

SEARCHING FOR A NEEDLE IN A HAYSTACK: THE CONSTITUTIONALITY OF POLICE DNA DRAGNETS

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INTRODUCTION

Shannon Kohler was given a “choice” when he was approached by the Baton Rouge Police.¹ He could either allow the police to swab the inside of his mouth to analyze his DNA or he could refuse and, according to the police, be subjected to a court order and public speculation that he was a serial killer.² The police warned that the court order would most likely get Kohler’s name into the newspapers as being uncooperative in the investigation of the murders of four women and as a possible suspect in the crimes.³ Kohler eventually provided a sample of his DNA to the police.⁴ The irony of this situation was that Kohler was not even a suspect in the four murders.⁵ He did not drive the type of car that witnesses saw at the scenes of the crimes, and he had phone records showing he was at home on the nights that the murders occurred.⁶ The Baton Rouge Police, however, targeted Kohler and nearly 1,200 other men for DNA testing based on paltry connections to the victims, such as Kohler’s having once worked on the street on which the police found the first victim’s cell phone.⁷

In less than twenty years, “DNA dragnets”—the mass warrantless DNA testing of individuals whom authorities have neither probable cause nor reasonable suspicion to believe perpetrated a crime, but who merely live or work near a crime scene—has become a practice increasingly util-

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1. David M. Halbfinger, *Police Dragnets for DNA Tests Draw Criticism*, N.Y. TIMES, Jan. 4, 2003, at A1.

2. *Id.*

3. *Id.*

4. *Id.*

5. Glynn Wilson, *In Louisiana, Debate over a DNA Dragnet*, CHRISTIAN SCIENCE MONITOR, Feb. 21, 2003, at 3.

6. *Id.*

7. See POLICE PROFESSIONALISM INITIATIVE, UNIV. NEB. OMAHA, POLICE DNA “SWEEPS” EXTREMELY UNPRODUCTIVE: A NATIONAL SURVEY OF POLICE DNA “SWEEPS” 11–12 (2004), available at www.policeaccountability.org/dnareport.pdf [hereinafter SURVEY]; Wilson, *supra* note 5.

ized by police departments desperate to find answers in puzzling cases in which DNA left on a victim may be the only evidence police have available to solve a crime.⁸ The use of these dragnets, however, has raised Fourth Amendment concerns. The primary function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the government.⁹ Furthermore, at the core of the Fourth Amendment is the individual's right to be free from arbitrary intrusion by police.¹⁰ Accordingly, all searches, whether conducted with or without a warrant, must be reasonable.¹¹ The reasonableness of any search typically depends upon whether the government obtained a warrant prior to the search, in accordance with the Fourth Amendment's Warrant Clause.¹² While there are well-established exceptions to this rule,¹³ DNA dragnets fail to fall within

8. Jonathan F. Will, Comment, *DNA as Property: Implications on the Constitutionality of DNA Dragnets*, 65 U. PITT. L. REV. 129, 130 (2003); Wilson, *supra* note 5.

9. See *Katz v. United States*, 389 U.S. 347, 351 (1967); *Schmerber v. California*, 384 U.S. 757, 767 (1966).

10. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

11. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

12. See *Payton v. New York*, 445 U.S. 573, 586 (1980) ("It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." (footnote and internal quotations omitted)); *Terry v. Ohio*, 392 U.S. 1, 20 (1968) ("[T]he police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . ." (citation omitted)); *Katz*, 389 U.S. at 357 ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." (footnotes omitted)); *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.").

13. The Court has upheld warrantless searches incident to arrest by police officers on the principles that such searches protect officers and prevent the destruction of evidence. *Chimel v. California*, 395 U.S. 752, 762–63 (1969) ("When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule."). The Court has also upheld warrantless entry into an individual's home where police are in "hot pursuit" of a suspect. *United States v. Santana*, 427 U.S. 38, 42–43 (1976) (holding the defendant could not thwart an otherwise proper arrest that had been set into motion in a public place by retreating into her private residence, especially since the police needed to act quickly in order to prevent the destruction of narcotics evidence). Consent to a search by an individual has also been viewed by the Court to render a warrantless search reasonable as long as consent was truly voluntary. See *Florida v. Bostick*, 501 U.S. 429, 439–40 (1991) (consent to a search by officers on a bus was not coercive as long as a person would feel free to decline an officer's request or otherwise terminate an encounter); *Schneekloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973) (holding that the state must show that consent was voluntarily given to the officer to conduct a search and that "voluntariness is a question of fact to be determined from all the circumstances," taking into account both subjective and objective factors). In light of exigent circumstances, the Court has allowed police to conduct a search without a warrant where probable cause exists, such as when there is a threat to public safety or an arresting officer, or fear that there will be a destruction of evidence if the police do not act. See *Cupp v.*

an established exception.¹⁴ Although consent in the absence of probable cause or reasonable suspicion may render a search reasonable,¹⁵ the Supreme Court has held that the consent secured by police must be truly “voluntary” and not the product of coercion, express or implied.¹⁶ Whether the consent was given voluntarily or was a product of coercion is determined by the totality of the circumstances surrounding the questioning by police.¹⁷ In the case of DNA dragnets, however, consent given under coercive conditions where police threaten individuals with court orders and media scrutiny is not truly voluntary and thus is invalid.¹⁸

Furthermore, the Supreme Court has held that in order to determine the reasonableness of a search, a court must balance the intrusion on the individual’s privacy interests against the promotion of legitimate governmental interests.¹⁹ DNA dragnet practices do not satisfy the reasonableness balancing test in order to alleviate Fourth Amendment concerns. While the State has a legitimate interest in solving and preventing crimes, that interest does not outweigh individuals’ interests in keeping their genetic information private.²⁰ Thus, because the government’s interests in solving crimes

Murphy, 412 U.S. 291, 296 (1973) (upholding a forced scraping of suspect’s fingernails where police feared destruction of evidence); *Terry*, 392 U.S. 1 (upholding a limited search for weapons where officer reasonably suspected that his and the public’s safety was at issue). The Court has also adopted a “special needs, beyond the normal need for law enforcement” exception to the probable cause and warrant requirement. *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 619, 633–34 (1989) (citation and internal quotations omitted) (holding mandated drug and alcohol testing to be reasonable within the Fourth Amendment where the interest in public safety outweighed the privacy concerns of individual employees); *accord Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (holding suspicionless drug testing of Customs Service’s employees to be reasonable where applied to individuals involved in interdiction of illegal drugs and carrying firearms).

14. Dragnets are not conducted in light of truly voluntary consent by the individual. *See discussion infra* Part II.B. DNA dragnets are not conducted where there is a risk of loss of evidence because the DNA of an individual cannot be destroyed. *See discussion infra* Part II.A.2. Furthermore, dragnets cannot qualify as a special need exception because they are conducted for ordinary law enforcement purposes of finding a perpetrator of a crime. *See discussion infra* Part II.A.2. *See also* Jeffrey S. Grand, Note, *The Bleeding of America: Privacy and the DNA Dragnet*, 23 *CARDOZO L. REV.* 2277, 2297–2309 (2002).

15. *Schneckloth*, 412 U.S. at 219 (“It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”(citation omitted)).

16. *Id.* at 248.

17. *Id.* at 227 (“[T]he question whether a consent to a search was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.”).

18. *See Bostick*, 501 U.S. at 438. DNA dragnet practices often have police coercion to blame for their “consent” from individuals as police often threaten court orders, exposure to the media, or becoming a prime suspect in the crime.

19. *Camara v. Mun. Court*, 387 U.S. 523, 534–35 (1967).

20. *See Katz v. United States*, 389 U.S. 347, 351–52 (1967) (holding that things that a person seeks to keep private, and to which society recognizes a reasonable expectation of privacy, are subject to Fourth Amendment protections). For a discussion of why individuals’ interests in keeping their

with DNA dragnets do not outweigh individuals' interests in keeping the personal information contained in their DNA private, the use of DNA dragnets in the absence of probable cause and a judicial warrant cannot be upheld as constitutional.

