

Maryland v. King: Policing and Genetic Privacy

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I. INTRODUCTION

With its decision in *Maryland v. King*,¹ the Supreme Court finally stepped into the debate about the use of DNA databases in the American criminal justice system. Even for a cautious Court, this took some time in coming. The national system for sharing DNA profiles, the Combined DNA Index System (CODIS),² was authorized by Congress in 1994.³ Virginia had already established a state DNA database in 1989.⁴ And as in many criminal justice matters, we are number one. As of June 2013, the United States has the largest DNA database in the world, with 10.4 million offender profiles and 1.5 million arrestee profiles.⁵

With *King*, the Court decided a newly emerging database issue rather than an old one: whether the Fourth Amendment prohibits the collection of DNA samples from *arrestees* without a warrant or any individualized suspicion. (While this question had been the subject of disagreement among the lower courts, whether DNA samples could be collected from convicted offenders seems to have been settled without any involvement from the Court at all.⁶) Justice Kennedy's opinion

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¹ 133 S. Ct. 1958 (2013).

² Although CODIS specifically refers to the software used to link various DNA databases, it is also used a generic term to describe the DNA database system more generally. *See What is CODIS*, FBI, <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet>. (last visited Sept. 18, 2013).

³ *See* DNA Identification Act of 1994, Pub. L. No. 103-322 (1994) (codified as 42 U.S. § 14131 (2013)).

⁴ *See, e.g.*, SHELDON KRIMSKY & TANIA SIMONCELLI, GENETIC JUSTICE: DNA DATA BANKS, CRIMINAL INVESTIGATIONS, AND CIVIL LIBERTIES 38 (2011).

⁵ *See* FBI, *CODIS-NDIS Statistics*, <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics> (last visited Sept. 18, 2013). Offender profiles here include both convicted offender, detainee (non-citizens who are detained), and legal profiles. CODIS also includes categories of other DNA profiles, including missing persons and crime scene evidence.

⁶ *See, e.g.*, ANNA C. HENNING, CONG. RESEARCH SERV., R40077, COMPULSORY DNA COLLECTION: A FOURTH AMENDMENT ANALYSIS 9 (2010) (observing that “nearly all courts that reviewed laws authorizing compulsory DNA collection [except against arrestees] upheld the laws against Fourth Amendment challenges”).

for the five member majority held that the collection of DNA swabs from Alonzo King and others like him were reasonable Fourth Amendment searches, given the outcome of a balancing of interests between the individual and government. In a sharply written dissent, Justice Scalia condemned the approval of suspicionless searches actually conducted for law enforcement purposes, and for crafting a decision that was unlikely to be cabined by the particulars of King's case or Maryland's statute.⁷ The *King* majority opinion, however, affirms that the age of DNA in criminal justice is here to stay.

The problem with *King* is that it may become influential in ways that were not fully contemplated by the Supreme Court. While some may lament the micromanagement of policing by the modern Supreme Court's jurisprudence, the reality is that police investigation practices are unevenly regulated. Indeed, what *King* reveals is the extent to which the Court leaves many matters untouched by Fourth Amendment constraints and subjects them, for better or worse, to the control of the other political branches (as well as to likely squabbling in the lower courts). This essay discusses three notable revelations in the Court's decision about the future of policing and genetic privacy. As the following sections discuss, however, what the Court introduces, it also fails to regulate or even guide in any significant sense.

II. "WHEN THE SEARCH INVOLVES NO DISCRETION"⁸: DISCRETIONARY POLICE JUDGMENTS

First, Justice Kennedy's majority opinion permits the police to use arrests instrumentally and to collect DNA samples from those whom the police may suspect are involved in other unrelated crimes. This possibility arises from the Court's longstanding reluctance to rein in police discretion under the Fourth Amendment, coupled with the *King* majority's glib dismissal of concerns about these judgments.

We can begin with the *King* case itself. When Maryland police arrested Alonzo King for assault in 2009, they had no idea that he might be connected to an unrelated and unsolved 2003 rape. The police only had a basis to believe King was involved in the latter crime after receiving information from the state Forensic Sciences Division that his DNA profile taken from the assault arrest matched crime scene evidence from the rape.⁹ In support of the conclusion that the search, in the form of the cheek swab taken from King, was reasonable, Justice Kennedy noted that the DNA collection from King was "not subject to the judgment of officers whose perspective might be 'colored by their primary involvement in the often

⁷ *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013).

⁸ *Id.*

⁹ *Id.* at 1966.

competitive enterprise of ferreting out crime.”¹⁰ In short, to the extent that police discretion is ever a problem, it was not, for the *King* majority, a problem in the collection of arrestee DNA for database inclusion.

Yet this is a miserly reading of “discretion.” While it is true that Maryland law does require the police to take DNA samples from *all* of those arrested for a qualifying offense like King’s,¹¹ this is only one of the potentially discretionary judgments the police make, and a decision made late in the contact between the police and King. Let’s reimagine the *King* facts. What if the police had a hunch that King was involved in the 2003 rape case, but had no basis to apply for a warrant to obtain a DNA sample? Could the police decide to arrest King for a different offense—assuming that they had the necessary probable cause—when they had the opportunity?

