

The Constitutionality of DNA Sampling on Arrest

An Interim Report
to the Legal Issues Working Group of the
National Commission on the Future of DNA Evidence

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Introduction

This report discusses the constitutionality of taking, analyzing, and storing DNA samples from individuals who are arrested.¹ Although only one state requires DNA sampling on arrest² and one other has abandoned the experiment,³ efforts to enact laws authorizing or requiring DNA databanking for arrestees are underway.⁴ Several constitutional objections to the practice might be raised. The most salient constitutional protections are the reasonableness and warrant clauses of the Fourth Amendment, the self-incrimination clause of the Fifth Amendment, and the due process clause of the Fourteenth Amendment.⁵ This report analyzes these protections and concludes that they probably do not foreclose a carefully constructed system for compelling individuals subject to custodial arrest to supply samples of their DNA.⁶

1. The analysis has benefitted from comments from Paul Giannelli, Fran Gilligan, and Ralph Spritzer.

2. See 15 LA. REV. STAT. § 609(A) (1998) (“A person who is arrested for a felony sex offense or other specified offense on or after September 1, 1999, shall have a DNA sample drawn or taken at the same time he is fingerprinted pursuant to the booking procedure.”). Despite the language of the statute, it is reported that the state will delay implementing the requirement for lack of funding and testing facilities. See Guy Gugliotta, *A Rush to DNA Sampling; Vital Police Tool? Affront to Liberty? Both?*, WASH. POST, July 7, 1999, at A1, available at 1999 WL 17012783.

3. A South Dakota statute provided that “[t]he Attorney General shall procure and file for record genetic marker grouping analysis information from any person taken into custody for a violation of the provisions of chapter 22-22.” However, in 1997 the law was amended to restrict the collection of samples from convicted offenders. See S.D. CODIFIED LAWS § 23-5-14 (Supp. 1999).

4. In December 1998, New York Police Commissioner Howard Safir and Mayor Rudolph Giuliani called on the New York legislature to consider expanding the New York state databanking law to allow DNA collection from every person arrested. See John Kifner, *Safir Says DNA Proposal Would Cut Property Crime*, N.Y. TIMES, Dec. 3, 1998, § 1, at 5. A bill introduced early in 1999, in the Connecticut General Assembly would require the collection of DNA from those arrested of any criminal offense. The bill does not require destruction of the sample unless the arrestee is not later “convicted of an offense.” 1999 Ct. S.B. 315 (introduced Jan. 15, 1999).

5. Some state constitutions contain other provisions that may be applicable, and some states interpret their constitutions differently than the Supreme Court interprets the United States Constitution. See, e.g., *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1270-71 (9th Cir. 1998) (analyzing an employer’s genetic testing program under the right to privacy found in Article I, § 1 of the California Constitution as well as the U.S. Constitution). This report is confined to an analysis of the federal constitution.

6. After this report was prepared for the Commission’s use, the Supreme Court decided *City of Indianapolis v. Edmond*, 121 S.Ct. 447 (2000), and *Ferguson v. City of Charleston*, 121 S.Ct. 1281 (2001). These opinions limit the application of the “special needs” doctrine analyzed in Part III.B.3. For a discussion of their implications in this context, see D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORNELL J.L. & PUB. POL’Y __ (forthcoming 2001).

This conclusion does not imply that the practice would be desirable. All jurisdictions already require certain categories of convicted offenders to “donate” their DNA for inclusion in databanks.⁷ Yet, most jurisdictions have not completed the task of collecting, let alone analyzing, DNA from these offenders. In addition, the trend is to add new categories of offenders, making still more formidable the task of collecting and analyzing DNA for the existing databases. The wisdom of expanding the databases still further, to reach those who have not been shown to have committed felonies or other offenses, is open to question.

That policy question, important as it is, lies beyond the scope of this report. We ask only what the government constitutionally can do, assuming that it is prepared to devote adequate resources to the task—not what it should do. To answer this distinct question of constitutional law, Part I of this report considers the Self-incrimination Clause. It explains why even compulsory DNA sampling does not violate the privilege against self-incrimination. Part II examines the Due Process Clause. It shows that neither the process of collecting DNA nor the storage of it (or the information encoded in it) deprives individuals of liberty without due process of law. Finally, Part III analyzes the Search and Seizure Clause. It shows that a suitably structured program for collecting, analyzing, and storing DNA information probably does not offend the Fourth Amendment, notwithstanding the lack of a search warrant or probable cause to believe that DNA profiling will help establish that the individual committed the offense for which the arrest was made.

I. SELF INCRIMINATION

The Fifth Amendment to the Constitution provides that no person shall “be compelled in any criminal case to be a witness against himself” Despite vigorous dissents from certain Justices,⁸ the Supreme Court has held time and again that the privilege against self-incrimination reaches no farther than communications that are “testimonial.”⁹ Thus, it does not protect an

7. *See, e.g.*, ALA. CODE § 36-18-24 (1998); ALASKA STAT. § 44.41.035 (Michie 1999); ARIZ. REV. STAT. §§ 13-281, 41-2418.(1999); ARK. CODE ANN. § 12-12-1105 (Michie 1997).

8. *See, e.g.*, United States v. Mara, 410 U.S. 19, 32-38 (1973) (Marshall, J., dissenting); Schmerber v. California, 384 U.S. 757, 778 (1966) (Douglas, J., dissenting); *id.* at 779 (Fortas, J., dissenting).

9. *See* Holt v. United States, 218 U.S. 245, 252 (1910). In *Holt*, Mr. Justice Holmes dismissed as an “extravagant extension of the Fifth Amendment” the argument that it violated the privilege to require a defendant to put on a blouse for identification purposes. He explained that “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.” *Id.* at 252-53.

More recently, the Court has stated that “in order to be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.” *Doe v. United States*, 487 U.S. 201, 210 (1988). According, the Fifth amendment did not extend to a consent form waiving a privacy interest in foreign bank records because the consent form spoke in the

individual from government compulsion to provide blood or other biological samples. For example, in *Schmerber v. California*,¹⁰ a man was arrested at a hospital while receiving treatment for injuries suffered in an accident involving the automobile that he had apparently been driving. At the direction of a police officer, a physician at the hospital withdrew a blood sample over the suspect's objection. Chemical analysis indicated a high blood alcohol level, and the man was convicted for driving while intoxicated. Although he insisted that the forced extraction of his blood forced him to be a witness against himself, the Supreme Court affirmed the conviction. The majority explained that:

Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. 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.¹¹

In light of this doctrine, the Court of Appeals for the Tenth Circuit made short shrift of a Fifth Amendment argument against DNA databanking for convicted offenders. In *Boling v. Romer*,¹² the court simply stated that the claim that "requiring DNA samples from inmates amounts to compulsory self-incrimination fails because DNA samples are not testimonial in nature."¹³ The same result follows inescapably with respect to DNA samples from arrestees.¹⁴

hypothetical and did not identify any particular banks, accounts, or private records; it neither "communicate[d] any factual assertions, implicit or explicit, [n]or convey[ed] any information to the Government." *Id.* at 215.

Revealing mere physical or behavior characteristics is not "testimonial." *See, e.g.*, *United States v. Wade*, 388 U.S. 218 (1967) (a suspect could be compelled to participate in a lineup and to repeat a phrase provided by the police so that witnesses could view him and listen to his voice); *Gilbert v. California*, 388 U.S. 263, 266-67 (1967) (a suspect could be compelled to provide a handwriting exemplar because "in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the privilege's] protection"); *United States v. Dionisio*, 410 U.S. 1, 7 (1973) (suspects could be compelled to read a transcript to provide a voice exemplar because the "voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said").

10. 384 U.S. 757 (1966).

11. *Id.* at 765 (footnote omitted).

12. 101 F.3d 1336, 1340 (10th Cir. 1996).

13. *See also* *United States v. Hubbell*, 167 F.3d 552, 573-74 (D.C. Cir. 1999) (dictum).

14. In addition, even if the extraction of biological material somehow could be construed as testimonial, the implications of the privilege against self-incrimination are not entirely clear. Under

II. DUE PROCESS

The Fifth and Fourteenth Amendments provide that no person “shall be deprived of life, liberty, or property, without due process of law” This Due Process Clause requires that the government adopt fair procedures before invading personal liberty or property interests, and that, at a minimum, the invasion rationally can be said to advance some legitimate governmental purpose. DNA databanking, it can be argued, implicates two aspects of personal liberty—bodily integrity and the privacy of personal information. We consider each in turn.

A. Bodily Integrity

Although the removal of a person’s cells plainly infringes a liberty interest in bodily integrity, it is well settled that the safe and relatively painless removal of blood does not offend due process.¹⁵ In *Breithaupt v. Abram*,¹⁶ for instance, a pickup truck collided with a car in New

Pennsylvania v. Muniz, 496 U.S. 582 (1990), it appears that arrestees might not need to be advised that the privilege entitles them to decline to give a DNA sample. In *Muniz*, a plurality opinion for four justices written by Justice Brennan reasoned that “questions regarding [a suspect’s] name, address, height, weight, eye color, date of birth, and current age. . . fall within a ‘routine booking question’ exception which exempts from *Miranda*’s coverage questions to secure the ‘biographical data necessary to complete booking or pretrial services.’” *Id.* at 601 (some internal quotation marks and citations omitted). Another four justices, in an opinion by Chief Justice Rehnquist, took the position that the questions “were not testimonial and do not warrant application of the privilege,” making “it . . . unnecessary to determine whether the questions fall within the ‘routine booking question’ exception to *Miranda* Justice Brennan recognizes.” *Id.* at 608. Only Justice Marshall took issue with the proposed “routine booking exception” to the application of *Miranda v. Arizona*, 384 U.S. 436 (1966). *Id.* at 608–09.

