required records, or reporting an accident, does not clothe such required conduct with the testimonial privilege.

*Id.* (citation and footnotes omitted).

133. *See, e.g.*, *Mimiya Hosp., Inc. v. U.S. Dep't of Health & Human Servs.*, 331 F.3d 178, 181 (1st Cir. 2003) ("The deprivation of a constitutionally protected interest in life, liberty, or property is a threshold requirement for a successful procedural due process claim." (citing *Aponte v. Calderon*, 284 F.3d 184, 191 (1st Cir. 2002))); *Ashki v. INS*, 233 F.3d 913, 921 (6th Cir. 2000) ("[T]o demonstrate that the Due Process Clause has been violated, Petitioner must establish that she has been deprived of a life, liberty, or property interest sufficient to trigger the protection of the Due Process Clause in the first place." (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569 (1972))).

134. 3 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW* § 17.4, at 28 (3d ed. 1999) (discussing how "liberty" may be affected by three types of governmental restraints: "(1) physical freedom, (2) the exercise of fundamental constitutional rights and (3) other forms of freedom of choice or action").

135. *Roth*, 408 U.S. at 571–72.

136. Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 369 (2000); *see Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–41 (1985) ("Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" (quoting *Roth*, 408 U.S. at 577)). While the property interest may be created by state law, "federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9

has a recognizable property or liberty interest, then the next step is to determine “what process is due.”<sup>137</sup> Under *Mathews v. Eldridge*,<sup>138</sup> that step entails a balancing of three factors: (1) the strength of the private interest affected by the proposed official action; (2) the risk of deprivation of that interest under the existing procedures and the likely value of substitute or additional safeguards; and (3) the government’s interest in avoiding additional procedures, including any administrative and financial burdens any added process would entail.<sup>139</sup>

### 1. *Self-Incrimination and Due Process in the Event of a Conviction*

The Supreme Court’s ruling in *Schmerber v. California* is instructive on the scenario involving the provision of a sample which subsequently leads to a criminal conviction.<sup>140</sup> In *Schmerber*, the petitioner was arrested at the hospital while undergoing treatment for injuries he sustained in an automobile accident.<sup>141</sup> At the direction of the police and over petitioner’s objection, a doctor at the hospital withdrew blood from him.<sup>142</sup> A subsequent blood analysis revealed the presence of enough alcohol to indicate intoxication, and the petitioner was convicted of driving while intoxicated.<sup>143</sup>

The Court ruled that the extraction of the petitioner’s blood and its subsequent chemical analysis did not involve “even a shadow of testimonial compulsion . . . or enforced communication,” and, thus, the privilege against self-incrimination was not implicated.<sup>144</sup> With respect to the Due Process Clause, the Court found no violation since the blood had been drawn “in a simple, medically acceptable manner in a hospital environment.”<sup>145</sup> In light of this holding, providing a DNA sample (from

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(1978) (quoting *Roth*, 408 U.S. at 577).

137. *Loudermill*, 470 U.S. at 541 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

138. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

139. *Id.* at 335; *accord* *Hampton v. Hobbs*, 106 F.3d 1281, 1287 (6th Cir. 1997).

140. *Schmerber v. California*, 384 U.S. 757 (1966).

141. *Id.* at 758.

142. *Id.*

143. *Id.* at 759.

144. *Id.* at 765 (“Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner’s testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.”).

145. *Id.* at 759–60. The due process analysis was based on the Fourteenth Amendment. *Id.* at 759.

which a profile is extracted), whether voluntarily or through judicial compulsion via a court order, does not appear to infringe on the privilege against self-incrimination and would not violate due process, thereby providing no support for the challenge of a conviction on those grounds.<sup>146</sup>

## 2. *Self-Incrimination and Due Process When the Sample Eliminates the Provider as the Perpetrator*

As demonstrated previously, if the member of the targeted group who provides the sample is eliminated as the possible perpetrator, the privilege against self-incrimination would not afford that person a viable legal ground for the return or destruction of the provided sample.<sup>147</sup> But what about the Fifth and Fourteenth Amendments' right to due process? Does the police's failure to return or destroy the sample upon request constitute the deprivation of a property interest without due process of law?

While in certain circumstances courts have declined to recognize a

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146. See Burk & Hess, *supra* note 23, at 18 ("[D]espite the information content of DNA molecules, analogizing their physical removal from an individual to forced or coerced confession seems to strain the definition of the danger that the Fifth Amendment was designed to guard against."); Kaye, *supra* note 23, at 463–65 (arguing that there are no self-incrimination concerns in requiring DNA samples from arrestees).