The Supreme Court’s decisions on police discretion make the answer a clear “yes.” In *Whren v. United States*,¹² one of the many “war on drugs” cases from the 1990s, the Court makes it apparent that complaints about the actual enforcement motivations of the police are irrelevant under the Fourth Amendment. Although the defendants in *Whren* focused on the likely but impossible to prove race-based assumptions of the D.C. vice officers in their case, Justice Scalia’s majority opinion shows little patience for any claims about the ulterior motives of the police, so long as probable cause for a criminal offense exists.¹³ Much to the dismay of those who have criticized the instrumental use of the traffic laws for illegal drug enforcement against minority drivers, Justice Scalia declared the Fourth Amendment to be the wrong forum for such claims.¹⁴ Yet *Whren* should not be understood as a case only about racially motivated policing; *Whren*’s approach protects any “secret” motive the police harbor, so long as some underlying criminal offense exists to justify the stop or arrest. Indeed, as the Court made clear later in *Atwater v. City of Lago Vista*, even mere dislike of the arrestee provides no basis for a Fourth Amendment claim, so long as some criminal law violation existed.¹⁵

Thus the Fourth Amendment poses no obstacle to the instrumental use of the substantive criminal laws by the police. And so in our *King* hypothetical, the

¹⁰ *Id.* at 1970 (quoting *Terry v. Ohio*, 392 U.S. 1, 12 (1968)).

¹¹ MD. PUB. SAF. CODE ANN. §§ 2-504(a)(3)(i) & 14-101 (2013), *unconstitutional as applied* by *Maryland v. King*, 133 S. Ct. 1958 (stating that “a DNA sample *shall* be collected from an [eligible] individual . . .”) (emphasis added).

¹² 517 U.S. 806 (1996).

¹³ *Id.* at 813 (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”).

¹⁴ *Id.*

¹⁵ 532 U.S. 318 (2001). Formally, of course, *Atwater* focuses on whether the Fourth Amendment requires a crime to be sufficiently “serious” to support a custodial arrest. The facts strongly suggest, though, that the incident arose out of some personal animus the officer harbored toward the defendant. *Id.* at 324 (noting that the officer yelled “[w]e’ve met before” and “[y]ou’re going to jail” before the defendant’s young children).

police would have been free to rely on a hunch to target King for his DNA (for crime 1) and arrest him for an unrelated offense (crime 2). In the actual *King* opinion, Justice Kennedy does acknowledge that sometimes police receive the benefit of having arrested someone on one offense—usually minor—only to realize that the person is responsible for a much more serious offense. Such inadvertent discoveries caught both Oklahoma City bomber Timothy McVeigh and serial killer Joel Rifkin.¹⁶ That Justice Kennedy only speaks of fortuitous discoveries is of little significance, though. If police motives are unregulated by the Fourth Amendment, then it is irrelevant whether the police discover that someone is involved in a second crime unrelated to the crime of arrest through design or happenstance.¹⁷ In neither case can a defendant complain.

These motivations are not fanciful. The investigation of the “grim sleeper” murders in Southern California is illustrative of the instrumental use of arrest for DNA collection. Frustrated by the “cold case,” the LAPD tried various methods of tracking down the killer. Although the police did not know who the person was, they did have DNA evidence taken from the crime scenes and hoped for a possible match. One technique the LAPD used—though ultimately without success—relied upon the instrumental arrests of prostitution “johns” found in the areas where the suspect was thought to frequent.¹⁸

The police used these arrests as a DNA “dragnet”; those arrestees matching the demographic profile of the unknown killer were asked to consent to a DNA swab.¹⁹ In such a dragnet, DNA sample collection depends on voluntary consent. A statute authorizing compulsory collection of genetic samples makes the instrumental use of arrest for genetic sampling even easier for the police. Thus, while the (retrospectively innocent) johns could have refused consent to genetic sampling, a law that authorized compulsory arrestee DNA collection would offer them no such choice, even if the police lacked probable cause that any one of them had any connection to the murders.²⁰ (The LAPD did eventually find the person they identified as the perpetrator, Lonnie Franklin, through a different type of

¹⁶ *Maryland v. King*, 133 S. Ct. 1958, 1971 (2013).

¹⁷ The difficulty of divining the “real” motivations of the police goes a long way to explain why the Court eliminated the “inadvertence” requirement in the plain view doctrine. See *Horton v. California*, 496 U.S. 128, 138–42 (1990) (eliminating “inadvertence” requirement for plain view seizures).

¹⁸ Joel Rubin, *LAPD Goes Undercover to Find a Killer*, L.A. TIMES, Nov. 1, 2008.