15. Indeed, it is questionable whether today’s Court even would apply a due process analysis. See *County of Sacramento v. Lewis*, 523 U.S. 833, 849 n.9 (1998) (Souter, J., noting that “*Rochin*, of course, was decided long before *Graham v. Connor* (and *Mapp v. Ohio*, 367 U.S. 643 (1961)), and today would be treated under the Fourth Amendment, albeit with the same result.”). In *Rochin v. California*, 342 U.S. 165 (1952), to which Justice Souter refers, police broke into a suspect’s room, attempted to extract narcotics capsules he had put into his mouth, took him to a hospital, and directed that an emetic be administered to induce vomiting. This course of conduct, the Court wrote, “shocks the conscience” in that:

Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents--this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Id. at 172.

16. 352 U.S. 432 (1957).

Mexico. Three occupants of the car were killed, and the driver of the truck was seriously injured. A pint whiskey bottle, almost empty, was found in the glove compartment of the pickup truck. The driver was taken to a hospital, where he lay unconscious in the emergency room with the smell of liquor on his breath. A state patrolman asked an attending physician to take a blood sample. Laboratory analysis showed this blood to contain about .17% alcohol, and this blood alcohol evidence was used to convict the driver of involuntary manslaughter. The driver later challenged his imprisonment on the ground that the conduct of the police in seizing the blood from his unconscious body was so offensive as to deprive him of due process of law.

The Supreme Court rejected this argument, weighing the severity of the infringement on personal liberty against the public interest in preventing automobile accidents and in adjudicating complaints for drunken driving accurately. The majority first observed that “certainly the test as administered here would not be considered offensive by even the most delicate.”¹⁷ The Court then concluded that “so slight an intrusion” of “the right of an individual that his person be held inviolable” could not prevail as against “the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road. And the more so since the test likewise may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses.”¹⁸

Much the same analysis has been applied to uphold taking DNA samples from prison inmates. In *Kruger v. Erickson*,¹⁹ the federal District Court for the District of Minnesota observed that “the procedures . . . are performed” by “trained laboratory technician[s]” “according to

17. *Id.* at 436. The Court added that:

Furthermore, due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of “decency and fairness” that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process. The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors. Likewise, we note that a majority of our States have either enacted statutes in some form authorizing tests of this nature or permit findings so obtained to be admitted in evidence. We therefore conclude that a blood test taken by a skilled technician is not such “conduct that shocks the conscience,” nor such a method of obtaining evidence that it offends a “sense of justice.”

See id. at 436–37 (citations and footnote omitted).

18. *Id.* at 439.

19. 875 F. Supp. 583 (D. Minn. 1995).

medically acceptable protocols.”²⁰ It therefore held that the extraction of an inmate’s blood for DNA databanking “does not ‘shock the conscience,’ nor ‘offend[] the sense of justice.’”²¹

Removing cells for DNA profiling from arrestees might not involve a physician as in *Breithaup*, or even a technician as in *Kruger*. DNA can be extracted from many sources, including not just white blood cells, but from buccal cells lining the cheek, from saliva, and probably from skin scrapings. A police officer might be trained to take a buccal swab, to collect a saliva sample, or to remove epidermal cells with a sticky pad. Because such procedures are even less intrusive and less dangerous than removing blood with a hypodermic needle—the procedure employed in *Breithaup*—the use of trained medical personnel probably is not so shocking or offensive as to violate the Due Process Clause.

B. Informational Privacy

Freedom from bodily intrusion is one species of “privacy” that the Due Process Clause surely protects. A distinct stand of privacy is the right to keep highly personal information confidential. At the outset, however, it is not clear that the “liberty” or “property” that the clause protects includes such a right to informational privacy. Moreover, even if this form of privacy is a “liberty” or “property” interest, a system of DNA databanking that includes reasonable safeguards for preventing improper disclosure of the information satisfies the Due Process Clause.

These conclusions follow from the Supreme Court’s opinion in *Whalen v. Roe*.²² New York adopted a law requiring physicians to file copies of prescriptions for certain dangerous drugs with the state Department of Health. The information, including the name and address of the patient, was entered into a computerized data base. The forms themselves were stored in a vault and destroyed after five years. Access to the data was restricted, and public disclosure of the identity of patients was prohibited by the statute and by a Department of Health regulation.²³ Twenty months after the effective date of the Act, the computerized data had only been used in two investigations involving alleged overuse of drugs by specific patients.

A group of patients and physicians challenged the constitutionality of the statute. A three-judge district court held that “the doctor-patient relationship intrudes on one of the zones of privacy accorded constitutional protection” and that the patient-identification provisions of the Act invaded this privacy with “a needlessly broad sweep.” It enjoined enforcement of the provisions of the Act that dealt with the reporting of patients’ names and addresses.

20. *Id.* at 587.

21. *Id.*

22. 429 U.S. 589 (1977).

23. Willful violation of these prohibitions was punishable by up to one year in prison and a \$2,000 fine.

The Supreme Court unanimously reversed. Justice Stevens' opinion for the Court first observed that the New York law was "the product of an orderly and rational legislative decision,"²⁴ that "could reasonably be expected to have a deterrent effect on potential violators as well as to aid in the detection or investigation of specific instances of apparent abuse."²⁵ Therefore, even though the number of instances in which the data base was used was small, "the patient-identification requirement was a reasonable exercise of New York's broad police powers."²⁶

This portion of the opinion applies the traditional "rational basis" test. Under this standard, the Court will not invalidate legislation under the Due Process Clause merely because it is unwise or apparently unnecessary; rather, there must be no rational basis for concluding that the law furthers a legitimate government interest. A much more demanding standard applies to legislation that infringes fundamental rights such as freedom of expression or procreative liberty. An invasion of such a right requires the state to show a compelling interest rather than mere rationality.²⁷

That the *Whalen* Court choose to apply the rational basis test thus suggests that it did not see the statute as implicating a constitutional right to privacy. Indeed, Part II of the Court's opinion explicitly rejected the argument that the record-keeping system invaded a protected "zone of privacy."²⁸ Plaintiffs maintained that the system infringed two distinct privacy interests — one "in avoiding disclosure of personal matters," and another "in independence in making certain kinds of important decisions."²⁹ The Court implicitly assumed that the Due Process Clause protects these interests, but it did little to confirm or deny this premise. Instead, it merely concluded that "neither the immediate nor the threatened impact of the patient-identification requirements in the New York . . . Act . . . on either the reputation or the independence of patients for whom Schedule II drugs are medically indicated is sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment."³⁰ Indeed, in the concluding portion of

24. *Id.* at 597.

25. *Id.* at 598.

26. *Id.*

27. *See, e.g.,* *Roe v. Wade*, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.").

28. 429 U.S. at 598.

29. *Id.* at 599–600.

30. *Id.* at 603–04. *Whalen* rejected the Fourth Amendment as the basis for either of these rights. *See id.* at 604 n. 32 ("The *Roe* appellees also claim that a constitutional privacy right emanates from the Fourth Amendment, citing language in *Terry v. Ohio*, 392 U.S. 1, 9, at a point where it quotes

its opinion, the Court stated that it had “not decided” whether “unwarranted disclosure” of “personal information in computerized data banks or other massive government files” might violate the constitution.³¹

In contrast to the Court’s opinion, the concurring opinions squarely addressed whether a constitutional right to privacy necessitated more demanding review. Justice Brennan agreed that “limited reporting requirements in the medical field are familiar . . . and are not generally regarded as an invasion of privacy.”³² He suggested, however, that “[b]road dissemination by state officials of such information . . . would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests.”³³ Furthermore, he worried that “[t]he central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and [was] not prepared to say that future developments will not demonstrate the necessity of some curb on such technology.”³⁴ Nevertheless, he concluded that strict scrutiny was not required unless and until there was some showing that the system would result in unauthorized dissemination.³⁵ Justice Stewart sharply disputed Justice Brennan’s claim

from *Katz v. United States*, 389 U.S. 347. But those cases involve affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations. We have never carried the Fourth Amendment’s interest in privacy as far as the *Roe* appellees would have us. We decline to do so now.”).

31. *Id.* at 605:

A final word about issues we have not decided. We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York’s statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual’s interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure

32. *Id.* at 606.

33. *Id.*

34. *Id.* at 607.

35. “In this case, as the Court’s opinion makes clear, the State’s carefully designed program includes numerous safeguards intended to forestall the danger of indiscriminate disclosure. Given this serious and, so far as the record shows, successful effort to prevent abuse and limit access to the

that broad dissemination “would clearly implicate constitutionally protected privacy rights.” His concurring opinion demonstrates that the Supreme Court has never recognized such a privacy right.³⁶

Whalen does not reveal whether government collection of personal DNA information implicates a privacy right that is an aspect of the liberty protected under the Fifth and Fourteenth Amendments. Instead, the case deals with the acquisition and storage of privately generated medical data. There are intimations that the state is constitutionally required to maintain the confidentiality of this information, but even this is unclear.

Nevertheless, some lower courts have recognized a privacy right to nondisclosure of stigmatizing personal information. For example, in *In re Doe*,³⁷ the Court of Appeals for the Second Circuit held that New York City’s Commission on Human Rights may have violated the right to privacy by issuing a press release that identified the plaintiff as HIV seropositive.³⁸ This year, in *Powell v. Schriver*,³⁹ the same court extended *Doe* to brand the gratuitous disclosure to prison inmates that a prisoner was an HIV positive transsexual as an invasion of the prisoner’s right to privacy and to allow recovery of damages under the civil rights laws. In still another recent case, *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*,⁴⁰ the Ninth Circuit Court of Appeals extended *Doe* and related cases to medical tests for pregnancy, syphilis, and the allele for sickle cell anemia.⁴¹

personal information at issue, I cannot say that the statute’s provisions for computer storage, on their face, amount to a deprivation of constitutionally protected privacy interests, any more than the more traditional reporting provisions.” *Id.*

36. *Id.* at 607.

