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Note

Arresting DNA: Privacy Expectations of Free Citizens Versus Post-Convicted Persons and the Unconstitutionality of DNA Dragnets

Aaron B. Chapin *

On November 8, 1999, Charles Raines, then incarcerated in a Maryland penitentiary, had his inner cheek swabbed by the State to collect his DNA for inclusion in a statewide DNA database.¹ As it turned out, Raines's DNA matched that collected from a rape victim in an unsolved 1996 case.² In August 2003, Raines was indicted for the 1996 rape.³ Raines's attempt to suppress the DNA evidence, as an unreasonable search performed without suspicion in violation of the Fourth Amendment, was denied by the Maryland Appellate Court in a 4-3 decision.⁴

On March 25, 2002, Thomas Kincade was asked by his parole officer to submit a blood sample to obtain his DNA for inclusion in the combined DNA database.⁵ Kincade refused for personal reasons and was held in violation of the DNA Analysis Backlog Elimination Act of 2000 (DNA Act).⁶ As a result, his stay of sentence was lifted and he was taken into custody

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1. *Maryland v. Raines*, 857 A.2d 19, 21-23 (Md. 2004).

2. *Id.* at 22.

3. *Id.* at 20.

4. *Id.*

5. *United States v. Kincade*, 379 F.3d 813, 820 (9th Cir. 2004).

6. The DNA Analysis Backlog Elimination Act of 2000 provides funds to states for processing stored DNA samples, and authorizes the samples to be taken from federal and military offenders. See 42 U.S.C. § 14135 (2000). Since 2000, every state has passed DNA acts of their own allowing for DNA of post-convicted persons to be entered into a combined database. Laurie Stroum Yeshulas, *DNA Dragnet Practices: Are They Constitutional?*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 133, 135 n.18 (2003) (listing the laws of all fifty states authorizing the use of these criminal DNA databases).

where he was forced to submit a DNA sample.⁷ Kincade challenged the DNA Act as an unconstitutional violation of his Fourth Amendment rights, but that challenge was rejected by the Ninth Circuit in a 5-1-5 decision.⁸

In 2001 and 2002, Baton Rouge, Louisiana police conducted a DNA dragnet in an attempt to solve a serial murder case.⁹ Without having a warrant, probable cause, or even reasonable suspicion, police asked over 600 men for a sample of their DNA.¹⁰ One person caught up in this dragnet, Floyd Wagster, Jr., complied with the police request, but only after being coerced.¹¹ As a result, Wagster filed suit against the department, protesting the coercive practice of DNA dragnets.¹² However, Wagster's attempt to have his sample returned or destroyed, as well as other attacks on the constitutionality of allowing police to retain these samples, has thus far been unsuccessful.¹³

This Note examines the Fourth Amendment questions of whether, and under what circumstances, police may obtain a DNA sample, retain that sample, and use that sample to create a DNA fingerprint for later use. Applying the reasoning used in DNA Act cases to the issue of DNA dragnets, this Note argues that compelled DNA collection from free citizens without individualized suspicion is necessarily unconstitutional. Further analysis demonstrates the inapplicability of various Fourth Amendment exceptions to these dragnets and raises serious questions regarding the viability of consent to DNA searches.

Part I of this Note examines the practice of DNA dragnets and how they work. Part II reviews the reasonableness test behind the Fourth Amendment, and the relevant exceptions to the constitutional doctrine. Part III examines the privacy expectations of post-convicted persons and introduces litigation regarding the DNA Act. Finally, Part IV applies the reasoning behind DNA Act cases to DNA dragnets, and, after examining

7. *Kincade*, 379 F.3d at 821.

8. *Id.*

9. Richard Willing, *La. Case Triggers Battle over DNA*, USA TODAY, May 29, 2003, at 3A.

10. *Id.*

11. *DNA Suit Issues Will Not Go Away*, THE BATON ROUGE ADVOC., Aug. 19, 2004, at 8B [hereinafter *DNA Suit Issues*].

12. *Id.*

13. *See id.*; Willing, *supra* note 9.

other possible avenues for the legality of these dragnets, ultimately concludes that the practice is unconstitutional.