¹⁹ See *id.*

²⁰ California now authorizes the collection of DNA for all felony arrests, but did not do so until 2009, after this dragnet was used. Even so, the technique here would likely not fall under the current version of the DNA collection law, as prostitution under most circumstances is a misdemeanor in California. See Cal. Penal Code § 296(a)(2)(C)(2013) (authorizing felony arrestee DNA sampling); see also Cal. Dep’t of Justice, *Expansion of State’s DNA Data Bank Program on Jan. 1, 2009: Collection of DNA Samples from all Adults Arrested for Any Felony Offense*, (Dec. 15, 2008), http://oag.ca.gov/sites/all/files/pdfs/bfs/691B_121508.pdf; Ca. Penal Code 647(b) (defining prostitution).

genetic match: a familial search of the state database that turned up his son Christopher's DNA profile and later through the collection of discarded trash from a restaurant that yielded Franklin's own DNA and confirmed a match.²¹)

What *King* fails to acknowledge is that the very existence of a DNA database gives the police incentives to turn every encounter into an arrest.²² This may arise out of a general desire to add more profiles to the database. For as long as the police have existed, they have sought some way of rounding up the "usual suspects," and in this respect the desire to create a rogues' gallery of genetic material is not far-fetched. In other cases, the police may specifically seek the DNA of a particular individual—as per our hypothetical—yet lack probable cause for a warrant to collect his DNA sample.²³ While it is true that database laws give the police few choices at the literal moment of sample collection,²⁴ little reins in the police in their decision about whom to target, when, and why. Similar concerns have been raised about the United Kingdom's DNA database, which contains profiles for nearly ten percent of the population.²⁵ In 2009, the British Human Genetics Commission, an independent government advisory body, in assessing privacy concerns about its country's DNA database, quoted one police

²¹ Jennifer Steinhauer, 'Grim Sleeper' Arrest Fans Debate on DNA Use, N.Y. TIMES, July 8, 2010, available at <http://www.nytimes.com/2010/07/09/us/09sleeper.html>. These techniques, particularly familial searches, have generated their own controversies and commentary. See, e.g., Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 304 (2010) (arguing "flatly against familial search methods").

²² See HUMAN GENETICS COMM'N (U.K.), NOTHING TO HIDE, NOTHING TO FEAR?: BALANCING INDIVIDUAL RIGHTS AND THE PUBLIC INTEREST IN THE GOVERNANCE AND USE OF THE NATIONAL DNA DATABASE 21 (2009) ("[T]he way that a decision to create a national DNA database can result in changes to police practice, to the likelihood and procedure of arrest, to decisions about which crimes are investigated, to the way crimes are committed and even to the sorts of crimes that are committed.").

²³ Even if the *King* opinion had come out in *King's* favor, however, the police appear to have a number of other options. Police have surreptitiously collected DNA from suspects, either through collecting discarded materials or through simple ruses. The lower courts for the most part have declared that such actions do not even qualify as Fourth Amendment searches. For a general discussion of these issues, see Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. U. L. REV. 857 (2006). Indeed, Maryland Attorney General Doug Gensler scoffed that "if police are . . . genuinely interested in someone's DNA, they could just go pick up their Diet Coke can at the McDonald's." See Elizabeth Flock, *Privacy Experts: Supreme Court Ruling on DNA Swabs Could Lead to Big Brother Scenario*, U.S. NEWS, June 4, 2013, <http://www.usnews.com/news/articles/2013/06/04/privacy-experts-supreme-court-ruling-on-dna-swabs-could-lead-to-big-brother-scenario>.

²⁴ Maryland v. King, 133 S. Ct. 1958, 1970 (describing Maryland's law as requiring the collection of DNA samples from all arrestees "charged with serious crimes").

²⁵ Tom Whitehead, *More Than One in 10 People in DNA Database for First Time*, THE TELEGRAPH (Oct. 27, 2009, 6:54 PM), <http://www.telegraph.co.uk/news/uknews/law-and-order/6448452/More-than-one-in-10-people-on-DNA-database-for-first-time.html>. Although CODIS contains the largest number of profiles, the U.K.'s database has the largest number of profiles per capita. See KRIMSKY & SIMONCELLI, *supra* note 4, at 167.

official as saying that DNA collection had wrought a change over police attitudes because

[i]t is apparently understood by serving police officers that . . . the DNA of the offender can be obtained: samples can be obtained after arrest but not if there is a report for summons . . . *It is now the norm to arrest offenders for everything if there is a power to do so.*²⁶

These same incentives will have an impact even beyond the CODIS context, as a growing number of law enforcement agencies collect DNA for their own “offline” databases. To be included into CODIS, a sample must comply with federal law, both in terms of the qualifying conviction, arrest, or detention,²⁷ and the standards of the laboratory processing the sample.²⁸ But these requirements do not apply if a police department decides to set up its own DNA database, something a growing number of law enforcement agencies have chosen to do. Few or no rules regulate these databases, such as New York City’s, which contains 11,000 profiles.²⁹ The DNA database maintained by the District Attorney’s office of Orange County, California has collected more than 90,000 DNA profiles (up from just 15,000 a few years ago³⁰), many of which were obtained in exchange for dropped charges in misdemeanor arrests such as criminal trespass.³¹ Interested in obtaining DNA samples from those not eligible for compulsory collection under state law, or simply frustrated with state DNA analysis backlogs, police chiefs tout these local databases as valuable investigative tools.³² In some cases, these “rogues” DNA databases collect samples not only from arrestees, but also from volunteers (including victims who might be considered perpetrators one day) and suspects.