37. 15 F.3d 264 (2d Cir. 1994).

38. Plaintiff had entered into a conciliation agreement under which Delta Airlines hired him as a customer services agent. Notwithstanding the *Whalen* Court’s explicit disclaimer of any decision regarding the constitutional basis of a right to nondisclosure of medical information, the Second Circuit wrote that *Whalen* “recognized” such a right. 15 F.3d at 267. Departing from Justice Brennan’s view that the right to nondisclosure could be overcome only by a compelling state interest, the Court of Appeals remanded for further findings under an intermediate level of constitutional scrutiny that required only a substantial state interest to overcome the privacy right.

39. 175 F.3d 107 (2d Cir. 1999).

40. 135 F.3d 1260 (9th Cir. 1998).

41. Administrative and clerical employees at a national laboratory operated by state and federal authorities alleged that the laboratory tested their blood and urine for these conditions without their knowledge or consent. This testing, they contended, violated Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and their right to privacy as guaranteed by the constitutions of California and the United States. The district court granted the defendants’ motions

These cases rest on a remarkably generous (if not disingenuous) reading of *Whalen*,⁴² and other courts have expressed “grave doubts” about the existence of a constitutional right to nondisclosure of “personal” information.⁴³ Nevertheless, assuming *arguendo* that *Doe*, *Powell*, and *Norman-Bloodsaw* are correctly decided, they do not invalidate arrestee DNA databanking. The purely identifying features of DNA are not in the same stigmatizing category as having tested positive for HIV or syphilis, having undergone a sex change operation, having used narcotics, or being pregnant. And, even if DNA data were the type of information to which the privacy right attaches, the unmistakable lesson of *Whalen v. Roe* is that collecting and storing the information do not infringe the right to privacy as long as the government provides reasonable and effective safeguards to ensure the confidentiality of the DNA samples and data.

III. SEARCH AND SEIZURE

Objections grounded in the Fourth Amendment are not so easily dismissed. That amendment provides that:

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 Warrant 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.

Thus, compulsory DNA sampling on arrest would violate this right if (1) it constitutes a “search or seizure” that (2) is “unreasonable,” either because the police lack a judicial warrant to take

for dismissal, judgment on the pleadings, and summary judgment on all these claims. The Ninth Circuit affirmed as to the ADA claims, but reversed as to the Title VII and state and federal privacy claims. The court of appeals recognized that cases like *Doe*, “defining the privacy interest in medical information[,] have typically involved its disclosure to ‘third’ parties, rather than the collection of information by illicit means,” but thought “it goes without saying that the most basic violation possible involves the performance of unauthorized tests—that is, the non-consensual retrieval of previously unrevealed medical information that may be unknown even to plaintiffs.” *Id.* at 1269. Having discerned a liberty right under the Due Process Clause, however, the Ninth Circuit proceeded to analyze that right solely in Fourth Amendment terms, balancing the government’s interest in collecting the information against the nature of the invasion of privacy. *Id.* The court reasoned that while the government had no legitimate interest in conducting the tests, the invasion was profound because it involved especially sensitive information about the health or genetic status of the employees. *Id.* at 1269–70.

42. *See supra* note 31.

43. *See American Fed’n of Gov’t Employees, AFL-CIO v. Department of Hous. & Urban Dev.*, 118 F.3d 786, 788 (D.C. Cir. 1997) (reviewing and analyzing the division among the circuits); *Jarvis v. Wellman*, 52 F.3d 125, 126 (6th Cir. 1995) (holding that no constitutionally protected privacy interest exists in medical records).

DNA, because they lack adequate information to believe that the DNA will help to prove that the suspect is guilty of the crime for which the arrest is made, or because the system of collecting or using the samples unjustifiably invades personal privacy.

This section analyzes arrestee DNA databanking with respect to both these points. It suggests that the threshold question of whether there is a search should be answered in the affirmative but that a carefully designed and very limited system of arrestee databanking might be deemed reasonable under the balancing test that the Supreme Court has applied to Fourth Amendment claims in recent years. Part A considers whether collecting DNA on arrest is a search. Part B discusses the standards or tests that might be used to determine reasonableness under the Fourth Amendment and how these apply to DNA databanking.

A. Is the Taking of the DNA Sample a Search or Seizure?

A threshold question in considering the constitutionality under the Fourth Amendment of DNA sampling is whether the acquisition of the sample is a search or seizure. If it is not, then the Fourth Amendment is no barrier. As shown below, whether the collection of a biological sample is a search or seizure depends on the method of collection and the disposition of the sample. If sampling involves a physical intrusion into the body, the procedure is a search or seizure for Fourth Amendment purposes. But if it is merely an inspection of material on the surface of the body, it is arguable that there is a search or seizure only if subsequent analysis can reveal sensitive, personal information. Unless the process for DNA sampling on arrest is highly circumscribed, it can reveal such information and therefore should be treated as a search.

1. The *Katz* Standard

A great deal of modern Fourth Amendment law is built on *Katz v. United States*.⁴⁴ In *Katz*, the government acquired key evidence to convict the defendant of interstate gambling by attaching an electronic listening and recording device to the outside of a public telephone booth. The government argued that the interception was not a search because there was no physical trespass and the telephone booth was a public place. The Supreme Court held that neither entry onto private property nor inspection of tangible items is an essential feature of a search, for “the Fourth Amendment protects people, not places.”⁴⁵ It protected the defendant, the Court explained, because “a person in a telephone booth . . . who occupies it, 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.”⁴⁶ Because the federal agents had no warrant authorizing the interception, the majority held that the search violated the Fourth Amendment.

44. 389 U.S. 347 (1967).

45. *Id.* at 351.

46. *Id.* at 352.

In a concurring opinion, Justice Harlan elaborated on the majority’s remarks. In perhaps the most famous passage in the opinions to emanate from the Justices in *Katz*, he wrote:

[T]here is a twofold requirement, 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.”⁴⁷

Applying this standard, he explained that “[t]he point is not that the booth is ‘accessible to the public’ at other times, but that it is a temporarily private place whose momentary occupants’ expectations of freedom from intrusion are recognized as reasonable.”⁴⁸

Under *Katz*, the crucial threshold question for DNA sampling is whether society should recognize the expectation that the sample is not “up for grabs” by the government as reasonable. As applied to samples of biological material, several factors affect this determination. These include (1) the extent to which the material is displayed to the public, (2) the extent of the bodily invasion caused by the sampling procedure, and (3) the nature of the information that can be extracted from the sample. We now consider these in turn.

2. Public Exposure and Knowledge

Public exposure of a bodily characteristic is highly significant in determining whether forcing the individual to reveal that characteristic to the government is a Fourth Amendment search. In *Katz*, the notion of public exposure was pivotal,⁴⁹ and the more recent case of *United States v. Dionisio*,⁵⁰ turns on this consideration. In *Dionisio*, federal agents had obtained a recording of a conversation showing illegal gambling operations. A grand jury ordered twenty people to read the transcript of the conversation aloud so that agents could record their voices. When Dionisio refused, the government obtained a court order compelling him to furnish the voice sample. Dionisio persisted, arguing that the order violated his rights to be free from self-incrimination and unreasonable searches and seizures. The district court held him in civil contempt and ordered him to be imprisoned until he complied or until the grand jury expired. The Court of Appeals for the Seventh Circuit reversed. It rejected the self-incrimination claim, but concluded that to force Dionisio to give a voice sample without having probable cause to believe that his voice was on the recording violated the Fourth Amendment.

47. *Id.* at 361 (Harlan, J., concurring).

48. *Id.* at 361.

49. *See id.* at 351 (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”).

50. 410 U.S. 1 (1973).

The Supreme Court disagreed. It held that neither the grand jury subpoenas nor the recording process constituted a search or seizure. On historical grounds and because a grand jury subpoena does not itself physically confine anyone, the Court held that there was no “seizure” of the person. As for the taking of the voice sample, the Court again concluded that there was no action that fell within the scope of the Fourth Amendment. As the Court explained it:

The physical characteristics of a person’s voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man’s facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.⁵¹

The exposed-to-the-public principle, however, is ambiguous. In *Dionisio*, it was described in terms of features that are casually and constantly observed in public.⁵² As to these characteristics, the approach can be summarized as a public-knowledge rather than a mere public-exposure standard, and in this form it is relatively unproblematic. If the information about the person’s body that the state seeks is known to people in the course of everyday life, and if authorities have secured the individual’s presence consistently with the Fourth Amendment, then compelling the person to expose that information is not a further search or seizure.

But what about features that are less widely known or not known at all by casual observers? Courts have extended the notion of “exposed to the public” well beyond the range of that which is constantly exposed and easily observed. For example, fingerprints are deposited in public places, but their detailed structure is not common knowledge. Nevertheless, some courts have used the public-exposure principle to justify excluding compulsory fingerprinting from Fourth Amendment constraints.⁵³ In *Palmer v. State*,⁵⁴ for instance, the Indiana Supreme Court

51. *Id.* at 14.

52. The opinion quoted with approval the observation in *United States v. Doe* (Schwartz), 457 F.2d 895, 898-99 (2d Cir. 1972), that:

There is no basis for constructing a wall of privacy against the grand jury which does not exist in casual contacts with strangers. Hence no intrusion into an individual’s privacy results from compelled execution of handwriting or voice exemplars; nothing is being exposed to the grand jury that has not previously been exposed to the public at large.