I. THE HISTORY AND PROCEDURE OF DNA DRAGNETS

In December 1996, Juli Busken, a twenty-one-year-old University of Oklahoma dance student, was brutally raped and murdered.¹⁴ The police had no leads, except for some DNA evidence collected from the rape itself.¹⁵ Twenty years earlier, this case would have probably been filed away as unsolvable. Indeed, even in 1996, there was little the police could do. Today, however, the police have a suspect—a DNA profile extracted from the semen found at the scene. To find out who the profile matched, police “searched” the DNA of hundreds of men with only vague connections to the victim, in what the media dubbed a “DNA dragnet.”¹⁶

The first reported DNA dragnet took place in Britain in 1986, where police sought voluntary blood samples from over 4500 men connected to a village where two teenage girls were raped and murdered.¹⁷ The DNA itself did not provide a suspect, but when Colin Pitchfork did not show up to have his DNA collected, the police had their man.¹⁸ These DNA dragnets are less common in the United States than the rest of the world¹⁹ because of concerns raised by the Fourth Amendment.²⁰

14. *60 Minutes* (CBS television broadcast, Sept. 12, 2004).

15. *Id.*

16. *Id.* The dragnet was ultimately unsuccessful; police found a suspect already incarcerated in the Oklahoma state penitentiary. *Id.*

17. See Jeffrey S. Grand, *The Bleeding of America: Privacy and the DNA Dragnet*, 23 CARDOZO L. REV. 2277, 2285 (2002); see also Mark Hansen, *DNA Dragnet*, A.B.A. J., May 2004, at 38, 38; Richard Willing, *Privacy Issue Is the Catch in Police DNA “Dragnets,”* USA TODAY, Sept. 16, 1998, at 1A.

18. See Grand, *supra* note 17, at 2285; *60 Minutes*, *supra* note 14.

19. See *60 Minutes*, *supra* note 14; see also Fred Barbash, *Crime-Solving by DNA Dragnet: Britain Makes Arrests in Rape Cases After Thousands of “Voluntary” Neighborhood Tests*, WASH. POST, Feb. 2, 1996, at A21 (referencing three foreign DNA dragnets before 1996); Hansen, *supra* note 17, at 42 (noting that, in Europe, “DNA testing has become almost routine”); Willing, *supra* note 17, at 1A (noting that DNA dragnets are an accepted practice in many European countries). The largest DNA dragnet took place in Germany in 1998, where over 16,000 people were searched. David M. Halbfinger, *Experts Question Growing Practice of DNA Dragnets: Coercive Test May Violate Rights*, HOUSTON CHRON., Jan. 4, 2003, at 23; Hansen, *supra* note 17, at 42.

20. See Willing, *supra* note 17, at 2A (quoting Simon Davies, a visiting fellow at the London School of Economics: “The received wisdom has always been that the U.S. was immune (to widespread DNA searches) because of your Constitution.”).

Possibly the first such dragnet to take place in the United States happened in San Diego in 1990, where police tested about 800 men in search of a serial killer.²¹ However, despite Fourth Amendment concerns, DNA dragnets are becoming increasingly common in this country with over eighteen occurring since 1990, four of which happened in 2004.²²

The procedure of DNA dragnets is fairly straightforward. If the police recover DNA evidence from a crime scene, but have no suspect, police take DNA samples from dozens to hundreds of persons who are not suspects, but who live or work near the crime scene.²³ These samples are used to create a “genetic fingerprint” of the individual searched, which is compared to the evidence from the scene in hopes of finding a genetic match.²⁴