Part I of this Note will describe and define what the practice of DNA dragnets entail and explore the history of this relatively new practice. Additionally, it will explain the type of information found in DNA profiles and the potential for abuse of that information. Part II of this Note will address the Supreme Court's Fourth Amendment jurisprudence related to searches and intrusions of the body, focusing on whether DNA dragnets would pass constitutional muster. Specifically, it will argue that DNA dragnets do not withstand constitutional scrutiny because DNA testing results in a severe intrusion into the privacy of an individual by revealing personal medical information. This level of intrusion is not outweighed by the need of police departments to prevent and investigate crimes and to protect the public where there are other means of investigating and solving crimes. In addition, DNA dragnets do not fall within any of the exceptions to the Fourth Amendment created by the Supreme Court. Namely, consent given by dragnetees is not voluntary but results from coercion by police; exigent circumstances do not warrant taking a sample in the absence of a warrant where genetic information contained in an individual's blood cannot be altered or destroyed; and ordinary law enforcement needs do not qualify as "special needs" allowing police to conduct these warrantless and suspicionless searches.

I. DNA DRAGNETS

A. *Definition and Procedure of DNA Dragnets*

While the facts and circumstances behind DNA dragnets vary from case to case, many dragnet investigations harbor common characteristics.²¹ First, dragnets are typically carried out in cases in which police have recovered DNA evidence from a victim.²² Accordingly, all of the eighteen dragnets that have occurred in the United States have involved cases of rape,

genetic information private outweighs the State's interest in solving and preventing crimes, see *infra* Part II.A.

21. Grand, *supra* note 14, at 2282.

22. Aaron B. Chapin, Note, *Arresting DNA: Privacy Expectations of Free Citizens Versus Post-Convicted Persons and the Unconstitutionality of DNA Dragnets*, 89 MINN. L. REV. 1842, 1845 (2005).

murder, or both.²³ Second, the dragnets are carried out in cases in which police have only a vague description of the perpetrator and thus must proceed without particularized suspicion of any individual.²⁴ Accordingly, most dragnets are conducted in order to obtain samples from people who either lived or worked near the scene of the crime, focusing on those who might have had some opportunity to commit the crime under investigation.²⁵ Third, since police lack probable cause for a warrant, DNA samples are gathered from individuals through purportedly voluntary consent.²⁶ A person's failure to consent to a search often rouses the suspicions of the police and leads them to focus upon an individual, which some view as the ultimate purpose behind a dragnet.²⁷ Fourth, once consent is obtained from individuals, police collect samples of usually blood or saliva to be tested for the individuals' genetic codes, which is then compared to the DNA evidence recovered from the victim.²⁸

B. History

The first reported DNA dragnet occurred in the English village of Narborough in 1986.²⁹ In an attempt to solve the rape and murder of two teenage girls from the village, police in the town sought voluntary blood samples from 4,500 men between the ages of seventeen and thirty-four.³⁰ The men in the village cooperated largely because of social pressure exerted by the small community and the desire of most of the village's citizens to protect the community's young women.³¹ The DNA samples

23. SURVEY, *supra* note 7, at 8; *see also* Chapin, *supra* note 22, at 1845 (finding that cases subjected to dragnets are those with DNA at the crime scene).

24. Grand, *supra* note 14, at 2282–83.

25. *See* Chapin, *supra* note 22, at 1845; Fred W. Drobner, *DNA Dragnets: Constitutional Aspects of Mass DNA Identification Testing*, 28 CAP. U. L. REV. 479, 485 (2000); Grand, *supra* note 14, at 2283; *see also* SURVEY, *supra* note 7, at 9–13. The survey provides a summary of the eighteen dragnets performed in this country and from some of the descriptions it is clear police limited dragnets to those living or working in the area of the crimes. Whether these dragnets would perhaps work better in smaller areas, like the village of Narborough, England, where there is a smaller number of people and less mobility remains to be seen.

26. Chapin, *supra* note 22, at 1846; Drobner, *supra* note 25, at 503; Grand, *supra* note 14, at 2283.

27. Chapin, *supra* note 22, at 1846 (“The DNA dragnet’s greatest usefulness is in stirring up potential suspects.”); Grand, *supra* note 14, at 2284 (suspecting the true reason why dragnets are conducted is actually for police to see who will refuse and then focus on that individual as a suspect); *see also* Drobner, *supra* note 25, at 487 (indicating that police statements that a suspect would not become a suspect because of his or her refusal to get tested were disingenuous, and that refusal actually leads to pressure on individuals, which may ultimately make them incriminate themselves by getting tested).

28. Drobner, *supra* note 25, at 486.

29. Angus J. Dodson, *DNA “Line-Ups” Based on a Reasonable Suspicion Standard*, 71 U. COLO. L. REV. 221, 223–24 (2000).

30. *See* Chapin, *supra* note 22, at 1844; Dodson, *supra* note 29, at 223–24.

31. Dodson, *supra* note 29, at 224.

collected from men in the village, however, were not ultimately responsible for the apprehension of the perpetrator of the crimes.³² When a local man, Colin Pitchfork, attempted to have one of his co-workers provide a DNA sample in his place, the police's suspicions were raised, and eventually he was charged with the crimes.³³

Since this first dragnet, the practice has become commonplace in England.³⁴ The results of dragnets conducted in England have been impressive and the public far less resistant to the practice in comparison to the American public, perhaps due to its success.³⁵ The Forensic Science Service of England and Wales has carried out 292 dragnets since 1995.³⁶ Of those 292 dragnets, sixty-one, or about twenty percent of all sweeps, have produced significant matches that have pushed investigations towards a specific individual and often led to the conviction of the individual.³⁷ Following England's seeming success with DNA dragnets, the practice spread to other countries such as France and Germany.³⁸ Germany was the site of the largest DNA dragnet to date.³⁹ The German DNA dragnet occurred in 1998 and led to the testing of nearly 16,400 people before a mechanic was found to be the perpetrator of the rape and murder.⁴⁰

DNA dragnets in the United States have been far from successful.⁴¹ The first dragnet to take place in the United States occurred in 1990 in San Diego when police tested more than 800 African American men in an attempt to identify the person who stabbed six people to death in their homes.⁴² Since then, DNA dragnets have become increasingly popular in the United States with eighteen occurring since 1990, four of which occurred in 2004.⁴³ The success rate of these dragnets, however, leads their popularity to be suspect. The only comprehensive study done on this topic

32. Chapin, *supra* note 22, at 1844; *see also* Dodson, *supra* note 29, at 224 (stating that a man who did not submit a sample was eventually arrested for the crimes).

33. *See* Chapin, *supra* note 22, at 1844; Dodson, *supra* note 29, at 224.

34. *DNA Dragnet*, CBS NEWS, Sept. 12, 2004, <http://www.cbsnews.com/stories/2004/09/10/60minutes/main642684.shtml>.

35. Amanda Ripley, *The DNA Dragnet*, TIME, Jan. 24, 2005, at 39, 40.

36. *Id.*

37. *Id.*

38. Grand, *supra* note 14, at 2285.

39. Halbfinger, *supra* note 1.

40. *Id.*

41. *See* SURVEY, *supra* note 7, at 8 (finding only one of the eighteen dragnets performed in the United States yielded a perpetrator of the crime under investigation).

42. Chapin, *supra* note 22, at 1845. Although SURVEY, *supra* note 7, at 9, lists the first dragnet as occurring in 1987, the procedure used in that case, namely, that police officers tested individuals who were already on a police suspect list, does not fit the definition of a dragnet adopted in this Note and thus does not qualify as the first dragnet in the United States.