410 U.S. at 14.

53. In *Dionisio* itself, the Court observed that fingerprinting “involves none of the probing into an individual’s private life and thoughts that marks an interrogation or search.” 410 U.S. at 15 (quoting *Davis v. Mississippi*, 394 U.S. 721, 727 (1969)). However, *Davis* did not hold that fingerprinting was not subject to the Fourth Amendment. Rather, the *Davis* Court suggested in dictum that “[i]t is

reasoned that the warrantless acquisition of defendant's fingerprints during his trial did not constitute a seizure forbidden by the Fourth Amendment because "fingerprints are an identifying factor readily available to the world at large."⁵⁵ Other courts, citing *Dionisio*, have held that shining an ultraviolet lamp on an arrestee's skin to expose chemicals transferred from stolen money is not a search because the fluorescent material "may be compared to a physical characteristic, such as a fingerprint or one's voice, which 'is constantly exposed to the public.'"⁵⁶

Likewise, it might be argued that DNA is constantly exposed to the public. Many people shed hairs, cough or sneeze, expectorate, and even leave fingerprints that can contain cells. At best, however, the fact of such exposure is a relevant consideration is deciding whether the Fourth Amendment applies. *Dionisio* and cases extending it involve no intrusion into or touching of

arguable, however, that, because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." 394 U.S. at 727. Even so, the implication is that the detention to take fingerprints is a seizure of the person, but "the fingerprinting process itself" is not a search.

Likewise, in *Cardwell v. Lewis*, 417 U.S. 583 (1974), a plurality of the Supreme Court implied that scraping paint from the exterior of a suspect's car and examining it in the laboratory did not rise to the level of a search. *See id.* at 591-92 ("With the 'search' limited to the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle left in the public parking lot, we fail to comprehend what expectation of privacy was infringed. Stated simply, the invasion of privacy, 'if it can be said to exist, is abstract and theoretical.'") (plurality opinion, footnote and citation omitted). *But see id.* at 592 ("Under circumstances such as these, *where probable cause exists*, a warrantless examination of the exterior of a car is not unreasonable under the Fourth and Fourteenth Amendments.") (emphasis added).

54. 679 N.E.2d 887, 891 (Ind. 1997).

55. *See also* *State v. Inman*, 301 A.2d 348, 355-56 (Me. 1973) ("By the very reason of their nature it cannot be considered that there is a constitutionally protected expectation of privacy as to the characteristics of the fingerprint pattern of one validly in police custody any more than it can be said there is a constitutionally protected expectation of privacy as to any other outward physical characteristic of one whose person has been validly seized."); *Doe v. Poritz*, 662 A.2d 367, 381 n.8 (N.J. 1995) ("because plaintiff has no reasonable expectation of privacy in his fingerprints, photograph or matters of public record, the requirement to provide such information as part of the registration process [for convicted sex offenders] does not constitute a search").

56. *State v. Holzapfel*, 748 P.2d 953 (Mont. 1988) (quoting *Commonwealth v. DeWitt*, 314 A.2d 27, 30-31 (Pa. Super. Ct. 1973)). *See also* *United States v. Richardson*, 388 F.2d 842, 845 (6th Cir. 1968) ("We do not regard the examination of appellant's hands under the ultraviolet light as a search within the meaning of the Fourth Amendment."). A minority of jurisdictions reject this view. *See, e.g.,* *People v. Santistevan*, 715 P.2d 792 (Colo. 1986).

private areas of the body⁵⁷ and no discovery of information about the individual beyond the identifying characteristics. Accordingly, even if one takes the dubious position that DNA is constantly exposed to the public in a meaningful way, we must consider whether these additional factors create a reasonable expectation of privacy.

3. Invasion of the Body

An inspection or extraction that penetrates the body or enters its cavities usually is regarded as infringing a reasonable expectation of privacy and hence falling within zone of the Fourth Amendment. DNA can be extracted from many sources, including white blood cells, buccal cells inside the cheek, saliva, and (probably) skin scrapings.⁵⁸ As explained below, the manner of extraction and the site of the materials extracted make it likely that the former two procedures will be considered searches, but they are not dispositive of how the latter two should be treated.

a. Blood Samples

Removing blood from the circulatory system invades bodily integrity, and as such, constitutes a search. The leading case is *Schmerber v. California*,⁵⁹ which involved taking blood from a man being treated in a hospital for injuries received in an automobile accident.⁶⁰ The Supreme Court held that the warrantless seizure of the blood at the direction of the police met the Fourth Amendment's reasonableness standard, and it described the applicability of that amendment in no uncertain terms:

It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment.⁶¹

57. *Cf. McClain v. State*, 410 N.E.2d 1297 (Ind.1980) (penile emission sample to test for gonorrhea is a search subject to Fourth Amendment).

58. DNA also can be extracted from hair samples that include cells from the roots. Courts are divided on the question of whether taking a hair sample rises to the level of a Fourth Amendment search or seizure. *See, e.g., United States v. DeParias*, 805 F.2d 1447, 1456-57 (11th Cir.1986); *United States v. Anderson*, 739 F.2d 1254, 1256-57 (7th Cir.1984). In *In re Grand Jury Proceedings (Mills)*, 686 F.2d 135 (3d Cir. 1982), a divided panel held that because hair was visible to the public, *Dionisio* governed as to removing hairs by cutting, but noted that extracting the portion below the skin might make the result in *Cupp* applicable.

59. 384 U.S. 757 (1966).

60. *See supra* Part I.

61. *Id.* at 767.

Schmerber was decided in 1966, however; today, it is possible to withdraw blood from a fingertip with a device that leaves almost no trace and produces virtually no sensation. This advance in technology makes blood sampling less disturbing than using a hypodermic needle and syringe or even pricking a fingertip and squeezing, but it does not overcome the fact that tissue in a portion of the body that is not voluntarily exposed to the world is being extracted. Even if blood could be “teleported” from the inside of the body to an external container, the “person” would be searched.

b. Buccal Swabs

Swabbing the inside of the cheek can provide cells for DNA analysis. This procedure is less invasive than removing blood by conventional means, but it too exceeds an inspection of the surface of the body presented to the public at large. Consequently, buccal swabbing is likely to trigger Fourth Amendment protection. This conclusion seems confirmed by *Cupp v. Murphy*.⁶² In *Cupp*, the defendant was suspected of strangling his wife. Police took fingernail scrapings from him over his objections. The scrapings contained “traces of skin and blood cells, and fabric from the victim’s nightgown,”⁶³ and defendant was convicted of murder. The case came to Supreme Court on a petition for a writ of habeas corpus. The Court reasoned that the removal of the sample was a search:

Unlike the fingerprinting in *Davis*, the voice exemplar obtained in *United States v. Dionisio* . . . , or the handwriting exemplar obtained in *United States v. Mara*, 410 U.S. 19, the search of the respondent’s fingernails went beyond mere ‘physical characteristics . . . constantly exposed to the public,’ . . . and constituted the type of ‘severe, though brief, intrusion upon cherished personal security’ that is subject to constitutional scrutiny.⁶⁴

If scraping or cutting a fingernail to remove dried blood or other debris is a search, then so is scraping the inside of a cheek.

c. Saliva Samples

Saliva sampling resembles the voice sample found to lie outside the zone of the Fourth Amendment in *Dionisio*. A voice sample travels from the larynx to locations outside the body—nothing is inserted into the body or a body cavity to extract the sound. Likewise, a saliva sample can be acquired without any intrusion. However, the situation differs from *Dionisio* in that saliva, unlike voice, is not routinely presented to the public.

62. 412 U.S. 291 (1973).

63. *Id.* at 292.

64. *Id.* at 295.

Cases dealing with breath sampling seem to blur these considerations together. The Supreme Court spoke to the classification of breath sampling in *Skinner v. Railway Labor Executives' Association*.⁶⁵ In that case, the Federal Railroad Administration had promulgated regulations that mandated blood and urine tests of employees involved in certain train accidents and that authorized railroads to administer breath and urine tests to employees who violate certain safety rules. Some provisions authorized breath and urine tests on a “reasonable suspicion” of drug or alcohol impairment, but others did not require any showing of individualized suspicion. Railway employees alleged that this system violated their Fourth Amendment rights. The Court of Appeals for the Ninth Circuit invalidated the regulations, holding that the drug testing required reasonable suspicion.

The Supreme Court reversed, but it did not dispute that taking breath samples is a search. To the contrary, the Court apparently perceived no distinction between taking blood by puncturing a blood vessel and having a person expel air from the mouth. The majority wrote as follows:

We have long recognized that a ‘compelled intrusio[n] into the body for blood to be analyzed for alcohol content’ must be deemed a Fourth Amendment search. See *Schmerber v. California*, 384 U.S. 757, 767-768 (1966). See also *Winston v. Lee*, 470 U.S. 753, 760 (1985).^[66] In light of our society’s concern for the security of one’s person, see, e.g., *Terry v. Ohio*, 392 U.S. 1, 9 (1968),^[67] it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests. Cf. *Arizona v. Hicks*, 480 U.S. 321, 324-325 (1987). Much the same is true of the breath-testing procedures Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or ‘deep lung’ breath for chemical analysis, . . . implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in *Schmerber*, should also be deemed a search⁶⁸

65. 489 U.S. 602 (1989).

66. *Winston* held that a court-approved removal of a bullet lodged just below the skin of a suspect done under a local anesthetic was an unreasonable search, given the availability of other evidence against the suspect and conflicting medical testimony on the risks of the operation.

67. *Terry* held the Fourth Amendment applicable to “stop and frisks.” Balancing the extent of the invasion against the value to law enforcement, however, the court held that investigative stops and “pat-downs” merely required “reasonable suspicion”; neither a warrant nor probable cause was necessary.