Relying on *Schmerber*, lower courts consistently have ruled that the DNA Act's requirement that prisoners provide samples does not violate the Self-Incrimination or Due Process Clauses of the Fifth Amendment. See, e.g., *Vore v. U.S. Dep't of Justice*, 281 F. Supp. 2d 1129, 1137–38 (D. Ariz. 2003) (finding "meritless" the contention that the DNA Act violates the Self-Incrimination or Due Process Clauses of the Fifth Amendment); *United States v. Reynard*, 220 F. Supp. 2d 1142, 1174 (S.D. Cal. 2002) (citing *Schmerber* in holding that compelled extraction of blood samples under the DNA Act does not violate the Fifth Amendment privilege against self-incrimination); *Groceaman v. U.S. Dep't of Justice*, No. Civ.A 301CV1619G, 2002 WL 1398559, at \*4 (N.D. Tex. June 26, 2002), *aff'd*, 354 F.3d 411 (5th Cir. 2004) ("[T]he extraction of blood for purposes of the Act, whether voluntary or compelled by the BOP, does not violate plaintiffs' right to Due Process."). Challenges to state DNA statutes on similar grounds have met the same fate. See *Shaffer v. Saffle*, 148 F.3d 1180, 1181 (10th Cir. 1998) (reiterating that DNA samples obtained pursuant to Oklahoma law "are not testimonial in nature"); *Boling v. Romer*, 101 F.3d 1336, 1340–41 (10th Cir. 1996) (holding that Colorado's DNA statute violates neither the self-incrimination privilege nor the right to due process); *Rise v. Oregon*, 59 F.3d 1556, 1562–63 (9th Cir. 1995) (finding that Oregon's DNA statutes do not implicate the Due Process Clause); *Kruger v. Erickson*, 875 F. Supp. 583, 587 (D. Minn. 1995), *aff'd on other grounds*, 77 F.3d 1071 (8th Cir. 1996) (finding that Minnesota's DNA statute did not violate due process because evidence showed that the "procedures employed . . . [were] performed according to medically acceptable protocols").

147. See discussion *supra* Part III.B.1.

property interest in bodily tissues,<sup>148</sup> the same has not held true for “renewable body tissues and fluids, such as hair, blood, and sperm.”<sup>149</sup> Some commentators maintain that a DNA sample triggers a recognizable property interest under the Due Process Clause<sup>150</sup> and argue that under *Mathews*, the government is obligated to “provide some measure of procedural protection before depriving individuals of their DNA samples.”<sup>151</sup> Thus, to the extent there are no procedural protections, the

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148. See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 487–97 (Cal. 1990) (refusing to recognize conversion claim to bodily tissues and cells); see also *Cornelio v. Stamford Hosp.*, 717 A.2d 140, 143–44 (Conn. 1998) (holding that, even assuming that plaintiff had a property interest in cervical cells removed from her body for purposes of a Pap smear test, as a matter of state statutory law, in action seeking replevin, she had no right to the immediate possession of the slides that contained her cells).

149. Laura J. Hilmert, Note, *Cloning Human Organs: Potential Sources and Property Implications*, 77 IND. L.J. 363, 378 (2002); see *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 283 (Cal. Ct. App. 1993) (recognizing sperm as part of decedent’s estate for probate purposes); *Venner v. State*, 354 A.2d 483, 498 (Md. Ct. Spec. App. 1976) (“It is not unknown for a person to assert a continuing right of ownership . . . over such things as . . . fluid waste, secretions, hair, fingernails, toenails, blood, and organs or other parts of the body, whether their separation from the body is intentional, accidental, or merely the result of normal body functions.” (footnote omitted)); see also *Rao, supra* note 136, at 373 (“[B]lood is currently deemed to be full-fledged property—a ‘product’ whose sale constitutes ‘income’ under the tax code, while the ‘business expenses’ incurred by the seller in creating this ‘product’ are deductible for the purposes of the tax laws.”); William Boulter, Note, *Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693, 712 (1995) (“[M]any body parts are now commonly treated as commodities appropriate for sale, with very little legal involvement. Blood, semen, hair, teeth, sweat, and urine are the simplest of these, but even pieces of skin and muscle from living persons have been sold without raising any controversy.”) (footnotes omitted).