43. Chapin, *supra* note 22, at 1845.

found that only one of the eighteen DNA dragnets performed thus far in the United States has produced a viable suspect in the crime under investigation.⁴⁴ Ten of the eighteen cases that were investigated through the use of a DNA dragnet were ultimately solved by other means and four remained unsolved.⁴⁵

C. *The Nature of Information Revealed by DNA Testing*

Once a police department obtains samples from suspects through a DNA dragnet, the samples are tested to reveal the individual's DNA profile. The human genome remains substantially the same between every individual, but within each individual's chromosomes live variations and mutations that are unique to each individual.⁴⁶ By testing a sample and isolating these areas of variations, or polymorphisms, a scientist can compare these areas of variations with the areas of variations in another sample.⁴⁷ If the two samples carry the same polymorphisms, "a scientist can calculate the probability that the samples came from the same person, based on how frequently those polymorphisms occur in the general population."⁴⁸

While some have analogized this process to that of comparing fingerprints, this analogy neglects the complex and personal data that is revealed by an individual's genetic profile. In the case of a fingerprint, all that is revealed about the individual is his or her identity, not any of the individual's personal or medical information. In *Davis v. Mississippi* the Supreme Court considered the constitutionality of a fingerprint dragnet.⁴⁹ In investigating a rape, the police in Meridian, Mississippi, for a period of ten days, took twenty-four African American youths to police headquarters in order to briefly question, fingerprint, and then release them without charge.⁵⁰ The petitioner in the case, however, was confined overnight in a Jackson jail without a warrant or probable cause for his arrest.⁵¹ The Court found that where the police made no attempt to employ procedures to comply with the

44. The only case where a criminal suspect was identified pursuant to a DNA dragnet occurred in Lawrence, Massachusetts. The study noted that this dragnet actually involved one of the fewest number of persons in comparison to other DNA dragnets the study examined. The case involved the sexual assault of a nursing home resident and thus police were able to begin with a rather short list of potential suspects based on employment and access to the victim. SURVEY, *supra* note 7, at 4.

45. *Id.* at 8.

46. Dodson, *supra* note 29, at 227; Grand, *supra* note 14, at 2286–87.

47. Dodson, *supra* note 29, at 227–28.

48. *Id.* at 228.

49. 394 U.S. 721, 727 (1969).

50. *Id.* at 722.

51. *Id.* at 723.

Fourth Amendment, fingerprints obtained from the defendant by the police were a product of an illegal detention at police headquarters and improperly admitted into evidence.⁵² The Court, however, did leave the door open for taking fingerprints from individuals without probable cause or a warrant.⁵³ The Court noted that the taking of such fingerprints could comport with the Fourth Amendment because of the unique nature of fingerprinting that made it much less of an intrusion upon the personal security than other types of police searches and detentions.⁵⁴ The Court explained that “[f]ingerprinting involves none of the probing into an individual’s private life and thoughts that marks an interrogation or search.”⁵⁵

In stark contrast to fingerprinting, DNA profiling probes into the private lives of individuals. DNA can be used to reveal information that is highly personal and intimate in nature, such as an individual’s behavioral characteristics and propensity to contract certain diseases.⁵⁶ The fear among civil libertarians is that information revealed by a DNA profile after a DNA dragnet could eventually make its way to insurance companies.⁵⁷ Once insurance companies know an individual’s propensity for a genetic disease, the company may cancel policies.⁵⁸ This fear is exacerbated because many states have yet to regulate procedures for DNA storage and test results after an individual has been cleared as a suspect in the crime.⁵⁹ Individuals who have been tested often have had to sue to try to get their samples and DNA test results back from police departments.⁶⁰ Even more troublesome for individuals who have been subjects of DNA dragnets is the minimal security measures taken to keep samples and DNA profiles private and away from the public eye.⁶¹ In Oklahoma, for example, DNA samples from a dragnet in a rape and murder investigation are kept in ordinary envelopes.⁶² Thus, the dangers of the revealing and private information exposed by DNA dragnets falling into the hands of insurance companies, or

52. *See id.* at 728.

53. *See id.* at 727.

54. *See id.*

55. *Id.*

56. James F. Van Orden, *DNA Databases and Discarded Private Information: “Your License, Registration, and Intimate Bodily Details, Please,”* 6 N.C. J.L. & TECH. 343, 348–49 (2005).

57. *DNA Dragnet*, *supra* note 34.

58. *Id.*

59. *See id.*

60. *See id.* (explaining the case of Blair Shelton, who submitted to a DNA dragnet testing and had to sue to get his results and sample back—the suit took nearly three years); Halbinger, *supra* note 1 (explaining that Shannon Kohler was engaged in a similar suit to regain his sample and test results after he was cleared as a suspect).

61. *See DNA Dragnet*, *supra* note 34.

62. *Id.*

other individuals who may use the information to discriminate against dragnetees, represents a real and imminent possibility.

II. FOURTH AMENDMENT JURISPRUDENCE AND THE CONSTITUTIONALITY OF DNA DRAGNETS

The Fourth Amendment of the United States Constitution states that [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁶³

With the memory of abuses by British government agents fresh in the minds of the Constitution's Framers, the Fourth Amendment was included in the Constitution in an effort to guard against warrantless physical searches of homes by agents of the government.⁶⁴ The Fourth Amendment also reflected the common law tradition of the right and entitlement of the individual to be left alone in his home.⁶⁵ However, the Supreme Court has interpreted the Fourth Amendment's protection to extend beyond merely an individual's rights in his home, but also to the "inestimable right of personal security [that] belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs."⁶⁶ Accordingly, the Supreme Court has recognized that "the Fourth Amendment protects people, not places."⁶⁷

The Fourth Amendment and its protections of probable cause and reasonableness are only implicated where a government action constitutes a "search" or "seizure."⁶⁸ Should a state action not constitute a search or seizure, the Fourth Amendment's protections do not apply, and police may

63. U.S. CONST. amend. IV.

64. *Chimel v. California*, 395 U.S. 752, 760–61 (1969) (noting that the Fourth Amendment was "in large part a reaction to general the warrants and warrantless searches that had so alienated colonists"); Nathan H. Seltzer, *When History Matters Not: The Fourth Amendment in the Age of the Secret Search*, 40 CRIM. L. BULL. 105, 115–19 (2004).

65. Seltzer, *supra* note 64, at 117.

66. *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968).

67. *Katz v. United States*, 389 U.S. 347, 351 (1967).

68. *See* U.S. CONST. amend. IV. A "search" within the Fourth Amendment occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring). A "seizure" of property within the meaning of the Fourth Amendment occurs "when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). "Seizure" of a person within the meaning of the Fourth Amendment occurs when there is "meaningful interference, however brief, with an individual's freedom of movement." *Id.* at 113 n.5.

proceed in the absence of particularized suspicion that the individual committed or was involved in the commission of a crime.⁶⁹

With regard to intrusions into the human body, such as blood or cheek swabs needed to conduct DNA dragnets, the Supreme Court's decision in *Schmerber v. California*⁷⁰ is instructive. In *Schmerber*, the defendant was hospitalized after being involved in a car accident.⁷¹ The police suspected the defendant was intoxicated at the time of the accident and instructed a physician to withdraw a blood sample from the defendant while he was being treated at a hospital.⁷² The Court held that the withdrawal of the blood over the defendant's objection implicated the Fourth Amendment, because "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained."⁷³ The Court found that "these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search."⁷⁴ Thus, just as search warrants are ordinarily required for searches of dwellings, the Court found that "no less could be required where intrusions into the human body are concerned."⁷⁵ Despite ultimately finding the police acted properly given that they were confronted with an "emergency" that threatened the destruction of evidence,⁷⁶ the Court in *Schmerber* reiterated that the "integrity of an individual's person is a cherished value of our society."⁷⁷ Since *Schmerber*, the Supreme Court has gone on to recognize not just compelled intrusions into the body for blood tests but also urine analysis tests as being Fourth-Amendment-protected searches.⁷⁸

69. Van Orden, *supra* note 56, at 349–50.

70. 384 U.S. 757 (1966).

71. *Id.* at 758 & n.2.

72. *Id.* at 758.

73. *Id.* at 769–70.

74. *Id.* at 770.

75. *Id.*

76. *See id.* at 770–71 (explaining that the blood alcohol level in the defendant's blood would have dissipated if the officers would have waited for a warrant from a judicial officer, and that the officers used a reasonable and commonplace means of obtaining a sample, namely, a blood test). The Court applied the same analysis from *Schmerber* to a case where the State sought to force a robbery suspect to undergo surgery in order to remove a bullet from his chest to be used to build the case against him. *See Winston v. Lee*, 470 U.S. 753 (1985). The Court found such a forced surgery would violate the suspect's Fourth Amendment rights because of the medical risks the surgery posed and the severe intrusion the surgery posed to the suspect's privacy interests and bodily integrity. *Id.* at 766.