68. 489 U.S. at 616-17 (some citations omitted).

Apparently, the location of the air—in the alveoli—rather than innocuous method of collecting it, was crucial to the *Skinner* Court.

This single-minded mode of analysis leads one to ask whether material from the mouth rather than the lungs should be treated any differently. It is difficult to see why, but then, too much weight should not be placed on the site from which the sample originates.⁶⁹ The cursory analysis in *Skinner* leaves open the argument that saliva sampling is not a search because it involves no penetration of the body or its cavities.⁷⁰

d. Skin Scrapings

Collecting DNA from exfoliating epidermal cells would be even less invasive than saliva sampling. These cells are on the outside of the body, where they are “visible” to the world in much the same sense that fingerprints are exposed to the world. If an adequate number could be obtained by a procedure that is no more disturbing than fingerprinting, then both the site from which they are taken and the method of collection would suggest that this form of DNA sampling is not a search.

In sum, although taking blood or buccal cells is likely to be considered a search subject to the Fourth Amendment because of the method of extraction and location of the cells, it is possible that taking saliva or epidermal cells will not be considered a search on the basis of these factors alone. But there is a third factor to consider—the nature of the information derived from the cells.

4. Nature of the Information

Thus far, we have focused on the extent to which the material to be collected is exposed to the public and the manner in which it is collected. The final consideration in determining whether removal or inspection of bodily material is a search is the nature of the information that

69. Technically, *Skinner* leaves open the question whether taking air from the mouth instead of the alveoli would be sufficiently less intrusive to avoid the “search” classification. After all, that air is, in some sense, more exposed to the outside world than the “deep lung” that *Skinner* protects. The tenuousness of such distinctions point up the limitations of *Skinner*’s emphasis on location. The question of what investigations of the body or its contents should be considered a search involves a richer set of considerations, some of which are discussed at other points in *Skinner*.

70. Most lower courts have held that compelling a person to produce a saliva sample is a search. *See* *United States v. Nicolosi*, 885 F. Supp. 50 (E.D.N.Y.1995); *Henry v. Ryan*, 775 F. Supp. 247 (N.D.Ill. 1991); *State v. Ostroski*, 518 A.2d 915 (Conn. 1986); *State v. Reeves*, 671 P.2d 553 (Kan. 1983). *But see* *People v. Wealer*, 636 N.E.2d 1129, 1132 (Ill. Ct. App. 1994) (although the state conceded that taking and analyzing saliva is a search, “the level of intrusion necessary to obtain a saliva sample would on its face appear lower than that required for extracting blood”); *State v. Zuniga*, 357 S.E.2d 898 (N.C. 1987) (taking of saliva is unintrusive and therefore not a search).

can be derived from it. In bringing this factor to the foreground, *Skinner* makes a useful contribution. The majority opinion recognizes that “[u]nlike the blood-testing procedure at issue in *Schmerber*, the procedures prescribed by the . . . regulations for collecting and testing urine samples do not entail a surgical intrusion into the body.”⁷¹ Nonetheless, the opinion concludes that urine sampling followed by urinalysis is a search for the following reasons:

It is not disputed, however, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests.⁷²

The concern with “private medical facts” arises with any samples that can be subjected to DNA analysis. Arguably, *Skinner* is distinguishable in that urinalysis involves both the possible revelation of private information *and* interference with what might be called, for want of a better phrase, “excretory privacy.” DNA sampling is closer to voice sampling in that it can be done noninvasively, but it is closer to urinalysis in that subsequent biochemical testing can reveal “private medical facts.” To this extent, it cannot be said that it, like the fingerprinting in *Davis*, “involves none of the probing into an individual’s private life and thoughts that marks an interrogation or search.”⁷³ Certain parts of one’s genome—those that are related to otherwise nonobvious disease states or behavioral characteristics—are as much, if not more, a part of “an individual’s private life” as are the hormones or other chemicals that can be found in one’s urine.

Perhaps the conclusion that DNA sampling is a search because of the nature of the information in the sample could be avoided by a procedure that made it virtually impossible to extract the sensitive information. If the DNA is obtained in a noninvasive manner and if it were assured that information related to identification and nothing else could be obtained from it, the analogy to fingerprinting would be complete. Suppose, for instance, that police were equipped with miniaturized DNA chips that could probe only non-functional STR loci and that would destroy the DNA once it has been analyzed and the alleles recorded. This system might not rise to the level of a search. As currently practiced, however, DNA sampling should be considered a search within the meaning of the Fourth Amendment.⁷⁴

71. 489 U.S. at 617.

72. *Id.*

73. *Davis v. Mississippi*, 394 U.S. at 727.

74. The lower courts invariably deem blood sampling for DNA analysis to constitute a search or seizure, but their reasoning often is cursory. They rarely consider the nature of the extraction or the informational-privacy aspect of the subsequent analysis. *But see* *People v. Wealer*, 636 N.E.2d 1129, 1132 (Ill. Ct. App. 1994) (“conducting additional analysis on the sample further implicates fourth amendment interests”).

This conclusion does not imply that DNA sampling is impermissible—only that it must be subjected to serious Fourth Amendment analysis. As the *Skinner* Court observed, “[t]o hold that the Fourth Amendment is applicable to the . . . testing . . . is only to begin the inquiry into the standards governing such intrusions.”⁷⁵ It is time to articulate these standards for ascertaining the “reasonableness” of searches and to apply them to DNA sampling on arrest.

B. Is DNA Typing on Arrest a Reasonable Search?

1. The Framework for Analysis: Categorizing versus Balancing

The reasonableness of a search can depend on many things: the presence of a warrant, or, in the absence of a warrant, the feasibility or value of securing one; the extent and nature of the invasion of privacy; the purpose of the search; and the likelihood that it will achieve its goal. In theory, courts could inquire into the totality of the circumstances in each case,⁷⁶ but in practice the courts usually apply categorical rules. Thus, in *Cupp v. Murphy*,⁷⁷ the nail scraping case, the Court held that the search was reasonable, but only because it fell into a previously accepted category of warrantless searches. Namely, the search was “incident to a valid arrest”⁷⁸ in the sense that the police needed to act immediately to preserve the sample. Before the police intervened, defendant had placed his hands behind his back, then into his pockets, and a metallic sound, such as keys or change rattling, was heard. “The rationale of *Chimel*, in these circumstances, justified the police in subjecting him to the very limited search necessary to preserve the highly evanescent evidence they found under his fingernails.”⁷⁹ There was probable cause, and the exigent

75. 489 U.S. at 618–19.

76. *See* *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) (“The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *E.g.*, *United States v. Ramsey*, 431 U.S. 606 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry v. Ohio*, 392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Schmerber v. California*, 384 U.S. 757 (1966).”).

77. 412 U.S. 291 (1973).

78. *Id.* at 295 (“We believe this search was constitutionally permissible under the principles of *Chimel v. California*, 395 U.S. 752. *Chimel* stands in a long line of cases recognizing an exception to the warrant requirement when a search is incident to a valid arrest.”).

79. *Id.* at 296. Taking an arrestee’s DNA cannot be justified on the basis of the “incident to arrest” exception. This well established exception permits warrantless searches tailored to protecting the arresting officers from attack or potential evidence from destruction. *See Chimel v. California*, 395 U.S. 752 (1969). It does not justify routine searches unrelated to the offense for which the arrest is made.

circumstances justified the police in acting before seeking a warrant. Rules like these reflect, to varying degrees of accuracy, a balancing of the broad considerations listed above.

Applying these rules to collecting and storing DNA information on arrestees is neither simple nor free from doubt, but it seems likely that a highly circumscribed system of sampling and typing would be constitutionally acceptable. The constitutional analysis must attend to the following possible objections to DNA databanking: (a) there is no warrant and no probable cause (let alone reasonable suspicion) that the search will produce evidence of the offense for which the arrest is made;⁸⁰ and (b) the sampling infringes bodily integrity and informational privacy. In several other situations where these objections have been raised, however, the Supreme Court has held that the government could undertake searches or seizures without a warrant and without individualized suspicion. If DNA databanking falls into one of the categories that these cases have established, it satisfies the Fourth Amendment. If it does not, we must ask whether a new exception should be created—an inquiry that requires balancing the seriousness of the invasion of privacy against the governmental interests in the search.

This approach of defining and applying categorical exceptions can be contrasted to case-by-case balancing. In recent years, the Court, speaking through Justice Scalia, has interpreted the Fourth Amendment as requiring ad hoc balancing for searches as to which no clear historical precedent exists. In *Vernonia School District 47J v. Acton*,⁸¹ a case upholding mandatory random drug testing of high school athletes, Justice Scalia declared that:

At least in a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard “is judged by

80. The first clause of the Fourth Amendment bars unreasonable searches and seizures, while the second clause requires that warrants be based on probable cause and meet certain other requirements. The amendment is silent on how the reasonableness clause and the warrant clause interact. The Supreme Court has vacillated between two views. The first takes the warrant clause as predominant, establishing a rule that searches and seizures not based on a valid warrant are unreasonable per se. In the oft-repeated phrase from *Katz v. United States*, a warrant is required before every search or seizure “subject only to a few specifically established and well-defined exceptions.” 389 U.S. at 357. The Court reiterated this view most recently in *Flippo v. West Virginia*, 120 S. Ct. 7, 8 (1999). The second approach treats the warrant clause as simply stating the elements of a valid warrant (probable cause, particularity, and oath), should the state decide to seek one. Under this view, the absence of a warrant is merely one factor among many to consider in evaluating the reasonableness of a search. As the Court stated in *Terry v. Ohio*, 392 U.S. 1 (1968), which upheld warrantless, investigatory “stop-and-frisks” on less than probable cause, “the central inquiry [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.” *Id.* at 19.