150. See *Harlan, supra* note 2, at 199 (“Applying the labor, utilitarian, and personality theories to an analysis of property rights in a DNA sample demonstrates that the concept of DNA as property is consistent with the theoretical foundations of property.”); *Will, supra* note 27, at 141 (“Affording individuals property rights in their DNA implicates further protection under the Fourteenth Amendment regarding DNA dragnets.”); see also Catherine M. Valerio Barrad, Comment, *Genetic Information and Property Theory*, 87 NW. U. L. REV. 1037, 1040 (1993) (“[W]hen faced with the question, [courts] should recognize protectable property interests in genetic information under existing common law and theories of property justification and should vest those property interests in the individual whose cells contain the genetic information at issue.”).

151. *Harlan, supra* note 2, at 214. One commentator also argues that the Fifth Amendment’s Taking Clause, made applicable to the states through the Fourteenth Amendment, affords additional protection against the retention of a DNA sample. *Id.* at 215–19.

retention of the sample, or the failure to destroy it, may be said to violate due process.

### C. The Right to Privacy

While the Constitution does not explicitly mention a right to privacy,<sup>152</sup> the Supreme Court has acknowledged the existence of such a right based on the interests protected by the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments.<sup>153</sup> This right has been used to strike down laws affecting intimate life decisions relating to contraception, procreation, abortion, marriage, education, and child rearing.<sup>154</sup> Two

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152. See Yeshulas, *supra* note 31, at 146 (“The right to privacy is not explicitly expressed in any section of the United States Constitution.”). In American common law, the recognition of the right to privacy can be traced partly to the publication of an 1890 article by Samuel Warren and Louis Brandeis titled *The Right to Privacy*. See Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1335–36 (1992) (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)). Seventy years later, building on the views of Warren and Brandeis and the developing case law, Dean William Prosser wrote another significant article arguing that the tort of privacy had four categories: (1) public disclosure of private facts; (2) intrusion upon seclusion or solitude; (3) appropriation; and (4) false light. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). Later, the Restatement (Second) of Torts incorporated these four categories into its list of actionable privacy torts. RESTatement (SECOND) OF TORTS §§ 652A–652E (1977).

153. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that homosexuals’ right to liberty under the Due Process Clauses of the Fifth and Fourteenth Amendments affords them the right to engage in consensual sexual activity at home without government intervention); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (grounding a privacy right to terminate pregnancy in the Ninth and Fourteenth Amendments); *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (recognizing zone of privacy within the penumbra of rights guaranteed by the First, Third, Fourth, Fifth, and Ninth Amendments). See generally Burk & Hess, *supra* note 23, at 15 (“[T]he United States Supreme Court has recognized that certain enumerated guarantees in the Bill of Rights, together with certain guarantees implicit in the scheme of the Constitution, work to protect privacy.”).

154. See *Troxel v. Granville*, 530 U.S. 57, 65–67 (2000) (plurality opinion) (holding a Washington nonparental visitation statute unconstitutional because it infringes parents’ fundamental rights to make decisions affecting their children); *Roe*, 410 U.S. at 153 (holding that a woman’s decision to terminate her pregnancy is protected by the right to privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972) (recognizing that the right of privacy provides an individual the right “to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child” (citing *Stanley v. Georgia*, 394 U.S. 557 (1969))); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (recognizing a fundamental right to marry); *Griswold*, 381 U.S. at 484–86 (recognizing a fundamental right to use contraceptives); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (though *Skinner* was

interests are affected by this right—“[o]ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.”<sup>155</sup> This generalized right of privacy would not provide legal grounds to suppress incriminating evidence provided by consent or court order. But could this right be invoked to enjoin the retention, or direct the destruction of, a DNA sample from a person who voluntarily or by court order provided the sample and has been cleared as a suspect of the crime under investigation?

The Supreme Court’s recognition of a fundamental right to privacy, in the context of personal autonomy, has concerned matters relating to contraception, procreation, marriage, education, and child rearing.<sup>156</sup> Since those decisions protected one’s right to self-definition, it is highly improbable that a court would hold that the retention of a DNA sample infringes on that aspect of an individual’s right to privacy.<sup>157</sup> With respect to the confidentiality prong of the right to privacy, which has been held to protect against the disclosure of personal matters, such as medical information,<sup>158</sup> the outcome may be different.<sup>159</sup> Here, as noted previously,

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decided on the basis of equal protection, the Court concluded that “[m]arriage and procreation are fundamental” rights, thereby seemingly grouping procreation into the realm of protected privacy rights); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (finding a fundamental right to decisions regarding child rearing and education); *see also Prince v. Massachusetts*, 321 U.S. 158, 160–71 (1944) (striking down a state statute prohibiting minors from selling or distributing, *inter alia*, literature, was unconstitutional as applied because it allowed a state to exceed its police powers).