Finally, these exercises of police discretion, now given de facto approval by *King*, will almost certainly exacerbate the already racially disproportionate

²⁶ HUMAN GENETICS COMM’N *supra* note 22, at 21–22 (emphasis added) (quoting a “retired senior police officer”).

²⁷ 24 U.S.C. § 14132(a)(1) (listing eligible records that may be added to CODIS).

²⁸ 24 U.S.C. § 14132(b) (specifying conditions under which information may be added to CODIS).

²⁹ See Joseph Goldstein, *Police Agencies are Assembling Records of DNA*, N.Y. TIMES, June 12, 2013, available at <http://www.nytimes.com/2013/06/13/us/police-agencies-are-assembling-records-of-dna.html?smid=pl-share>.

³⁰ Tami Abdollah, *Orange County D.A.’s DNA database rapidly growing*, L.A. TIMES, Oct. 5, 2009, available at <http://articles.latimes.com/2009/oct/05/local/me-oc-dna-database5>.

³¹ See Goldstein, *supra* note 29.

³² *Id.* In a 2012 magazine article the director of public safety for Bensalem, PA, stated that his department’s local DNA database held 4,000 samples in a township of 60,000 residents. See Frederick Harran, *Adding DNA to the Investigative Toolbox*, SHERIFF, Sept./Oct. 2012, at 56.

representation in our DNA databases.³³ Drawing the line at arrestees may be “the worst choice of all.”³⁴ As law enforcement agencies become more aggressive in collecting greater numbers of DNA samples with disproportionate racial effects, there may be good social justice reasons to consider a universal database.³⁵

III. “TO HOLD FOR A SERIOUS OFFENSE”³⁶: CRIMINAL SUBSTANCE AND PROCEDURE

One might point out that some of the concerns about instrumental policing were already anticipated in the *King* majority opinion. The majority limits the decision’s holding to instances when “officers make an arrest supported by probable cause to hold for a serious offense . . .”³⁷ Justice Scalia’s dissenting opinion, however, rightly focuses on this tenuous limitation.³⁸ While it is true that at the time of *King*’s offense, Maryland limited arrestee DNA collection to certain qualifying felony offenses, little in *King*’s logic suggests that the Fourth Amendment bars the expansion of eligible offenses to minor crimes. In short, legislative discretion is as untouched as police discretion.

Much of this can be blamed on balancing. In Justice Kennedy’s view, the interests in *King* are the “quick and painless”³⁹ swab of the arrestee’s cheek, on the one hand, and an important governmental “interest in identification,”⁴⁰ on the other. The characterization of the arrestee’s interest is especially problematic; *King* complained about the information taken from him,⁴¹ not the Q-tip in his

³³ See Andrea Roth, *Maryland v. King and the Wonderful, Horrible DNA Revolution in Law Enforcement*, 11 OHIO ST. CRIM. L. J. 295 (2013). Roth’s Term Paper is also published in this issue.

³⁴ See *id.* at 308.

³⁵ Simon A. Cole, *How Much Justice Can Technology Afford? The Impact of DNA Technology on Equal Criminal Justice*, 34 SCIENCE & PUB. POL’Y 95, 102–03 (2007) (discussing merits of a universal DNA database to address inequality concerns).

³⁶ *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013).

³⁷ *Id.* (emphasis added); see also Transcript of Oral Argument at 13, *Maryland v. King*, 133 S. Ct. 1958 (2013) (No. 12-207), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-207.pdf (quoting Justice Breyer: “The only thing we have to decide is whether a person, where there’s probable cause to arrest a person for those four crimes, their fingerprints [and DNA] are all taken.”).

³⁸ *King*, 133 S. Ct. at 1989 (Scalia, J., dissenting) (“When there comes before us the taking of DNA from an arrestee for a traffic violation, the Court will predictably (and quite rightly) say, ‘We can find no significant difference between this case and *King*.’”).

³⁹ *Id.* at 1968 (majority opinion).

⁴⁰ *Id.* at 1971.

⁴¹ And while the DNA profile uploaded into CODIS provides limited information, the sample retained by the state is not so limited. The extent of protection given to this “vast genetic treasure map” depends on each State’s laws and what they offer in terms of preventing the government from analyzing that sample for other purposes. See *King v. State*, 425 Md. 550, 596 (2012) (“Although the Maryland DNA Collection Act restricts the DNA profile to identifying information only, we can not

mouth.⁴² Justice Kennedy suggests that there are few privacy concerns even in the information derived from these samples because the thirteen standardized CODIS markers correspond to non-coding “junk” DNA, and because Maryland law limits what can be done to the biological samples themselves.⁴³ The privacy concerns are more complicated than he suggests. The designation “junk” is misleading if it means that no sensitive information could be gleaned from these noncoding regions.⁴⁴ Moreover, the limits imposed on further access to and use of these samples varies considerably from state to state.⁴⁵

The majority’s view of the government’s interest is equally problematic. An arrestee’s “identity” encompasses any past criminal acts, as well as the simple verification of his person.⁴⁶ For now, however, assume this characterization is adequate. If the government is interested in “identifying” arrestees, why would the gravity of the offense matter? If utility is the metric, it will *always* be useful for the government to collect more information about criminals.⁴⁷

turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the state.”).