81. 515 U.S. 646 (1995).

balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."⁸²

As applied to DNA databanking, the choice between categorical analysis and direct balancing does not seem crucial. It is open to the courts to create new exceptions, and the same factors that operate in direct balancing will come into play. It will suffice to consider whether DNA databanking fits the established categories and whether the case for a new category is strong.

2. The Identification Exception

The courts have long recognized the importance of accurately identifying individuals who are arrested. One century ago, in *State ex rel. Bruns v. Clausmier*,⁸³ an arrestee sought damages from a sheriff for taking plaintiff's picture and including it in the local "Rogues' Gallery." The Indiana Supreme Court held that the sheriff was acting within his lawful authority:

It would seem, therefore, if, in the discretion of the sheriff, he should deem it necessary to the safe-keeping of a prisoner and to prevent his escape, or to enable him the more readily to retake the prisoner if he should escape, to take his photograph, and a measurement of his height, and ascertain his weight, name, residence, place of birth, occupation, and the color of his eyes, hair, and beard, as was done in this case, he could lawfully do so.⁸⁴

82. *Id.* at 652-53 (citing *Skinner*, at 619; footnote and internal quotation marks omitted). Similar language appears in *Wyoming v. Houghton*, 119 S.Ct. 1297 (1999):

In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. See *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *California v. Hodari D.*, 499 U.S. 621, 624 (1991). Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. See, e.g., *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-653 (1995).

Id. at 1300. Justice Breyer preferred to place less emphasis on history, commenting that "I join the Court's opinion with the understanding that history is meant to inform, but not automatically to determine, the answer to a Fourth Amendment question." *Id.* at 1304 (concurring opinion).

83. 57 N.E. 541 (Ind. 1900).

84. *Id.* at 542.

In 1932, in *United States v. Kelley*,⁸⁵ a panel of the Second Circuit composed of three of the most able judges in the history of the United States,⁸⁶ dismissed a petition alleging that federal agents violated the constitution in taking the fingerprints of a man arrested for selling a quart of gin. Judge Augustus Hand observed that fingerprinting had become “a method of identifying persons charged with crime [that is] widely known and frequently practiced both in jurisdictions where there are statutory provisions regulating it and where it has no sanction other than the common law.”⁸⁷ The court allowed that “[a]ny restraint of the person may be burdensome,”⁸⁸ but reasoned that:

Such means for the identification of prisoners so that they may be apprehended in the event of escape, so that second offenders may be detected for purposes of proper sentence where conviction is had, and so that the government may be able to ascertain, as required by . . . the National Prohibition Act, whether the defendant has been previously convicted, are most important adjuncts of the enforcement of the criminal laws. . . . The slight interference with the person involved in finger printing seems to us one which must be borne in the common interest.⁸⁹

85. 55 F.2d 67 (2d Cir. 1932).

86. The panel consisted of Learned Hand, Thomas Swan, and Augustus Hand.

87. *Id.* at 70. The Second Circuit summarized the pertinent cases as follows:

The Maryland Court of Appeals held that it was lawful, though before conviction, to photograph and measure under the Bertillon system a person arrested on a felony charge. *Downs v. Swann*, 111 Md. 53, 73 A. 653. In Maryland no statute existed authorizing such means of identification. The Supreme Court of Indiana reached a similar conclusion in *State ex rel. Bruns v. Clausmeier*, 154 Ind. 599, 57 N.E. 541, and *O’Brien v. State*, 125 Ind. 38, 25 N.E. 137, and so did the Supreme Court of Arkansas in *Mabry v. Kettering*, 92 Ark. 81, 122 S.W. 115. The Court of Appeals of the District of Columbia is in accord. *Shaffer v. U.S.*, 24 App.D.C. 417. The Court of Chancery of New Jersey in *Bartletta v. McFeeley*, 107 N.J.Eq. 141, 152 A. 17, held only a year ago, and in the absence of a statute, that a prisoner who had been arrested for possessing papers pertaining to a lottery was lawfully subjected to photographing, finger printing, and measurement under the Bertillon system. To the same effect is the opinion of the New York Court of General Sessions in *People v. Sallow*, 100 Misc.Rep. 447, 165 N.Y.S. 915, and of the Supreme Court of the District of Columbia in *United States v. Cross*, 9 Mackey (20 D.C.) at page 382.

Id. at 69.

88. *Id.* at 68.

89. *Id.* The court placed little emphasis on the value of fingerprints to prove prior convictions under the National Prohibition Act, writing “[w]e prefer, however, to rest our decision upon the general right of the authorities charged with the enforcement of the criminal law to employ finger printing as an appropriate means to identify criminals and detect crime.” *Id.* at 70.

Indeed, in most jurisdictions escape from arrest is a separate criminal offense. Once lawfully arrested, a person has an obligation to remain in custody until the police complete the necessary administrative processing, sometimes culminating in pretrial release and sometimes in pretrial incarceration. Making a record of identifying characteristics of every arrestee facilitates the enforcement of the statutes criminalizing escape from arrest.

Thus, although the Supreme Court has yet to bestow its formal blessing on routine fingerprinting or other identification procedures on arrest, it has intimated that inquiries that merely identify arrestees are valid,⁹⁰ and today most courts take the propriety of fingerprinting arrestees for granted.⁹¹ The procedure is a kind of inventory search, providing an unequivocal record of just who has been arrested, that is considered appropriate when the state takes an individual into custody.⁹²

Of course, recording biometric data that help establish the identity of those charged with crimes serves another function. Once the data have been justifiably obtained as part of the “inventory” of the arrested individual, they can be used to solve crimes unrelated to the one for which the arrest was made, on the ground that the further use does not amount to an independent invasion of privacy. For example, “mug shots” can be shown to a victim of a robbery in the hope that the victim will be able to identify the perpetrator or to exclude innocent suspects.⁹³ Some courts have turned this investigative practice into a new rationale for fingerprinting. For example, in *Jones v. Murray*,⁹⁴ the first federal appellate case to address the constitutionality of DNA databanking for convicted offenders, the Fourth Circuit pointed to “universal approbation of

90. See *Illinois v. LaFayette*, 462 U.S. 640, 646 (1983) (plurality opinion noting that “inspection of an arrestee’s personal property may assist the police in ascertaining or verifying his identity” as one ground for allowing a warrantless, inventory search of the shoulder bag of an incarcerated arrestee); cf. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (plurality opinion treating procedures to identify an arrestee as exempt from the strictures of *Miranda v. Arizona*, 384 U.S. 436 (1966), discussed *supra* note 14).

91. *E.g.*, *Napolitano v. United States*, 340 F.2d 313, 314 (1st Cir.1965) (“Taking of fingerprints [prior to bail] is universally standard procedure, and no violation of constitutional rights.”); *Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963) (“it is elementary that a person in lawful custody may be required to submit to photographing . . . and fingerprinting . . . as part of routine identification processes.”).

92. For cases approving of inventory searches of possessions or automobiles following an arrest, see, *e.g.*, *Illinois v. LaFayette*, 462 U.S. 640 (1983); *South Dakota v. Opperman*, 428 U.S. 364 (1976).

93. Acquiring picture of lawfully detained individuals also is permissible under the theory that ordinary photography is not a search or seizure. Cf. *United States v. Dionisio*, 410 U.S. 1 (1973) (voice exemplar); *United States v. Mara*, 410 U.S. 19 (1973) (handwriting exemplar).

94. 962 F.2d 302 (4th Cir. 1992).

‘booking’ procedures that are followed for every suspect arrested for a felony, whether or not the proof of a particular suspect’s crime will involve the use of fingerprint identification.”⁹⁵ In articulating “the government’s interest in preserving a permanent identification record of convicted felons,”⁹⁶ however, the *Jones* court lost sight of the original rationale for fingerprinting and spoke only of “resolving past and future crimes”⁹⁷ in that “[i]t is a well recognized aspect of criminal conduct that the perpetrator will take unusual steps to conceal not only his conduct, but also his identity.”⁹⁸ Emphasizing that “[d]isguises used while committing a crime may be supplemented or replaced by changed names, and even changed physical features,”⁹⁹ the court concluded that collecting DNA profiles, like taking fingerprints, is justified to link an offender to a crime.¹⁰⁰

These observations may well be correct—the power of DNA typing to forge links between suspects and criminal activity cannot be denied. However, this investigatory use of biometric data is not what underlies the identification exception. The analysis in *Jones* posits a government interest that is distinct from the traditional justification for recording biometric data. This investigatory interest is more appropriately analyzed under the “special interests” exception discussed in the next section. The normal “identification exception” might be better denominated a “true identity” exception, since it merely relates to the government’s need to know precisely who it has arrested.

Although the identity exception seems well established, whether DNA typing can be subsumed within it is less clear. On the one hand, fingerprints already provide an unequivocal, and in some respects, a better record of personal identity than forensic DNA typing. Monozygotic twins can be distinguished by their fingerprints, but not by their genotypes. In addition, with current technology, fingerprints can be obtained more easily and more cheaply than DNA profiles. On the other hand, fingerprint patterns cannot be converted into numerical data that can be searched as efficiently as DNA data.¹⁰¹ An arrestee might be carrying false identification, and

95. *Id.* at 306.

96. *Id.* at 307.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* (“Even a suspect with altered physical features cannot escape the match that his DNA might make with a sample contained in a DNA bank, or left at the scene of a crime within samples of blood, skin, semen or hair follicles. The governmental justification for this form of identification, therefore, relies on no argument different in kind from that traditionally advanced for taking fingerprints and photographs, but with additional force because of the potentially greater precision of DNA sampling and matching methods.”).