77. *Schmerber*, 384 U.S. at 772.

78. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) ("Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment."); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989).

Accordingly, because DNA dragnets may require blood tests and because the Court has already specifically addressed the taking of blood tests by police officers, dragnets conducted with blood tests would qualify as searches within the meaning of the Fourth Amendment. Saliva testing would also likely qualify as a search within the meaning of the Fourth Amendment, because it too involves intrusions into the body in order to obtain a sample of bodily fluids. Like urine analysis, the procurement of a saliva sample does not entail a surgical intrusion into the body. The Supreme Court has nonetheless held that intrusions such as urine tests constitute a search for purposes of the Fourth Amendment because of the potential for analysis of such a sample to “reveal a host of private medical facts” about an individual.⁷⁹ Thus, both methods of conducting a DNA dragnet, procuring a sample of blood or saliva, would qualify as searches under the Fourth Amendment.

Although a governmental action may implicate a search within the meaning of the Fourth Amendment, that search may withstand constitutional scrutiny if it is “reasonable.”⁸⁰ The Fourth Amendment prohibits searches from being unreasonable, but it fails to define precisely what conditions render a search reasonable. The reasonableness of a given search or seizure depends upon balancing legitimate governmental interests against the individual’s right to privacy and personal security free from arbitrary interference by law officers.⁸¹ In most instances the Supreme Court has relied on the fulfillment of the Warrant Clause to render a search reasonable within the meaning of the Fourth Amendment.⁸² At the very least, in the absence of a warrant, a search must ordinarily be based upon an individual suspicion of wrongdoing in order to be found reasonable.⁸³

79. *Skinner*, 489 U.S. at 617.

80. *Schmerber*, 384 U.S. at 768 (“[T]he Fourth Amendment’s proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.”).

81. *United States v. Knights*, 534 U.S. 112, 118–19 (2001); *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999); *see also Camara v. Mun. Court*, 387 U.S. 523, 536–37 (1967) (“[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.”).

82. *See Terry v. Ohio*, 392 U.S. 1, 20 (1968) (“We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure” (citations omitted)); *see also Johnson v. United States*, 333 U.S. 10, 14 (1948) (“When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.”).

83. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (“A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.” (citation omitted)); *Chandler v. Miller*, 520 U.S. 305, 308 (1997) (“The Fourth Amendment requires government to respect ‘[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures.’ This restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion.” (quoting *Von Raab*, 489 U.S. at 668) (alteration in original)).

“[B]ecause the ultimate touchstone of the Fourth Amendment is ‘reasonableness,’”⁸⁴ the Supreme Court has also recognized limited and well-delineated exceptions to the requirement of a warrant and, in certain cases, even the requirement of probable cause in order for a search to be reasonable.⁸⁵ DNA dragnets, however, remain outside the constitutionality of the Fourth Amendment because they are conducted in the absence of a warrant, lack probable cause, and fail to fall within recognized exceptions to the requirement of a warrant or probable cause, such as voluntary consent, exigent circumstances, or “special needs”; thus DNA dragnets fail to satisfy the reasonableness balancing test.

A. Reasonableness Analysis

Although the determination that a search is reasonable is usually a result of the fulfillment of the Warrant Clause, in the absence of a warrant, a search may still be found to be reasonable and thus constitutional.⁸⁶ In order to determine the reasonableness of a search under the Fourth Amendment, the degree to which the search imposes upon the individual’s expectation of privacy is weighed against the government’s need for the search in order to promote a legitimate interest.⁸⁷ In the case of DNA dragnets, the individual’s expectation of privacy lies in his interest to keep the information contained in his DNA out of the hands of the public. On the other hand, the government’s interest is in finding potential rapists and murderers. While law enforcement interests are undoubtedly important, the Constitution does not afford police whatever means it likes in meeting these interests.⁸⁸ The Fourth Amendment’s emphasis on protecting the privacy and dignity of the individual cannot allow police to test individuals’ blood or saliva to reveal important and private DNA information without probable cause and a warrant.

1. Individual Expectation of Privacy in Information Contained in DNA

Whether a search conducted by police constitutes an unreasonable action by law enforcement under the Fourth Amendment depends upon the intrusion the search imposes upon the individual subject to the search.⁸⁹

84. *Brigham City, Utah v. Stuart*, 126 S.Ct 1943, 1947 (2006).

85. *See supra* note 13.

86. *See Terry*, 392 U.S. at 20.

87. *See Camara v. Mun. Court*, 387 U.S. 523, 534–35.

88. *See id.* at 528 (“The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”).

89. *See United States v. Hensley*, 469 U.S. 221, 228 (1985).

This personal intrusion, however, is not merely limited to the impact of the intrusion at the time the sample is extracted from the individual.⁹⁰ Rather, the personal intrusion resulting from DNA dragnets that violates the Fourth Amendment lies not with the means by which a sample is taken, often the rather noninvasive buccal swab, but with the personal information found within the sample once it has been tested by law enforcement authorities. The DNA identification process has frequently been referred to as “DNA fingerprinting,” but such a title overlooks the more-than-superficial information that is revealed by DNA profiling. While the Supreme Court in *Davis v. Mississippi* noted that “[f]ingerprinting involves none of the probing into an individual’s private life and thoughts that marks an interrogation or search,”⁹¹ it is clear that DNA profiling does include probing into the personal life of the individual.⁹²

Although the Supreme Court has not yet addressed the intrusion that DNA testing involves, other state and federal courts addressing the issue have failed to consider not just the intrusion that results from the procedure used to obtain a sample, but also the intrusion upon the individual’s interest in keeping private the information revealed by a sample. For example, when the Ninth Circuit applied the reasonableness balancing test to determine whether requiring federal offenders to have their DNA tested without a warrant violated the Fourth Amendment, the court did not consider the intrusion DNA testing poses upon individuals’ interests in keeping the information within their DNA private.⁹³ Instead, the court merely considered the intrusion posed by the procedure of withdrawing a DNA sample from an individual.⁹⁴ Thus, the court explained the intrusion “is not significant, since such tests are commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain.”⁹⁵ The court at no point considered the individual’s expectation of privacy in the host of information that could be revealed through DNA testing.⁹⁶ Similarly, the Court of Appeals of Maryland in *State v. Raines* considered whether a statute requiring the collection of DNA samples from certain convicted persons violated the Fourth

90. See Chapin, *supra* note 22, at 1859.

91. 394 U.S. 721, 727 (1969).

92. See discussion *supra* Part I.C.

93. See *United States v. Kincade*, 379 F.3d 813, 836–38 (9th Cir. 2004) (court considered only the potential for the improper use of the information but not the individual suspect’s interest in keeping person health and genetic information private from even law enforcement officers).

94. See *id.*

95. *Id.* at 836 (citation and internal quotations omitted).

96. See *id.* at 836–38.

Amendment.⁹⁷ Again the court concluded that the state's compelling interest in collecting DNA from convicted individuals outweighed the minor physical intrusion imposed by DNA testing through buccal swabbing or blood sampling.⁹⁸ The Maryland Court of Appeals, like the Ninth Circuit, never considered the intrusion posed by the subsequent testing of a DNA sample and the information that testing reveals.

Thus, what both the Maryland court and Ninth Circuit failed to consider, however, is the individual's privacy interest in the identifying information contained in the saliva or blood sample taken. As the Supreme Court has recognized, the privacy interests at issue in an individual's biological samples include the "host of private medical facts about an [individual]" that may be revealed by testing of the sample, and are not merely limited to whether or not the procedure used to procure a sample is invasive.⁹⁹ As the District Court for the Eastern District of New York properly recognized, "[a] saliva sample can provide a significant amount of genetic identity information and it is generally not an item in the public domain."¹⁰⁰ The host of medical and biological information contained within a DNA sample represents information that individuals typically seek to keep from the public sphere and thus should be protected under the Fourth Amendment by requiring warrants or a showing of probable cause to obtain it. DNA, unlike a fingerprint, does not merely contain a record of an individual's identity but vast amounts of personal information including physical health and behavioral characteristics, among others.¹⁰¹ According to the Human Genome Project, "DNA can provide insights into many intimate aspects of a person and their families including susceptibility to particular diseases, legitimacy of birth, and perhaps predispositions to certain behaviors and sexual orientation."¹⁰² The nature of the information DNA provides "increases the potential for genetic discrimination by government, insurers, employers, schools, banks, and others."¹⁰³

Furthermore, many states do not require police departments to destroy samples or return them to their owners even if a person is not found to be a suspect in the crime under investigation.¹⁰⁴ Thus, police departments can

97. 857 A.2d 19, 20–21 (Md. 2004).