⁴² The focus on the intrusion into the arrestee’s body, however, isn’t unusual. Fourth Amendment analysis centers on how the government *acquires* the information. In the context of DNA, however, where the acquisition is conducted with little literal intrusion, that analysis fails to take into account the *content* of the information. This has been especially true in cases where the government collects “shed” or “abandoned” DNA from suspects without their knowledge. For an analysis of these issues, see Joh, *supra* note 23; see also Erin Murphy, *Back to the Future: The Curious Case of United States v. Jones*, 10 OHIO ST. J. CRIM. L. 325, 330–31 (2012) (“Current Fourth Amendment law emphasizes acquisition . . . It cares little for what happens next—to what use that information is put.”).

⁴³ *King*, 133 S. Ct. at 1980.

⁴⁴ See, e.g., KRIMSKY & SIMONCELLI, *supra* note 4, at 234–235 (observing that “no serious scientist refers to noncoding regions any longer as ‘junk’.”).

⁴⁵ See, e.g., DUSTIN HAYS, *DNA, FORENSICS, AND THE LAW* (2008) available at <http://www.dnapolicy.org/images/issuebriefpdfs/DNA,%20Forensics,%20and%20the%20Law%20Issue%20Brief.pdf> (noting that “many states authorize access to their DNA forensic databases for non-law-enforcement purposes,” including unspecified “humanitarian” purposes); see also David Lazer & Viktor Mayer-Schonberger, *Statutory Frameworks for Regulating Information Flows: Drawing Lessons for the DNA Data Banks From Other Government Data Systems*, 34 J. L. MED. & ETHICS 366 (2006) (observing that “the retention of physical DNA samples . . . invites re-purposing at a later stage”); Mark A. Rothstein & Meghan K. Talbot, *The Expanding Use of DNA in Law Enforcement: What Role for Privacy?*, 34 J. L. MED. & ETHICS 153, 158 (2006) (noting that “as long as [DNA] samples are stored, there is a possibility that they could be used by unauthorized third parties in ways that might lead to disclosure of confidential information, or for malicious, retributive, or oppressive purposes”).

⁴⁶ *King*, 133 S. Ct. at 1971 (“A suspect’s criminal history is a critical part of his identity that officers should know when processing him for detention.”).

⁴⁷ This assumption—that more information will always be better—also ignores the serious limitations on the science of DNA identification, as well as publicized instances of human error that have led to erroneous identifications. See, e.g., Osagie K. Obasogie, Op-ed., *High-Tech, High-Risk Forensics*, N.Y. TIMES, July 24, 2013 (describing wrongful arrest for murder based on DNA sample contaminated by paramedics).

King does little to limit states from expanding the scope of their arrestee profiles to all arrestees, regardless of the severity of the offense. As highly regulated as constitutional criminal procedure is, substantive criminal law is not. And as William Stuntz pointed out, the imposition of constitutional law makes some kinds of legislation easier, and others more difficult in terms of political benefits and costs.⁴⁸ Thus, legislatures have been less inclined to add on to Fourth Amendment restrictions⁴⁹ than they have been eager to enlarge the reach of substantive criminal law, because it is an area relatively untouched by the Supreme Court's case law.⁵⁰

Legislatures are free to widen the scope of *King* in two ways. First, legislatures can expand the group of arrestees eligible for compulsory DNA collection. The expansion of the convicted offender database is illustrative. When the federal government first established CODIS, most states only collected DNA samples from those convicted of violent felonies or felony sex offenses.⁵¹ Over time, however, the pool of eligible convictions has only grown. Today, all states require all convicted felons to submit a DNA sample; a majority of states require those convicted of misdemeanor sex offenses to do the same.⁵² In 2012, New York became the first "all crimes state"; the state DNA database will now include samples from all misdemeanor convictions, in addition to felony convictions.⁵³ This means that those convicted of crimes as minor as jumping subway turnstiles and shoplifting will have their DNA samples collected for inclusion in the state DNA database.⁵⁴

That same expansion is likely to happen for eligible arrestees. While most of the twenty-eight states collecting DNA samples from arrestees do so only for violent offenses or felonies, a handful already authorize DNA collection from some misdemeanor arrestees.⁵⁵ If permitting DNA collection for minor offenses can catch a terrorist or murderer, as Justice Kennedy suggests, that information is indeed valuable. Any piece of information that helps "identify" criminals is a useful one that, under *King*'s logic, is not limited to felony arrests. With available

⁴⁸ William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 793 (2006) ("Mandatory rules have the opposite effect. The existence of any given constitutional rule tends to reduce support for friendly legislation.").

⁴⁹ *Id.* at 792.

⁵⁰ *Id.* at 802–03 (explaining why "crime definition and sentencing" are "politically easier" than legislating police procedures).

⁵¹ See NATHAN JAMES, CONG. RESEARCH SERV., R41800, DNA TESTING IN CRIMINAL JUSTICE: BACKGROUND, CURRENT LAW, GRANTS, AND ISSUES 7 (2012).