101. See Eric Scigliano, *The Tide of Prints*, TECHNOLOGY REV., Jan.-Feb. 1999, at 63.

searching a database of DNA prints of individuals with outstanding warrants might reveal that the arrestee is a fugitive. Thus, the narrow, “true identity” exception might well pertain to DNA genotyping as much as it does to fingerprinting.

3. The “Special Needs” Exception

A relatively recent and somewhat amorphous category of searches that do not require a warrant or individualized suspicion goes under the rubric of “special needs.” These cases involve searches undertaken for some purpose other than the interception of contraband or the discovery of evidence of crime.¹⁰² Usually, but not always, these searches are not undertaken by the police. The category is described in *National Treasury Employees Union v. Von Raab*,¹⁰³ as follows:

While we have often emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause, . . . our decision in *Railway Labor Executives* 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. . . . [O]ur cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.¹⁰⁴

The “special needs” cases began with *Camara v. Municipal Court*.¹⁰⁵ Charged with violating the San Francisco Housing Code by refusing to permit an annual inspection of his residence in an apartment house, Camara argued that the inspection could not proceed in the absence of a warrant based on probable cause to believe that there was an infraction of the city’s housing code. The Court, however, distinguished between “typical Fourth Amendment cases”¹⁰⁶ and inspections intended to uncover “conditions which are hazardous to public health and

102. *See, e.g.*, *Ferguson v. City of Charleston*, 186 F.3d 469 (4th Cir. 1999) (upholding a policy instituted by the Medical University of South Carolina under which urine samples from maternity patients suspected of using cocaine were tested for cocaine and patients who tested positive were given a choice between being arrested and receiving drug counseling).

103. 489 U.S. 656 (1989).

104. *Id.* at 665-66 (citations omitted). It should be clear from this excerpt that *Von Raab* uses the phrase “beyond the normal need for law enforcement” not to define every circumstance in which balancing should be used, but merely to label a set of cases in which balancing has been used.

105. 387 U.S. 523 (1967).

106. *Id.* at 534.

safety.”¹⁰⁷ It rejected the argument that “warrants should issue only when the inspector possesses probable cause to believe that a particular dwelling contains violations of the minimum standards prescribed by the code being enforced.”¹⁰⁸ Instead, the Court held that warrants for searches for housing code violations in entire areas could be issued on the basis of standards that do not look to the situation in individual dwellings.¹⁰⁹

Later cases have upheld warrantless, suspicionless searches of many types: administrative inspections in “closely regulated” businesses;¹¹⁰ stops for questioning or observation at a fixed Border Patrol checkpoint¹¹¹ or at a sobriety checkpoint;¹¹² routine or random blood testing and urinalysis of certain employees¹¹³ and student athletes¹¹⁴ (but not candidates for public office);¹¹⁵ inspections and seizures for the purpose of inventorying and preserving an arrestee’s possessions;¹¹⁶ random “shakedown” searches of prison cells;¹¹⁷ and even visual anal or vaginal

107. *Id.* at 535.

108. *Id.* at 534.

109. *See id.* at 538 (speaking of “reasonable legislative or administrative standards for conducting an area inspection”—“standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multifamily apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling”).

110. *New York v. Burger*, 482 U.S. 691 (1987) (warrantless search by police of automobile parts junkyard to find evidence of stolen cars under a state statute regulating automobile dismantlers); *Donovan v. Dewey*, 452 U.S. 594, 598-599 (1981) (warrantless inspection of stone quarry pursuant to the Federal Mine Safety and Health Act of 1977); *United States v. Biswell*, 406 U.S. 311 (1972) (warrantless inspection of the premises of a pawnshop operator who was federally licensed to sell sporting weapons).

111. *United States v. Martinez-Fuerte*, 428 U.S. 543, 545–50, 566–67 (1976).

112. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 447, 455 (1990).

113. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602 (1989)..

114. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

115. *Chandler v. Miller*, 520 U.S. 305 (1997) (striking down a Georgia statute that demanded that every candidate for any of fourteen state offices present a certificate from a state-approved laboratory reporting that the candidate passed a urinalysis drug test).

116. *Illinois v. LaFayette*, 462 U.S. 640, 644 (1983) (“A so-called inventory search is . . . an incidental administrative step following arrest and preceding incarceration. To determine whether the search of respondent’s shoulder bag was unreasonable we must ‘balanc[e] its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.’”) (plurality opinion, citation omitted); *United States v. Edwards*, 415 U.S. 800, 804 (1974) (“With or

examinations of pretrial detainees.¹¹⁸ In each case, the Court has considered the importance of the government’s interest, the practicality and value of securing a warrant and requiring individual suspicion, and the gravity of the privacy invasion.¹¹⁹

Judges have disagreed as to the applicability of the “special needs” exception to convicted-offender DNA databanking.¹²⁰ On the one hand, the major purpose of the procedure is to gather information that will assist in the investigation of crime. To this extent, it sounds like “the normal need for law enforcement” rather than a “special need.” On the other hand, the information is not sought in connection with any particular, pending crime. However, there are other purposes for typing DNA from an offender or an arrestee that are distinct from the usual investigative function. One, considered in the previous section, is the administrative purpose of recording identifying characteristics in the event that the individual escapes and disguises his identity. Another, which would apply if the arrestee data were retained indefinitely, is to assist in identifying missing persons or victims of disasters. And, there are other reasons that the state might want to know the true identity of a pretrial detainee—contacting relatives in the event of serious illness, for example.

without probable cause, the authorities were entitled [at the stationhouse] not only to search [the arrestee’s] clothing but also to take it from him and keep it in official custody.”).

117. *Hudson v. Palmer*, 468 U.S. 517 (1984).

118. *Bell v. Wolfish*, 441 U.S. 520 (1979); *cf.* *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (warrantless search of probationer’s home was valid because special needs of the probation system made a warrant requirement impracticable and justified replacement of standard of probable cause by “reasonable grounds”).

119. Whether the Court has given proper weight to these factors and correctly applied them in each case is doubtful. *See, e.g., New York v. Burger*, 482 U.S. 691, 718 (1987) (dissenting opinion).

120. *Compare* *Shelton v. Gudmanson*, 934 F. Supp. 1048, 1051 (W.D. Wis. 1996) (“Although the state’s DNA testing of inmates is ultimately for a law enforcement goal, it seems to fit within the special needs analysis the Court has developed for drug testing and searches of probationers’ homes, since it is not undertaken for the investigation of a specific crime.”), *with* *Rise v. Oregon*, 59 F.3d 1556, 1564, 1568 (9th Cir.1995) (dissenting opinion asserting that “[t]he majority relies on the traditional law enforcement analysis [to uphold a convicted offender DNA databanking statute] because there is no basis for asserting such a special need here.”); *People v. Wealer*, 636 N.E.2d 1129, 1135 (Ill. Ct. App. 1994) (“in the absence of a clearly articulated administrative justification independent of a law enforcement purpose, we are reluctant to extend the special needs line of cases to the present statute, which has an ostensible law enforcement purpose.”); *State v. Olivas*, 856 P.2d 1076, 1089 (Wash. 1993) (concurring opinion arguing that “the ‘special needs’ analysis relied upon by the majority was not designed for application to searches and seizures in the context of ordinary law enforcement,” but that the same balancing should be done under the test for law enforcement searches that are minimally invasive).

Certainly, the Court has made it clear that a regulatory system adopted solely to aid in the enforcement of criminal laws can be sustained under the special-needs balancing standard.¹²¹ In determining whether DNA databanking is comparable to the situations in the Supreme Court’s “special needs” cases, the pivotal question is whether the *raison d’etre* of the system is unrelated to probable cause for believing that the target of the search is guilty of a particular crime. If that is so, as it is for housing inspections, prison cell searches, employee drug tests, sobriety checkpoints, and so on, it is plausible to argue that the searches should be allowed if they would advance an important governmental interest without unduly invading the individual’s interest in privacy. Because the value of searching an arrestee to ascertain his DNA profile has nothing to do with the existence of probable cause, the balancing test of the “special needs” cases is appropriate.

Even if this analysis is correct, however, the outcome of the balancing is not entirely clear. As discussed in Part A of this section, the physical intrusion is minimal, especially if the surface of the skin is not penetrated. Certainly, it is far less offensive than the body cavity searches of arrestees upheld in *Bell v. Wolfish*.¹²² Furthermore, if there is adequate assurance that genotyping of only “vacuous” loci can take place, no additional privacy interests are implicated.¹²³ Finally,

121. *See* *New York v. Burger*, 482 U.S. 691 (1987) (upholding warrantless searches by police of junkyards as part of a registration and record-keeping system instituted to detect trafficking in stolen automobile parts).

122. 441 U.S. 520 (1979).