98. *See id.* at 29.

99. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617.

100. *United States v. Nicolosi*, 885 F. Supp. 50, 55 (E.D.N.Y. 1995).

101. *Van Orden*, *supra* note 56, at 348.

102. Human Genome Project, DNA Forensics, http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml (last visited July 5, 2006).

103. *Id.*

104. *See DNA Dragnet*, *supra* note 34; *see also Chapin*, *supra* note 22, at 1860.

lawfully keep databases of those individuals tested during a DNA dragnet.¹⁰⁵ As one scholar has noted, “Since police departments routinely search these private databases, the intrusion upon the dragnetee is arguably repeated more times than the initial intrusion upon bodily integrity.”¹⁰⁶ Additionally, with the mapping of the human genome underway and increasing knowledge of DNA analysis, biological samples “voluntarily” submitted during a dragnet may be tested in the future to reveal more intimate details about an individual’s biological and behavioral makeup.¹⁰⁷ The highly personal information revealed by general genetic testing and any future testing could be accessed not only by law enforcement agencies, but also “other government agencies and even private corporations, such as health-care providers and insurers.”¹⁰⁸

Disclosure to other agencies and corporations represents a real privacy concern for individuals subjected to DNA dragnets because of the lack of security measures taken to protect DNA samples and profiles.¹⁰⁹ Police departments take few, if any, security measures to keep samples and DNA profiles private and away from the public eye.¹¹⁰ Many states lack statutes informing police what to do with DNA after an individual has been cleared of the charges and, as a result, take a less-than-vigilant approach to protecting samples from becoming public.¹¹¹ Even if statutes were to place limitations upon the dissemination of DNA profiles, “the risk of disclosure cannot be discounted.”¹¹² Thus, the severe intrusion upon the privacy interests of an individual through genetic testing and profiling occurs not just once but may, in fact, occur repeatedly exposing both an individual’s intimate physical and behavioral details to the public.

The importance of keeping personal medical information private has been recognized as a legitimate privacy interest by the Supreme Court.¹¹³ In *Whalen v. Roe*, the Court considered the constitutionality of a New York

105. Chapin, *supra* note 22, at 1860.

106. *Id.*

107. Grand, *supra* note 14, at 2288.

108. *Id.* at 2289.

109. See *DNA Dragnet*, *supra* note 34.

110. See *id.* (stating that DNA samples from a dragnet conducted in a rape and murder case are kept in envelopes in the crime lab).

111. See *id.*

112. Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 TEX. L. REV. 49, 96 (1995).

113. See *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457 (1977) (reaffirming that one element of privacy includes the individual interest in avoiding disclosure of personal matters); *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977) (recognizing for the first time that privacy includes two interests: the individual interest in avoiding disclosure of personal matters and the individual interest in making certain important decisions independently).

statute requiring that a physician provide the state with a copy of every prescription for certain drugs.¹¹⁴ The copy of the prescription provided to the state not only the name of the drug prescribed but also the name, address, and age of the patient.¹¹⁵ In considering whether the statute at issue violated the Constitution, the Court recognized that protecting an individual's privacy involves at least two different interests.¹¹⁶ One interest the Court recognized was the right of the individual to make important decisions, such as those related to marriage, procreation, contraception, family relationships, and child rearing, free from governmental intervention.¹¹⁷ The second interest in privacy the Court recognized was "the individual interest in avoiding disclosure of personal matters."¹¹⁸ While the *Whalen* Court upheld the New York statute because of the procedural safeguards it contained against public disclosure of information, the Court recognized the danger in the government requiring the collection and storage of personal information.¹¹⁹ The Court pointed out that public disclosure could be potentially embarrassing and harmful and left open the question of whether disclosure of personal information by a system that did not contain security measures comparable to those in the New York statute would violate an individual's privacy interests.¹²⁰

Thus, as the Supreme Court has recognized in *Whalen*, an individual's privacy interests under the Constitution includes the right to keep personal medical information out of the public forum. The Court also recognized that absent procedural safeguards, as is the case of DNA dragnets today, an individual may have their privacy interests violated through public disclosure of medical information either intentionally or unintentionally. Given the "host of medical facts" revealed through DNA analysis, the complete lack of safeguards, and rather informal security measures taken by law enforcement to protect the samples of DNA, this potential to violate an individual's privacy interests is great.

Accordingly, while it is true that obtaining DNA samples does not represent an undue burden or hardship upon an individual's expectation of privacy, the information revealed through the testing of those samples and the potential disclosure of that personal information does impermissibly burden an individual's expectation of privacy. The intrusion posed by the

114. 429 U.S. at 593.

115. *Id.*

116. *See id.* at 599–600.

117. *See id.* at 599–600 & n.26.

118. *Id.* at 599.

119. *See id.* at 605–06.

120. *See id.*

information revealed through DNA testing, not merely the means of obtaining the sample, constitutes the unconstitutional action by the state. The intrusion does not end after a sample is taken. Rather, the intrusion begins with the procurement of the DNA sample from the individual.

2. Government Interest in Conducting DNA Dragnets

There thus exists a strong interest in keeping personal medical and behavioral information found within DNA private either for personal reasons or to prevent discrimination in society. Fourth Amendment jurisprudence, however, has never held an individual's interest in privacy to be absolute but has weighed it against the governmental interest furthered by a particular practice at issue.¹²¹ The government interests served by DNA dragnets typically cited include legitimate interests in "creating records for identification, in preventing criminal activity, in solving past and future crimes, and the advancement of criminal law enforcement."¹²² These governmental interests served by DNA dragnets, however, pale in comparison to an individual's interest in privacy when one considers that an individual's DNA is indestructible and unalterable, free citizens are targeted by these dragnets, and law enforcement pursue only ordinary law enforcement interests through DNA dragnets.

Because the information revealed by a DNA test in a dragnet is genetic in nature and not subject to change, a search warrant should be obtained by law enforcement in order to procure a sample. In *Schmerber v. California*, the Supreme Court considered whether a search consisting of a nonconsensual withdrawal of blood done without a warrant comported with the Fourth Amendment where the individual had been arrested for drunk driving.¹²³ The Court found the search to be constitutional and, in reaching its decision, considered the officer's belief that if he did not act, the evidence of the defendant's intoxication would be destroyed, as the percentage of alcohol would begin to diminish shortly after the drinking stopped.¹²⁴ Thus, if the officer had attempted to obtain a search warrant, the defendant's blood alcohol content when the sample was eventually taken may not have been above the legal limit and no evidence of his intoxication would have been secured.¹²⁵ Additionally, in *Cupp v. Murphy*, the Supreme

121. See *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

122. Laurie Stroum Yeshulas, *DNA Dragnet Practices: Are They Constitutional?*, 8 SUFFOLK J. TRIAL & APP. ADV. 133, 155 (2003); see also *People v. King*, 99 Cal. Rptr. 2d 220, 226–28 (Cal. Ct. App. 2000).

123. 384 U.S. 757, 758–59 (1966).