⁵² *See id.*

⁵³ See John Eligon & Thomas Kaplan, *New York State Set to Add All Convict DNA to Its Database*, N.Y. TIMES, Mar. 13, 2012, <http://www.nytimes.com/2012/03/14/nyregion/dna-database-pensions-and-redistricting-are-part-of-talks-on-major-albany-deal.html>.

⁵⁴ *See id.*

⁵⁵ See *DNA Sample Collection from Arrestees*, NAT'L INST. OF JUST., (Dec. 7, 2012), <http://nij.gov/topics/forensics/evidence/dna/collection-from-arrestees.htm>.

data suggesting that one out of three Americans have been arrested for some offense by age twenty-three, the impact of such an expansion across jurisdictions would be dramatic.⁵⁶

Second, legislatures can add profiles to a DNA database by making more legal violations subject to arrest, rather than only to citation. Thus, legislative discretion gives rise to greater police discretion. The United Kingdom's experience with its own DNA database, the National DNA Database (NDNAD), established in 1995, provides such an example. Parliamentary passage of the Criminal Justice Act of 2003 permitted systematic collection of DNA samples from arrestees for inclusion in the NDNAD.⁵⁷ These were limited to arrests for "recordable" offenses: a classification that restricted the police from arresting those involved in minor offenses.⁵⁸ With the passage of the 2005 Serious Organized Crime and Police Act, however, *all* crimes are now subject to arrest, including minor crimes such as driving in a bus lane and dropping litter, so long as the police believe that it is "necessary" to arrest the relevant person.⁵⁹ The resulting increase in the number of profiles in the NDNAD has not, however, led to an appreciable increase in the percentage of crimes solved through DNA profile matches.⁶⁰ While it is true that there is already a broad range of arrestable offenses under American criminal law, *King* invites even further legislative expansion of those crimes subject to arrest.

⁵⁶ See Robert Brame et al., *Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21, 25 (2012) (concluding that "arrest experiences are common among American youth (most likely on the order of 1 out of 3 by age 23)" based on self-reported survey data), available at <http://pediatrics.aappublications.org/content/early/2011/12/14/peds.2010-3710.full.pdf+html>.

⁵⁷ See HUMAN GENETICS COMMISSION, *supra* note 22, at 31; Helen Wallace, *The U.K. National DNA Database: Balancing Crime Detection, Human Rights and Privacy*, 7 EMBO REPORTS S26 (2006) (observing that provision permitting compulsory DNA collection upon arrest happened with little "public attention and debate").

⁵⁸ See KRIMSKY & SIMONCELLI, *supra* note 4, at 170 (outlining key legislation for NDNAD); *Arrests for All Offences Proposed*, BBC NEWS, (Aug. 17, 2004), http://news.bbc.co.uk/2/hi/uk_news/politics/3557266.stm (noting proposal to permit in theory arrests for all offenses).

⁵⁹ See, e.g., James Slack, *Big Brother Britain has World's Biggest DNA Database*, DAILY MAIL ONLINE (Jan. 5, 2006), <http://www.dailymail.co.uk/news/article-373249/Big-Brother-Britain-worlds-biggest-DNA-database.html#ixzz2YKu37T7J>; *Serious Organised Crime and Police Act 2005*, THE GUARDIAN (Jan. 19, 2009), <http://www.theguardian.com/commentisfree/libertycentral/2008/dec/16/serious-organised-crime-act> (noting that the Act "[m]akes all offences arrestable").

⁶⁰ See HOUSE OF COMMONS HOME AFFAIRS COMMITTEE, *THE NATIONAL DNA DATABASE: EIGHTH REPORT OF SESSION 2009–10* 5 (2010) (estimating that "as little as .3%" of those crimes resulted in a person being charged can be attributed to a DNA match).

IV. "THE GOVERNMENT'S INTEREST IN IDENTIFICATION"⁶¹: *TERRY* DNA STOPS

By relying on a balancing of interests that will surely never favor the individual from whom a DNA sample is taken, the *King* majority invites (and nearly decides) what is likely to be one of the next important DNA controversies in policing: *Terry* stops that involve the compulsory collection of DNA. Justice Ginsburg directly raised the question in the *King* oral argument.⁶²

In *Terry* itself, by choosing to regulate stop and frisks under the Fourth Amendment, the Court ended up legitimating them as police practices. In these potentially volatile situations, the *Terry* Court held, the police may pursue their interests in "effective crime prevention and detection," even in the absence of probable cause or a warrant.⁶³ A *Terry* stop and frisk permits the police to conduct brief investigations of the detained person, so long as reasonable in scope relative to the basis for the stop.⁶⁴ That investigation includes the "identity" of the suspect.⁶⁵

Thus in *Hiibel v. Sixth Judicial District Court of Nevada*, the Court upheld Larry Hiibel's arrest for refusing to identify himself under Nevada's stop-and-identify statute.⁶⁶ Justice Kennedy's majority opinion in that case emphasized that "questions concerning a suspect's *identity* are a routine and accepted part of many *Terry* stops."⁶⁷ From confirming a suspect's identity, continued the majority opinion, the police could discover whether "a suspect is wanted for another offense, or has a record of violence or mental disorder."⁶⁸ Those very words reappear in the *King* majority opinion's justification for compulsory arrestee DNA collection.⁶⁹

All of which is to say that *King* provides few brakes on this logical next step in DNA collection. If "knowledge of identity" has long been an acceptable objective in the *Terry* context,⁷⁰ and a DNA profile is a part of the individual's

⁶¹ *Maryland v. King*, 133 S. Ct. 1958, 1971 (2013).