123. Presumably, indefinite retention of pure biometric data that are legitimately gathered does not infringe any constitutionally recognized privacy interest. For example, states many provide for the expungement of fingerprints or other information related to an arrest or conviction, but it is not obvious that the Fourth Amendment necessitates such expungement. There is extensive variation in state legislation providing for expungement or sealing of criminal records. Some statutes provide for destruction of DNA records; others specify that it shall be retained. *See, e.g.*, ARK. CODE ANN. § 16-90-906 (1997) (“Any individual who has been charged and arrested for any criminal offense and the charges are subsequently nolle prossed, dismissed, or the individual is acquitted at trial is eligible to have all arrest records, petitions, orders, docket sheets, and any other documents relating to the case expunged”); CAL. PENAL CODE § 851.8(a) (1998) (arrestee who is found to be “factually innocent” can petition to have law enforcement agencies seal their records of the arrest for three years from the date of the arrest, and then destroy their records); *id.* at § 299(a) (sex offender “whose DNA profile has been included in the data bank . . . shall have his or her information and materials expunged from the data bank when the underlying conviction or disposition . . . has been reversed and the case dismissed, the defendant has been found factually innocent of the underlying offense . . . , the defendant has been found not guilty, or the defendant has been acquitted of the underlying offense.”); FLA. ST. ANN. § 943.0585 (West 1999) (“The court may only order expunction of a criminal history record pertaining to one arrest or one incident of alleged criminal activity . . . ,” but “[t]his section does not confer any right to the expunction of any criminal history record”); *id.* at § 943.0585(4) (“Any criminal history record of a minor or an adult which is ordered expunged by a court of competent jurisdiction . . . must be physically destroyed or obliterated by any criminal justice agency

there is no unjustified detention of the person or entry into the home or other property. In sum, if the collection and storage of the genetic information is properly structured, the effect on the security of “persons, houses, papers, and effects” is *de minimis*.

One qualification is in order. As the Court explained in *Skinner v. Railway Labor Executives’ Association*:¹²⁴

An essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents. A warrant assures the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope. . . . A warrant also provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case. . . .¹²⁵

Because police officers have considerable discretion to make warrantless arrests, and subjective factors come into play, the risk of arbitrary (or even bad faith) decisionmaking is present with DNA sampling from arrestees. Nevertheless, if the additional invasion of privacy due to genotyping is negligible, the discretion that exists in this context is not substantially more troublesome than it is in cases in which arrests are not followed by DNA sampling. If an officer

having custody of such record; except that any criminal history record in the custody of the department must be retained”); IOWA CODE ANN. § 692.17 (West 1999) (“Criminal history data in a computer data storage system shall not include arrest or disposition data or custody or adjudication data after the person has been acquitted or the charges dismissed”); 15 LA. REV. STAT. § 614(A) (1999) (“A person whose DNA record or profile has been included in the data base or data bank may request that his record of profile be removed . . . [if the] arrest on which the authority for including his DNA record or profile was based does not result in a conviction”); *id.* at 614(B) (“The state police shall remove all records and identifiable information in the data base or data bank pertaining to the person and destroy all samples from the person upon receipt of a written request for the removal of the record and a certified court order of expungement”); MINN. STAT. ANN. § 609A.03 (West 1998) (a convicted offender may file a petition for expungement, which is “an extraordinary remedy to be granted only upon clear and convincing evidence that it would yield a benefit to the petitioner commensurate with the disadvantages to the public and public safety”; the record may be sealed, but “shall not be destroyed or returned,” and “[u]pon issuance of an expungement order related to a charge supported by probable cause, the DNA samples and DNA records held by the bureau of criminal apprehension shall not be sealed, returned, or destroyed.”).

124. 489 U.S. 602 (1989).

125. *Id.* at 622 (citations omitted). *See also* Delaware v. Prouse, 440 U.S. 648, 661 (1979) (invalidating a system of automobile stops that involved the “kind of standardless and unconstrained discretion [which] is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.”).

lacks probable cause to arrest, evidence that results from collecting DNA and finding a match in the database of DNA from unsolved crimes is subject to exclusion.¹²⁶

To be balanced against the individual interest in the security of the person are the government's interests. As with the degree of the intrusion on personal privacy, these depend on the nature of the DNA databanking system. In addition to the administrative reasons to record biometric data that show a person's true identity discussed in connection with the identification exception, DNA sampling on arrest can help reduce serious crime in two ways. First, if a database of trace evidence DNA profiles from unsolved crimes is in place, a new arrestee's profile could be compared to those profiles. A "hit" could result in continued pretrial detention, prosecution, and conviction for the unsolved crime. Second, even if no unsolved-crime database exists, the arrestee's profile could be included in a database of DNA profiles from arrestees. (The most useful system would retain the identifying data on all arrestees, even those not convicted of any crimes. This would produce the largest database of potential offender DNA profiles.) DNA found at a crime scene or on a victim in an unsolved case could be analyzed and compared to all the potential offender profiles. A "hit" in the arrestee database could help solve the new case. This enhancement in crime-fighting is the major interest that courts have invoked to uphold convicted-offender databanking.¹²⁷ As we have just seen, it runs in two directions. An arrestee who commits crimes after being booked might be linked to those crimes, and an arrestee who has committed other crimes before being arrested might be linked to those past crimes.

But the very fact that there are convicted-offender databases in place diminishes the need for arrestee databases.¹²⁸ Many of the people who are arrested already have convictions and should be in a convicted-offender database. Arrestee databanking offers no new information about these individuals. Of the remaining arrestees without previous convictions, many will be

126. As a result, DNA sampling of arrestees could interfere with effective law enforcement.

127. *E.g.*, *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1996) (noting "the legitimate government interest in the investigation and prosecution of unsolved and future criminal acts by the use of DNA in a manner not significantly different from the use of fingerprints."). However, in upholding DNA databanking for convicted offenders, many courts also have relied on the notion that a conviction inherently diminishes the strength of the individual's privacy interest. *See, e.g.*, *Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir.1995) ("Once a person is convicted of one of the felonies . . . , his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sampling.").

128. In addition, the current backlog of samples to be analyzed and incorporated in the convicted-offender databases indicates that the actual benefit to law enforcement of allowing DNA sampling from arrestees may be limited, at least in the near future. However, this consideration seems to bear more heavily on the wisdom of such legislation than on its constitutionality. If, in principle, arrestee data would be a valuable supplement to (or replacement for) offender data, the Court probably would not invalidate legislation simply because a state is not yet prepared to implement the legislation fully.

convicted of the crime for which they were arrested. Even without arrestee databanking, their profiles would be added to the convicted-offender database, albeit at a later time. Of these, many will not be released pending trial in any event. Of those who are released, many will not commit crimes. Consequently, the total impact of taking DNA from arrestees could be small.

In other “special needs” cases, however, the Court has found the balance to favor searches that resulted in very few “hits.” In *Michigan Department of State Police v. Sitz*,¹²⁹ the Supreme Court validated the state’s use of a roadblock to discover drunk drivers despite a resulting arrest rate of only one to 1.5 percent. In *Bell v. Wolfish*,¹³⁰ the Court upheld body cavity searches of pretrial detainees despite the fact that there had been only one instance in which an inmate was discovered attempting to smuggle contraband. Indeed, in *Camara*, the fraction of housing inspections that led to findings of code violations probably was quite small.

But in these cases, the numbers of hits may be low precisely because the searches deter the conduct that they target. In *National Treasury Employees Union v. Von Raab*,¹³¹ the Court noted in dictum that this point “is well illustrated also by the Federal Government’s practice of requiring the search of all passengers seeking to board commercial airliners, as well as the search of their carry-on luggage, without any basis for suspecting any particular passenger of an untoward motive.”¹³² Even though only 42,000 inspections of over 10 billion pieces of luggage have detected firearms, the Court reasoned that “[w]hen the Government’s interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success.”¹³³

The difficulty with applying this reasoning to arrestee DNA databanking is that it is not obvious that individuals who would otherwise commit murder, rape, or other crimes for which DNA evidence is likely to be useful will be deterred by the possibility of having their DNA analyzed in connection with an arrest for an unrelated offense. Nevertheless, it can be argued that knowing that one’s DNA is on file could raise the perceived probability of apprehension and thereby deter some offenses. Even so, if it seems that an arrestee is no more likely than a randomly selected member of the general public to commit or have committed offenses for which DNA trace evidence will be found, courts may be reluctant to conclude that the balance of

129. 496 U.S. 444 (1990).

130. 441 U.S. at 559 (1979).

131. 489 U.S. 656 (1989).

132. *Id.* at 675 n.3.

133. *Id.*

interests supports DNA sampling.¹³⁴ If reliable data were to demonstrate that individuals arrested for various offenses tend to commit other offenses for which DNA evidence frequently is available, then the argument for allowing DNA sampling on arrest as a “special need” probably would prevail.

Conclusion

The analytical framework for evaluating the constitutionality of routine DNA sampling of arrestees is complex, and the outcome of the analysis is debatable. Some procedures for obtaining and analyzing the DNA arguably do not even rise to the level of a search, although others clearly do. For all methods of sampling, there is a sharply diminished expectation or invasion of privacy vis-à-vis the traditional search for contraband or instrumentalities of a crime, and the normal reasons for a warrant and individualized suspicion do not apply as strongly. Consequently, a cogent argument can be made that DNA databanking for arrestees is acceptable under an “identification exception” to the warrant requirement.

In addition, the fact that DNA databanking is not designed to produce evidence for the case at hand suggests that under the “special needs” line of cases, it would be appropriate to balance the nature and extent of the infringement of the individual’s privacy as against the state’s interest in having a database of genotypes. With convicted-offender databases, every court that has undertaken this balancing has concluded that DNA databanking is reasonable, and this result is consistent with the Supreme Court’s Fourth Amendment jurisprudence. But the very existence of these databases, combined with the routine practice of fingerprinting arrestees, weakens the constitutional case for compulsory DNA databanking on arrest. Which way the balance tips is, in our view, a close question, but one that probably would be resolved in favor of a minimally invasive, highly secure system for DNA databanking even at the point of arrest.

134. *See Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir.1995) (emphasizing that Oregon’s convicted-offender DNA statute authorizes taking “blood samples not from free persons or even mere arrestees, but only from certain classes of convicted felons”); *State v. Olivas*, 856 P.2d 1076, 1089, 1094 (Wash. 1993) (concurring opinion) (“We would be appalled, I hope, if the State mandated non-consensual blood tests of the public at large for purposes of developing a comprehensive Washington DNA databank.”).