124. See *id.* at 770–71.

125. See *id.*

Court considered a case where the respondent had not been arrested or been subject to a warrant when the police took a sample of scrapings from his nails without consent.¹²⁶ Following the murder of his wife, the respondent had come into the police department with a dark spot appearing to be blood under his fingernail.¹²⁷ The Court upheld the search of the respondent because it found that probable cause existed and the ready destructibility of the evidence again justified the police officer's actions.¹²⁸

The genetic information found within an individual's blood, however, is not the sort of evidence that was found in *Schmerber* or *Cupp*. Unlike those cases, an individual's genetic information cannot be altered or destroyed if police fail to act in a timely manner.¹²⁹ Furthermore, unlike in *Schmerber* and *Cupp*, even if DNA were of an ephemeral nature, the taking of a DNA sample in a dragnet would still be unwarranted because dragnets are conducted in the absence of probable cause.¹³⁰ Thus, as the Supreme Court has noted,

The interests in human dignity and privacy which the Fourth Amendment protects forbid [bodily] intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.¹³¹

In addition, the argument that individuals may pose flight risks does not justify obtaining samples of their DNA in the absence of a warrant under the exigent circumstances exception. If authorities have enough probable cause to believe an individual may pose a flight risk, they likely have enough probable cause to obtain a warrant or arrest the individual and should pursue those avenues in order to obtain a sample.¹³² Accordingly, police do not have a strong interest in obtaining DNA samples without a warrant where such evidence cannot be destroyed. Officers can conduct more thorough and targeted investigations to establish probable cause and then obtain a warrant to get a DNA sample from an individual. After all, an individual's DNA will not be destroyed or go anywhere in the meanwhile.

126. 412 U.S. 291, 292 (1973).

127. *Id.*

128. *See id.* at 296.

129. *See* *People v. Marshall*, 244 N.W.2d 451, 457 (Mich. Ct. App. 1976) ("Because blood type is genetic in nature and not subject to change, it would seem a search warrant must be obtained." (footnote omitted)).

130. *See* discussion *supra* Part I.A.

131. *Schmerber v. California*, 384 U.S. 757, 769–70 (1966).

132. *Drobner*, *supra* note 25, at 503.

In addition, when other courts in the country have upheld the procurement of genetic information in the absence of a warrant or probable cause, they have done so because the individual was a convicted felon and, unlike free citizens subjected to DNA dragnets, had a diminished expectation of privacy that could not outweigh the strong governmental interest at issue. In *Rise v. Oregon*, for example, the Ninth Circuit upheld an Oregon statute requiring felons convicted of murder or specific sexual offenses to submit a blood sample for a DNA databank.¹³³ The court noted that the statute did not violate the Fourth Amendment because felons “do not have the same expectations of privacy in their identifying genetic information that ‘free persons’ have.”¹³⁴ The court explained that felons had diminished expectations of privacy, because once an individual has been convicted of a crime, “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.”¹³⁵ The court then weighed this diminished expectation of privacy against the important government interest at issue, namely, strong evidence of high rates of recidivism among certain types of murderers and sexual offenders and findings that often their crimes were more likely to yield the type of evidence that could be run through a DNA database.¹³⁶ Thus, the court concluded that the DNA databank “advance[d] the overwhelming public interest in prosecuting crimes accurately.”¹³⁷ The Fourth and Tenth Circuits have also recognized the distinction between gathering DNA evidence from free persons and obtaining the DNA of convicted felons whose identities are a matter of legitimate state interest and who have reduced expectations of privacy due to their convictions.¹³⁸

Thus, where DNA sampling in the absence of a warrant or probable cause has been upheld by courts, there has been an undeniable governmental interest at issue that could not be outweighed by the rather weak and diminished privacy interests of the individual. The case of DNA dragnets, however, is the exact opposite. Individuals subject to a dragnet have strong privacy interests in keeping their personal and behavioral information contained within their DNA private, and this interest has not been diminished

133. 59 F.3d 1556, 1564 (9th Cir. 1995).

134. *Id.* at 1560.

135. *Id.*

136. *See id.* at 1561.

137. *Id.* (emphasis omitted).

138. *See Boling v. Romer*, 101 F.3d 1336, 1339–40 (10th Cir. 1996) (finding a Colorado statute requiring inmates convicted of an offense involving sexual assault to provide state with DNA samples before release to parole was not violative of the Fourth Amendment); *Jones v. Murray*, 962 F.2d 302, 310–11 (4th Cir. 1992) (finding Virginia legislation requiring the Department of Corrections to take and store blood of convicted felons for later DNA analysis did not violate the Fourth Amendment).

in any way by the commission of a crime.¹³⁹ The governmental interest at issue, namely, solving and deterring crimes, while important, is not important or compelling enough to outweigh this undiminished expectation of privacy; given that individuals subject to DNA dragnets retain their full rights, only an immensely important governmental interest could outweigh their privacy interests.

Cases involving involuntarily sampling from felons for DNA databases do indeed serve strong governmental interests, because, as the Ninth Circuit noted, there exists “uncontroverted evidence documenting the high rates of recidivism among certain types of murderers and sexual offenders.”¹⁴⁰ Thus, states have an undeniable interest in maintaining DNA databanks, because they have evidence that will in fact help meet governmental objectives of preventing or solving crimes. This strong, proven governmental interest weighs heavily against the rather diminished and weak expectations of privacy convicted felons possess.

DNA dragnets, however, cannot be characterized by evidence of their usefulness in solving crimes and thus meeting governmental objectives in solving crimes. Rather, dragnets act as a needle-in-a-haystack approach by police to hopefully find a perpetrator of a crime and, given their inefficiency, the governmental interest in them appears to be rather weak. The only comprehensive study conducted of DNA dragnet practices in the United States found that a dragnet was successful in producing a suspected offender in only one of eighteen cases examined.¹⁴¹ Even in that one successful case, the police department had begun with a short list of individuals to test because the sexual assault victim had come into contact with a very limited number of individuals.¹⁴² Furthermore, in a time when many cities and states face budget concerns, the testing of sometimes thousands of individuals places even greater burdens on already strained budgets.¹⁴³

Additionally, massive round-ups of hundreds or thousands of individuals “may actually hinder criminal investigations by increasing the backlog of work at the state crime lab.”¹⁴⁴ For example, in the Massachusetts investigation of the murder of Christa Worthington, a DNA sample of an individual was found to be a match to DNA recovered from Worthing-

139. *See supra* Part II.A.1.

140. *Rise*, 59 F.3d at 1561.

141. SURVEY, *supra* note 7, at 4.

142. *See id.*

143. *See* Am. Civil Liberties Union, *ACLU of Massachusetts Warns that Random DNA Dragnets Hinder, Not Help, Crime Investigations*, Apr. 15, 2005 [hereinafter ACLU], <http://www.aclu.org/privacy/medical/15323prs20050415.html> (mentioning the “wasteful” nature of DNA dragnets).

144. *Id.*

ton's body.¹⁴⁵ The police in the case had been in possession of the sample for more than a year but had not tested it because of the huge backlog created by a DNA dragnet the police department had conducted.¹⁴⁶ In addition, the matching sample had not even been procured from the dragnet but had been obtained as a result of information that led to a more focused investigation.¹⁴⁷ Thus, even if DNA dragnets were found to be constitutional, more focused police investigations would help solve crimes more efficiently both in terms of time and money.¹⁴⁸ Thus, the governmental interest in solving or preventing crimes through DNA dragnets, unlike in the case of collecting DNA samples from felons, is not strong where DNA dragnets' record of actually meeting those interests is so weak, especially given that there is such a strong interest in privacy asserted by free citizens subject to these searches.

In addition, the "special needs" doctrine that typically has acted to justify warrantless and suspicionless searches due to a strong governmental issue at stake is inapplicable to DNA dragnets. Where DNA dragnets serve primarily to further law enforcement purposes, they cannot be considered as serving a special need warranting exception to the requirement of probable cause under the Warrant Clause of the Fourth Amendment. The Supreme Court has found that a search unsupported by probable cause can be considered constitutional "when special needs, beyond the normal need of law enforcement, make the warrant and probable-cause requirement impracticable."¹⁴⁹ For example, in *Skinner v. Railway Labor Executives' Ass'n* and *National Treasury Employees Union v. Von Raab*, the Court upheld the warrantless and suspicionless alcohol and drug testing of employees.¹⁵⁰ In *Skinner*, the Court pointed to the need of the government to assure the safety of individuals riding trains by ensuring railway employees were not operating trains in an impaired manner as a significant governmental interest strong enough to overcome the privacy interests of employees.¹⁵¹ Similarly, in *Von Raab*, the Court upheld the drug testing program of the United States Customs Service because of its strong interest in assuring personnel were physically fit and not subject to any impairments given

145. *Id.*

146. *See id.*

147. *Id.*

148. *See* SURVEY, *supra* note 7, at 9–13 (including up to eighteen examples of the inefficiency of past DNA dragnets in solving crimes); ACLU, *supra* note 143.

149. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (citation and internal quotations omitted).

150. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 620–24 (1989); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670–72 (1989).

151. *See* 489 U.S. at 620–24.

that many carried fire arms and had impeachable integrity and judgment needed in the war on drugs.¹⁵²

Where the purpose to be served by a warrantless and suspicionless search, however, has been ordinary law enforcement needs, the Court has been unwilling to extend the special needs exception. In *City of Indianapolis v. Edmond*, the Court refused to uphold checkpoints set up by police in order to interdict unlawful drugs, because the checkpoint's primary purpose could not be distinguished from the general interest in crime control.¹⁵³ The Court explained that it was "particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends."¹⁵⁴ The Court did recognize that law enforcement could in fact set up checkpoints in the event of certain emergencies or exigencies, like a terrorist attack, but not in situations like the one before it where "authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction."¹⁵⁵

DNA dragnets, however, closely resemble the needle-in-the-haystack approach the Court repudiated in *Edmond*, and thus it appears they cannot qualify under a special needs exception. Like the actions of the police in *Edmond* where individuals were stopped in the hopes of finding a felon, individuals in DNA dragnets are subjected to DNA testing in the hopes of finding a genetic match in a criminal investigation. Furthermore, DNA dragnets merely serve the same sort of general interest in crime control as the roadblock that the Court found unconstitutional in *Edmond*. The sole purpose of a DNA dragnet, like the roadblock at issue in *Edmond*, is to apprehend a criminal.¹⁵⁶ Thus, the general interest in crime control served by DNA dragnets is not strong enough to outweigh the even stronger interest of free persons to be free from forced DNA testing and to keep their genetic information private.¹⁵⁷

152. See 489 U.S. at 670.

153. 531 U.S. 32, 44 (2000).

154. *Id.* at 43.

155. *Id.* at 44.

156. Grand, *supra* note 14, at 2302.

157. One scholar has noted that two circuit courts appear to have endorsed DNA databanks as serving interests beyond mere law enforcement. See Chapin, *supra* note 22, at 1866. The scholar further notes that although the Tenth Circuit in *United States v. Kimler* recognized that the government could assert a strong governmental interest beyond ordinary law enforcement needs under the special needs exception in creating a DNA databank, 335 F.3d 1132, 1146 (10th Cir. 2003), that court appeared to be referring to only imprisoned or formerly imprisoned individuals. See Chapin, *supra* note 22, at 1866. In fact, the Seventh Circuit in *Green v. Berge*, noted that the Tenth Circuit in *Kimler* appeared to balance the governmental interest at issue against the diminished privacy interests of prisoners rather than free persons. See 354 F.3d 675, 677 (7th Cir. 2004).

Therefore, although the government does indeed possess an important interest in solving and preventing crimes, that interest, like an individual's interest in privacy, is not absolute. In the case of DNA dragnets where free persons are forced to give evidence that has no chance of being destroyed and where police pursue only ordinary law enforcement interests, the interests of the individual must trump the interests of the government.

B. DNA Dragnets Do Not Involve Voluntary Consent from Individuals

Consent to a search relieves authorities of both the need to obtain a warrant and probable cause.¹⁵⁸ Accordingly, voluntary consent appears to offer a means of rendering DNA dragnets constitutional under the Fourth Amendment. However, thorough examination of the circumstances under which DNA dragnets are conducted shows that significant barriers prevent the consent garnered from individuals from being considered truly voluntary.

1. Determining the Voluntariness of Consent to a Search

The Supreme Court has recognized that searches conducted with the consent of the individual are constitutional even in the absence of a warrant or probable cause.¹⁵⁹ The touchstone for determining if consent renders a search constitutional is whether or not the consent given by the individual was "freely and voluntarily given."¹⁶⁰ Voluntary consent absent coercion, no matter how subtly applied, is required because absent truly voluntary consent, "the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."¹⁶¹ Whether a search resulted from truly voluntary consent or was "the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances" surrounding the "consent."¹⁶²

The Supreme Court in *Schneckloth v. Bustamonte* likened the test used to determine the voluntariness of a confession to that of determining the

158. *See Florida v. Jimeo*, 500 U.S. 248, 250–51 (1991) ("[W]e have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so.").

159. *See id.*

160. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973) ("[T]he Fourth and Fourteenth Amendments require that [the State] demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied."); *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

161. *Schneckloth*, 412 U.S. at 228.

162. *Id.* at 227.

voluntariness of a search.¹⁶³ The Court noted that its earlier cases in determining the voluntary nature of confessions had looked to the “totality of all the surrounding circumstances,”¹⁶⁴ which included examining subjective factors “regarding the characteristics of the accused” and objective factors “regarding the conduct of the police and the circumstances surrounding the interrogation.”¹⁶⁵ Accordingly, some of the factors the Court found may be considered in determining the voluntariness of a search included whether the subject of the search had knowledge of a right to refuse, the age of the accused, the educational level of the accused, where a police encounter takes place, and whether threats or physical punishment were used to induce consent.¹⁶⁶

For example, in *United States v. Mendenhall*, the Supreme Court, in a plurality opinion, first analyzed the subjective factors of the accused in determining whether the consent given by the defendant was voluntary; the Court noted the defendant was twenty-two years old, had an eleventh grade education, and was thus plainly capable of knowing consent.¹⁶⁷ The Court also went on to note the objective factors surrounding the defendant’s consent, such as that she was expressly informed twice that she could refuse consent to the search and still consented to the search, pointed to finding that consent had been voluntarily given.¹⁶⁸ Similarly, in *United States v. Watson*, the Court considered both subjective and objective factors in finding that the defendant in question had given valid voluntary consent to a search.¹⁶⁹ The Court considered subjective factors about the defendant, such as the fact that there was no evidence that the defendant was a “newcomer to the law, mentally deficient, or unable in the face of a custodial arrest to exercise free choice.”¹⁷⁰ The Court also looked to objective factors surrounding consent, such as the fact that the defendant consented on a public street rather than in the confines of a police station, there was no evidence of overt act or threat of force against the defendant, and there were no indications of any promises made to him in order to influence his consent.¹⁷¹

163. *See id.* at 226–27.

164. *Id.* at 226.

165. Ric Simmons, *Not “Voluntary” But Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 778 (2005) (citing *Schneekloth*, 412 U.S. at 226).

166. *See Schneekloth*, 412 U.S. at 226, 247, 249.

167. *See* 446 U.S. 544, 558 (1980) (plurality).

168. *See id.*

169. *See* 423 U.S. 411, 424–25 (1976).

170. *Id.*

171. *See id.* at 424.

Furthermore, more recently in *Florida v. Bostick*, the Supreme Court noted that “[c]onsent’ that is the product of official intimidation or harassment is not consent at all.”¹⁷² In *Bostick*, the Court held that where a defendant was asked for consent to search his luggage while on a bus, the proper test in determining whether the officer’s request for a search was coercive was “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”¹⁷³ The Court explained in *Bostick* that its formulation of the inquiry into the voluntary nature of the search was in accordance with its previous cases that took into account all the circumstances surrounding the encounter.¹⁷⁴ Thus, the Supreme Court has found that where a consenting party claims duress or coercion, the court must consider both the party’s subjective state of mind and whether an objectively reasonable person would feel coerced.¹⁷⁵

2. Assessing the Voluntariness of Consent in DNA Dragnets

The consent obtained by officers in DNA dragnets does not qualify as voluntary due to the coercive actions of police. Examination of the methods used by police to obtain consent reveals that many individuals subjected to testing of their DNA in police dragnets hardly feel their consent is given voluntarily. A participant in a mass DNA dragnet that occurred in Ann Arbor, Michigan, in 1995 stated that he was told he would “have to” to submit a DNA sample.¹⁷⁶ That same participant was informed that should he choose to refuse to cooperate with the police, the police would “go upstairs and get a court order.”¹⁷⁷ Similarly, in a DNA dragnet conducted in Baton Rouge, Louisiana, Shannon Kohler was told by police that if he refused to voluntarily consent to giving a DNA sample, they would obtain a court order to get such a sample.¹⁷⁸ In the same dragnet conducted in Baton Rouge, Floyd Wagster Jr. was subjected to similar threats by police.¹⁷⁹ Wagster was told by the police that should he refuse to “voluntarily” give a sample of his DNA, “We’re gonna go get a court order to get it from you. How you [sic] want to handle that? You want the court order? Fine with me. I’ll light your ass up on the . . . news, too.”¹⁸⁰

172. 501 U.S. 429, 438 (1991).