⁶² Transcript of Oral Argument at 7 *Maryland v. King*, 133 S. Ct. 1958 (2013) (No. 12-207), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-207.pdf.

⁶³ *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

⁶⁴ *Id.* at 20 ("whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place").

⁶⁵ *Id.* at 28 (noting that in *Terry* itself, Officer McFadden asked the suspects "their names . . . to dispel [his] reasonable belief" about their criminal activity).

⁶⁶ 542 U.S. 177, 182 (2004) (categorizing Nevada's law as one of many "stop and identify" statutes).

⁶⁷ *Id.* at 186 (emphasis added).

⁶⁸ *Id.*

⁶⁹ *Maryland v. King*, 133 S. Ct. 1958, 1972 (2013)

⁷⁰ *Hiibel*, 542 U.S. at 186.

identity for Fourth Amendment purposes,⁷¹ its collection would seem appropriate even in circumstances short of arrest. *Terry* itself contemplated that those detained could reasonably be subjected to practices to which they objected (thus the forced patdowns of Terry, Chilton, and Katz in *Terry*⁷²), so compulsory DNA swabbing would not seem to stretch those boundaries. If the analysis yielding the “identity” of a person subjected to the stop does not unduly prolong the stop⁷³ such an additional procedure would seem to fall within *Terry*’s scope.⁷⁴

When that day comes, the forced collection of DNA during investigative detentions will have a much larger social impact than arrestee DNA collection, particularly if one considers that most routine traffic stops qualify as *Terry* stops.⁷⁵ If a citizen encounters a police officer, the most common reason will be because she is pulled over as a driver in a traffic stop.⁷⁶ The lower courts have granted the police wide latitude in what they may do in such stops, including computer checks on the driver’s criminal history.⁷⁷ If such checks fall within *Terry*’s scope, it is hard to see why a cheek swab and a check against a DNA database would not as well.

For the moment, such DNA *Terry* stops are not routine police practice. DNA testing in a laboratory can take several days or longer. It took several weeks for Maryland to analyze and upload King’s profile to CODIS.⁷⁸ However, the technology for rapid DNA analysis that requires no scientific expertise and that can

⁷¹ *King*, 133 S. Ct. at 1970–75 (discussing how DNA profiles aid the government’s interest in identifying the arrestee).

⁷² *Terry v. Ohio*, 392 U.S. 1, 8 (1968).

⁷³ *See, e.g.*, *United States v. Place*, 462 U.S. 696, 709 (1983).

⁷⁴ And such an additional intrusion is unlikely to run afoul of *Terry*, given the rapid expansion of the permissible scope of the stop and frisk itself, including the “trend granting officers greater latitude in using force in order to ‘neutralize’ potentially dangerous suspects during an investigatory detention.” *United States v. Perdue*, 8 F.3d 1455, 1464 (10th Cir. 1993).

⁷⁵ Although the Supreme Court has never directly decided the issue, many lower courts have cited dicta from *Berkemer v. McCarty* that states “the usual traffic stop is more analogous to a so-called ‘*Terry* stop’ than to a formal arrest.” 468 U.S. 420, 439 (1984) (citations omitted). For a contrary view, see David A. Moran, *Traffic Stops, Littering Tickets, and Police Warnings: The Case of a Fourth Amendment Non-Custodial Arrest Doctrine*, 37 AM. CRIM. L. REV. 1143 (2000) (arguing that most traffic stops should be considered non-custodial arrests rather than *Terry* stops).

⁷⁶ *See* BUREAU OF JUSTICE STATISTICS, CONTACTS BETWEEN POLICE AND THE PUBLIC 1 (2011), available at <http://www.bjs.gov/content/pub/pdf/cpp08.pdf> (noting that most common reason for face-to-face contact with police was “being a driver in a traffic stop”). The last findings published by the BJS in 2008 report that of the 40 million Americans aged 16 or older who had face-to-face contact with the police, about 44.1% of them did so as a driver in a traffic stop. *Id.* at 1–2.

⁷⁷ *See, e.g.*, Wayne R. LaFave, *The “Routine Traffic Stop” From Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1881 (2004) (observing that “[m]ost courts confronted with the issue have concluded that a criminal-history check is a valid part of a traffic stop”).