155. *Whalen v. Roe*, 429 U.S. 589, 599–60 (1977) (footnote omitted); *see Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457 (1977); *accord In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999); *Vega-Rodriguez v. P.R. Tel. Co.*, 110 F.3d 174, 183 (1st Cir. 1997).

156. *See, e.g., Condon v. Reno*, 155 F.3d 453, 464 (4th Cir. 1998) (recognizing that “the Supreme Court has limited the ‘right to privacy’ to matters of reproduction, contraception, abortion, and marriage” (citations omitted)); *Vega-Rodriguez*, 110 F.3d at 183.

157. *See Burk & Hess, supra* note 23, at 29 (stating that the right to personal autonomy “is unlikely to be implicated in [DNA] testing, [because] the Supreme Court has tended to limit the scope of the autonomy right to matters directly bearing on decisions involving marriage, procreation, contraception, and child rearing”). *See generally Paul v. Davis*, 424 U.S. 693, 697, 713 (1976) (declining to find that the respondent’s right to privacy had been violated when police disclosed he had been arrested on a shoplifting charge because the right protects “fundamental” activities or those “implicit in the concept of ordered liberty”).

158. *See, e.g., Doe v. Delie*, 257 F.3d 309, 315 (3d Cir. 2001) (“The right to privacy in one’s medical information extends to prescription records.” (citing *Doe v. Se. Pa. Transp. Auth.* 72 F.3d 1133, 1138 (3d Cir. 1995)); *In re Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (“Extension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so

a distinction must be drawn between the profile derived from the sample and the remainder of the sample.<sup>160</sup> As to the latter, it may be possible to argue that the retention of the sample infringes on a person's right to informational privacy.<sup>161</sup> That is to say, if the safeguards surrounding the confidentiality of the sample are found to be insufficient, the government's interest, however articulated,<sup>162</sup> in the storage of a DNA sample from one

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personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over."); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) ("There can be no question that . . . medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection."). *See generally Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) ("[C]ourts have traditionally been reluctant to expand this branch of privacy beyond those categories of data which, by any estimation, must be considered extremely personal." (citing *Sheets v. Salt Lake County*, 45 F.3d 1383, 1388 (10th Cir. 1995))).

159. *See Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 789–90 (9th Cir. 2002) ("This interest, often referred to as the right to 'informational privacy,' applies both when an individual chooses not to disclose highly sensitive information to the government and when an individual seeks assurance that such information will not be made public." (citing *Whalen*, 429 U.S. at 599 n.24)); *Herring v. Keenan*, 218 F.3d 1171, 1175 (10th Cir. 2000) ("This circuit . . . has repeatedly interpreted the Supreme Court's decision in *Whalen* . . . as creating a right to privacy in the non-disclosure of personal information." (citation omitted)). *But see Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 574 (6th Cir. 2002) (declining to interpret "*Whalen* or *Nixon* as having created a constitutional privacy right that protects against the disclosure of personal information"); *Am. Fed'n of Gov't Employees v. Dep't of Hous.*, 118 F.3d 786, 791 (D.C. Cir. 1997) ("[E]xpressing . . . grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information.").

160. *See supra* notes 110–24 and accompanying text.

161. *See Juengst, supra* note 27, at 63 ("[T]he important feature of iDNAfication is what the DNA analyzed can disclose about the person being identified. It is, in other words, individuals' 'informational privacy' that is at stake in the prospect of widespread iDNAfication, and it is in those terms that the policy challenge of iDNAfication should be framed."); *Taylor, supra* note 112, at 522 ("Separate from the privacy interests protected under the Fourth Amendment, DNA testing—which has the potential to reveal a 'host of private medical facts' about the donor—also implicates a right to 'informational privacy' enforceable upon the states through the Due Process Clause of the Fourteenth Amendment.").