173. *Id.* at 436.

174. *See id.* at 436–37.

175. *See Grand supra* note 14, at 2303–04 (citing *Schneekloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973)).

176. Drobner, *supra* note 25, at 505 (internal quotations omitted).

177. *Id.* at 506 (internal quotations omitted).

178. Halbfinger, *supra* note 1.

179. *See* Mark Hansen, *DNA Dragnet*, 90 ABA J. 38, 40 (2004).

180. *Id.*

Such appeals to unfounded legal authority violate the Supreme Court's holding in *Bumper v. North Carolina*.¹⁸¹ In *Bumper*, the defendant's grandmother only consented to the police searching the premises after being told that the police had obtained a search warrant to do so when, in fact, the police had no such warrant.¹⁸² The Court explained that "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion."¹⁸³ Thus, the Court held that "[w]here there is coercion there cannot be consent."¹⁸⁴ Accordingly, the defendant's grandmother could not have voluntarily consented to the search where she was subject to coercion, because she believed there to be a valid search warrant mandating that she allow the officers into the home.¹⁸⁵ Similarly, statements by police that they will obtain samples of DNA through a court order that does not yet exist is an appeal to lawful authority that would void any consent.

The coercive settings of DNA dragnets also indicate that the consent by individuals cannot be voluntary and thus valid under the Fourth Amendment. As the Supreme Court indicated in *Schneckloth v. Bustamonte*, the subjective state of mind of the individual being interviewed is a factor in assessing whether consent that is given by the individual is the product of coercion.¹⁸⁶ Individuals refusing to submit to DNA sampling in high profile cases have been subject to media scrutiny.¹⁸⁷ Fear of media scrutiny has induced individuals to cooperate with police the first time they are asked for a DNA sample rather than being subjected to a search warrant and a great deal of public embarrassment.¹⁸⁸ Police in at least one DNA dragnet have used the fear of media attention and public speculation as leverage in order to force individuals to give DNA samples.¹⁸⁹ Furthermore, the police station setting where participants in DNA dragnets are asked for their DNA samples also serves as a coercive environment. The

181. See 391 U.S. 543 (1968); see also Drobner, *supra* note 25, at 506 (stating that police threats to obtain a court order if an individual would not submit a DNA sample may "run afoul" of *Bumper*).

182. 391 U.S. at 546.

183. *Id.* at 550.

184. *Id.*

185. See *id.*

186. See 412 U.S. 218, 249 (1973).

187. See Halbfinger, *supra* note 1 (describing the case of Shannon Kohler whose refusal to submit to a sample led to police threats of putting his name in the media as a suspected rapist and whose name was ultimately leaked from court documents to the media).

188. See *DNA Dragnets: The Uses and Abuses of Genetic Information*, 8 NEW ATLANTIS 104, 105 (2005), available at <http://www.thenewatlantis.com/archive/8/soa/TNA08-StateoftheArt-DNADragnets.pdf>.

189. See Halbfinger, *supra* note 1.

police station setting forces individuals to be surrounded by uniformed officers displaying indicia of authority and subjected to physical isolation, which may cause an individual to feel as though he cannot refuse a request to a search.¹⁹⁰ Individuals in at least one DNA dragnet reported feeling bullied by the police into submitting DNA samples and being treated as criminals in police stations by being fingerprinted, photographed, and isolated prior to signing a form to consent to the test.¹⁹¹

Additionally, individuals may not feel that they can refuse a request for a DNA sample, because they may fear even greater police scrutiny that may be generated by a refusal to submit a DNA sample. An individual refusing to cooperate with police in a dragnet often creates a lead for police to follow.¹⁹² An individual may choose to simply submit to the testing when asked the first time rather than deal with the police repeatedly as they continue to investigate. Individuals are effectively told by police to consent or have a criminal investigation turn their lives upside down.

Even where consent is elicited at the homes of individuals, cultural attitudes towards police may play into whether an individual subjectively feels he has a real choice to consent to the testing. In studies, African Americans have been found to view the justice system as unfair while whites believe the opposite.¹⁹³ These beliefs influence how individuals of different races interpret events.¹⁹⁴ As a result of their distrust in the fairness of the justice system, African Americans are much more suspicious of police, and these suspicions inform the way in which they view encounters with police.¹⁹⁵ Accordingly, to individuals in areas like England where violent crime has a fairly low incidence and the culture is more homogeneous, a police officer's request to aid in an investigation may be viewed by an individual to be less coercive and more a plea for help from police.¹⁹⁶ Where individuals feel police act upon racial motivations and have a tenuous relationship with police, however, they will likely feel that they do not have a real choice in whether to cooperate with police. Thus, even where a request for a DNA sample occurs on neutral territory or the territory of the individual, cultural attitudes towards police may cause an individual to view the "request" by a police officer as a thinly veiled demand.

190. Drobner, *supra* note 25, at 505.

191. *See id.*; *see also* Halbfinger, *supra* note 1.

192. *See DNA Dragnet*, *supra* note 34.

193. *See, e.g.*, Jon Hurwitz & Mark Peffley, *Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System*, 67 J. POL. 762, 769 (2005).

194. *Id.* at 778–79.

195. *Id.*

196. Drobner, *supra* note 25, at 506.

According to the analysis above, both subjective and objective factors warn against the ability of individuals subject to DNA dragnets to give truly voluntary consent to searches. Without consent abrogating the need for a warrant or probable cause, it appears that in order for DNA dragnets to withstand constitutional scrutiny, they must satisfy the reasonableness balancing test. DNA dragnets, as discussed above, however, are incapable of satisfying the reasonableness balancing test in the absence of a warrant or probable cause. Thus, the practice of DNA dragnets must be conducted pursuant to a warrant and probable cause to avoid running afoul of the Fourth Amendment.

CONCLUSION

The Fourth Amendment was included in the Constitution by the Framers because the abuses they had suffered at the hands of the British government were all too fresh in their minds. As the Supreme Court has noted, the Fourth Amendment “was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence.”¹⁹⁷ What the Framers feared and tried to guard against has unfortunately come to fruition. Although DNA dragnets are not the same as the warrantless searches suffered by the colonists, the principle underlying both types of searches is the same. Law enforcement officials use tactics of intimidation to secure acquiescence from individuals who feel they have no other choice but to submit to what is being asked of them. Admittedly, law enforcement officials have an interest and a duty to solve crimes, but this duty must be balanced against the right of the individual to be free from arbitrary and intrusive actions by police.

There is great appeal to the idea that police may be able to conclusively solve a crime by simply finding a DNA match between a victim and the people who may have come in contact with the victim. The reality, however, is that this process has been far from successful and has destroyed people’s lives and livelihoods while trampling upon the protections the Fourth Amendment sought to secure. Shannon Kohler gave his DNA sample to police, and even after cooperating with police, paid the price of having his name revealed in public court documents in what the police called “a good-faith clerical mistake.”¹⁹⁸ Within hours there was a local television

197. *Chimel v. California*, 395 U.S. 761, 761 (1969).

198. Halbfinger, *supra* note 1.

reporter at his door.¹⁹⁹ Kohler's DNA eventually cleared his name but the price paid was that his Fourth Amendment rights were ignored by the police, he was subjected to media speculation of being a killer, and he still has not been able to secure the return of his DNA sample from the police.²⁰⁰ As Kohler points out, the rights the Constitution secures for each citizen "are what makes America America,"²⁰¹ and when police trample those rights, rather than conduct more targeted investigations, they commit the very evil the Constitution's Framers sought to guard against—just with better technology.

199. *Id.*

200. *See id.*

201. *Id.* (internal quotations omitted).