⁷⁸ *Maryland v. King*, 133 S. Ct. 1958, 1984 (2013) (Scalia, J., dissenting) (discussing timeline of processing King’s DNA sample).

be conducted away from a lab is approaching.⁷⁹ Rapid DNA kits provide a fully automated process of extracting a DNA profile from a cheek swab at the point of collection: a “swab-in/profile-out” process.⁸⁰ In 2010, the FBI established a Rapid DNA Program Office to guide the development of technological standards; its goal is to help introduce a kit that will produce a DNA profile within two hours or less⁸¹ of the sample collection.⁸² The FBI intends to help police integrate Rapid DNA analysis technology into post-arrest booking procedures, and eventually to use these arrest analyses as a “fourth tier” of the National DNA Index System.⁸³

As with DNA analysis generally, however, once the technology for Rapid DNA is developed, there is good reason to believe that law enforcement agencies will be interested in using such kits for their own objectives as well, whether or not state legislatures or the federal government decide to approve of sample collection during *Terry* stops for inclusion into CODIS or state databases. Companies developing rapid DNA technology promise to deliver immediate results for “on-scene screening of *suspects*,”⁸⁴ not just for arrestees or for crime scene evidence. Companies like California-based Integenx are encouraging law enforcement agencies to consider rapid DNA testing as a tool that permits them to “decide much more [sic] where and how evidence gets tested and what gets tested”: a decision that includes using suspect profiles that are not currently approved for inclusion into CODIS.⁸⁵

⁷⁹ See Brief of Amicus Curiae National District Attorneys Association in Support of Petitioner at *19, *Maryland v. King*, 133 S. Ct. 1958 (2013) (No. 12-207), 2012 WL 6762584 (describing current DNA analysis, which can take weeks to complete, as “soon [to] be obsolete” when replaced by Rapid DNA analysis).

⁸⁰ See *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, FBI, <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited Nov. 10, 2013, 9:40 PM).

⁸¹ A Department of Homeland Security document obtained by the Electronic Freedom Foundation suggests that the federal government is working with private companies to develop Rapid DNA analyzers that will cost as little as one hundred dollars and produce results in “under an hour.” See *DHS Rapid and Low-cost DNA Biometrics*, DEPARTMENT OF HOMELAND SECURITY, <https://www.eff.org/file/36203#page/1/mode/1up> (last visited Nov. 10, 2013, 9:41 PM).

⁸² See *id.*

⁸³ The existing tiers include databases at the local, state, and national level. See *LDIS, SDIS, and NDIS*, DNA INITIATIVE, <http://www.dna.gov/solving-crimes/cold-cases/howdatabasesaid/ldisndisdis/> (last visited Sept. 20, 2013).

⁸⁴ John W. Blackledge et al., *Rapid DNA*, 14 NAT’L ACAD. ASSOCIATE 14, 16–17 (2012), available at http://issuu.com/fbi_nationalacademyassociate/docs/fbi_may_june2012_flipbk?e=3781121/2599422 (predicting that Rapid DNA will “soon become commonplace” police practice).

⁸⁵ See *Rapid DNA—Deployment Concepts for Government and Law Enforcement*, INTEGENX, WEBINAR (Dec. 3, 2012), <http://integenx.com/webinar-rapid-dna-deployment-concepts-for-government-and-law-enforcement/> (suggesting that rapid DNA testing will facilitate police “connectivity” with CODIS as well as with local police databases not regulated by federal standards).

All three of the scenarios I have raised here are far from inevitable. State lawmakers could severely curb police discretion, prohibit compulsory DNA samples in misdemeanor arrests, and ban DNA collection in *Terry* stops. But all of the trends suggest otherwise. Police discretion is a perennial topic for complaint but not for serious legislative or judicial action.⁸⁶ Moreover, federal initiatives like the Katie Sepich Enhanced DNA Collection Act, signed into law just this year, demonstrate legislative movements to *expand* the numbers of arrestees targeted for forcible DNA testing.⁸⁷ And few political careers are likely to be made limiting the reach of “one of the most significant scientific advancements of our era” in police work.⁸⁸

V. CONCLUSION

Maryland v. King justifies in Fourth Amendment law an expansive use of DNA sampling in the criminal justice system. Regrettably, Justice Kennedy’s majority opinion is at once too optimistic and doctrinally insufficient. The *King* majority opinion is too sanguine that the benefits of ever-expansive DNA identification by the government far outweigh the burdens on those whose profiles end up in DNA databases. It is also insufficient in that it opens up, as this term paper has suggested, many opportunities for DNA collection by the police that extend beyond the limits of serious offenses or even the category of arrestees. Justice Scalia’s bitter dissent may or may not be prescient. We may be heading toward a “genetic panopticon,”⁸⁹ with all the innuendos of oppression that the term suggests, or we may be moving toward a society in which “having a DNA profile will . . . become as common as having a [cellphone] number or email address: inconvenient sometimes, but tolerable because it is perceived as highly useful.”⁹⁰ Whatever the case may be, *King* has firmly moved us on a road toward less genetic privacy.

⁸⁶ See, e.g., Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199, 211 (2007) (observing that neither judicial decisions nor public pressure have resulted in important curbs on police discretion).

⁸⁷ Katie Sepich Enhanced DNA Collection Act, Pub. L. No. 112-253 (2013) (codified as 42 U.S.C. 14137a). The Act provides grants to states to implement arrestee DNA collection.

⁸⁸ *Maryland v. King*, 133 S. Ct. 1958, 1966 (2013).

⁸⁹ *Id.* at 1990 (Scalia, J., dissenting).

⁹⁰ See HUMAN GENETICS COMM’N, *supra* note 22, at 88.