162. One commentator notes that

courts vary from circuit to circuit in their opinions as to whether the government interest must be legitimate, compelling, substantial, or merely described as a general interest. Furthermore, most courts have not developed an enumerated list of factors to be considered in the balancing, and many of these courts employ an ad hoc, cursory, and seemingly intuitive test.

*Grand, supra* note 27, at 2316 (footnote omitted).

who has not been arrested, much less convicted of any criminal offense and who volunteered the sample or provided one via court order (and in either case is eliminated as the perpetrator of the offense), is outweighed by the informational privacy interest the person holds in his sample.<sup>163</sup>

#### IV. CONCLUSION

A person who provides a sample during the execution of a DNA sweep, voluntarily or through court order, and is later implicated in the offense under investigation (or even another offense) generally will face an uphill battle when seeking to suppress that evidence on Fourth Amendment grounds.<sup>164</sup> That person also will have no legal recourse under the Fifth Amendment or the theory that the use of the sample violated his right to privacy.<sup>165</sup>

A person who is eliminated as the perpetrator of the offense may, depending on the circumstances and including the measure of protection provided with respect to access and dissemination of the sample, argue that the police's failure to return or destroy the sample violates his right to due process and to informational privacy. Resolution of this question points to the larger issue concerning the expansion of DNA databanks and databases.<sup>166</sup> Some contend that a comprehensive DNA database that includes all citizens (and only contains those parts of the DNA code that identify persons without revealing other medical facts), "protected by strong privacy laws, would increase the odds of finding the guilty, freeing the innocent and vindicating the victim."<sup>167</sup> Others disagree.<sup>168</sup>

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163. Cf. *Kaye, supra* note 23, at 471 ("[E]ven if DNA data were the type of information to which the privacy right attaches . . . collecting and storing the information does not infringe the right to privacy as long as the government provides effective safeguards to ensure the confidentiality of the DNA samples and data."). *See generally* *Burk & Hess, supra* note 23, at 38-39 (arguing that under the balancing test used by some courts, "[v]irtually any legitimate governmental interest has been found to outweigh the individual's privacy expectations").

164. *See* discussion *supra* Part III.A.

165. *See* discussion *supra* Parts III.B-C.

166. *See* *Kaye & Smith, supra* note 26, at 429 ("[E]ven if the Constitution permits the state to incorporate the profile of a 'voluntary' sample into a database without explicit consent, it is appropriate to ask whether police *should* do so."); *see also* *Taylor, supra* note 112, at 513 (noting that federal law does not allow the indexing of DNA samples from persons who have provided elimination samples) [(internal quotation omitted)].

167. Akhil Reed Amar, Op-Ed., *A Search for Justice in Our Genes*, N.Y. TIMES, May 7, 2002, at A31; *see* *Kaye, supra* note 106, at 197 n.71 ("[A] population-wide data base would remove the incentive for police who are stymied in their efforts

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*DNA Dragnets*

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Constitutional questions aside, the extension of DNA databanks and databases beyond those convicted of criminal offenses raise policy questions that demand deliberate consideration.<sup>169</sup>

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to solve serial killings or rapes to resort to neighborhood-wide or race-specific mass DNA screenings."); Kaye & Smith, *supra* note 26, at 415 ("[A]rgu[ing] that a population-wide database with strict privacy protections may supply the better answer to the coverage question, and to the privacy concerns raised by any government program to take and analyze individuals' DNA.").

168. See Juengst, *supra* note 27, at 82 ("In order to preserve the rights of citizens to presumptive innocence, no arrestee, forensic, or suspect DNA profiles should be banked for use in subsequent investigations unless and until the DNA source is convicted of a crime."); Rothstein & Carnahan, *supra* note 6, at 169 ("We should resist the temptation to extend the scope of data banks beyond criminals convicted of violent felonies."). See generally Teresa K. Baumann, Note, *Proxy Consent and a National DNA Databank: An Unethical and Discriminatory Combination*, 86 IOWA L. REV. 667 (2001) (arguing against a national database).

169. See Rothstein & Carnahan, *supra* note 6, at 157 ("Just because a law is constitutional . . . does not necessarily mean that it reflects sound public policy. Thus, legislators, law enforcement officials, and all citizens interested in DNA forensics need to consider a range of issues in addition to predictions about whether a proposed law is constitutional."); see also Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 WAKE FOREST L. REV. 767, 812-25 (1999) (suggesting several policy considerations "that may increase the utility of state DNA databanking laws").