21. See Hansen, *supra* note 17, at 42.

22. Between 1994 and 1995 only two DNA dragnets took place—one in suburban Miami, Florida and another in Ann Arbor, Michigan. See Dana Hawkins, *Keeping Secrets: As DNA Banks Multiply, Who Is Guarding the Safe?*, U.S. NEWS & WORLD REP., Dec. 2, 2002, at 58, 58; Penny Brown Roberts, *La. Suit May Set DNA Law: Serial Killer ‘Dragnetting’ Raises Nationwide Issue*, BATON ROUGE ADVOC., Sept. 21, 2003, at 1A. Since January 2004 there have been separate dragnets in Omaha, Nebraska; Wichita, Kansas; Oklahoma City, Oklahoma; and Truro, Massachusetts. Jonathan Finer, *Baffled Police Try DNA Sweep; Town’s Men Asked To Give Samples in Murder Case*, WASH. POST, Jan. 12, 2005, at A3 (describing the DNA dragnet in Truro, Massachusetts); *More Details of BTK Case Matter to Public*, WICHITA EAGLE, Jan. 23, 2005, at 14A (describing the Wichita, Kansas DNA dragnet and noting that it is now the largest in the nation’s history with over 4000 individuals searched); *60 Minutes*, *supra* note 14 (describing the DNA dragnet in Oklahoma City, Oklahoma); *Swab? DNA Dragnets Raise Troubling Issues*, WICHITA EAGLE, Sept. 15, 2004, at 6A [hereinafter *DNA Dragnets*] (describing the Wichita DNA dragnet); Willing, *supra* note 9, at 3A (mentioning the DNA dragnet in Oklahoma City); Kristin Zagurski, *DNA Requests Warranted Omaha’s Police Chief Defends Using a List of Black OPPD Workers as an “Efficient Way” to Pursue a Lead in a Rape Investigation*, OMAHA WORLD-HERALD, June 30, 2004, at 2B (describing the DNA dragnet in Omaha). In total there have been at least eighteen such DNA dragnets in the United States since 1990. *DNA Dragnets*, *supra*, at 6A; Finer, *supra*, at 3A.

23. Willing, *supra* note 17, at 1A (defining DNA dragnet in Cheverly, Maryland as “taking DNA samples from dozens of men who are not suspects but who live or work near the scene of a crime”); see also Hansen, *supra* note 17, at 40 (defining DNA dragnet as a process “in which police collect samples on a large scale from individuals who are not suspects, but merely live or work near the crime scene. These samples are used to create DNA profiles that are compared to the profile of the perpetrator.”).

24. To create the “genetic fingerprint” used by police and DNA databases, forensic scientists identify specific “loci” (or genetic markers) on the sample gene. COMM. ON DNA FORENSIC SCI., NAT’L RESEARCH COUNCIL, THE EVALUATION OF FORENSIC DNA EVIDENCE 63, 66 (1996) [hereinafter *DNA EVIDENCE*]. These loci are located in areas of the genome which scientists cur-

However, since dragnetees are not suspects, police do not have authority to compel a search.²⁵ Therefore, dragnets are conducted on a supposedly voluntary basis;²⁶ but since refusing to consent raises suspicions,²⁷ there is little an individual can do to avoid having their DNA sampled.²⁸ The DNA dragnet's greatest usefulness is in stirring up potential suspects.

Once the investigation ends or eliminates the dragnetee as a suspect, the question remains of what to do with the genetic fingerprints on file. The federal DNA Act and most state DNA collection statutes direct the state to expunge from the DNA databank the profiles of convicted persons whose convictions were reversed.²⁹ However, these statutes do not address the profiles taken from persons who are not even suspects.³⁰ As a result, profiles are often retained in private police "suspect databases" which, while not shared among the states, are nevertheless routinely searched by the individual departments.³¹

rently believe have no genetic function, and were "purposely selected because they are not associated with any known physical or medical characteristics." H.R. Rep. No. 106-900(I), at 27 (2000); *see also* DNA EVIDENCE, *supra*, at 65.

25. *See generally* Grand, *supra* note 17, at 2294-2303 (arguing separately that detention of the person to obtain the sample is an illegal seizure and collecting the sample is an illegal search of the person). This Note recognizes the distinction between search and seizure, but focuses on the sample as a search as opposed to the investigatory stop as a seizure.

26. *See* Willing, *supra* note 9, at 3A (noting that police prefer to call DNA dragnets "voluntary elimination screens"); Willing, *supra* note 17, at 2A (reporting that police say the dragnets do "not violate the Fourth Amendment's bar on warrantless searches because samples are given voluntarily").

27. *See* Willing, *supra* note 9, at 3A ("Police concede that those guilty of crimes seldom volunteer to give their DNA sample. Even so, police say that also can be helpful. It raises suspicions about those who refuse and allows police to investigate them as potential suspects.").

28. *See, e.g., id.* (describing Shannon Kohler's uncooperative experience in the Louisiana dragnet).

29. *See, e.g.,* 42 U.S.C. § 14132 (2000), *amended by* Justice For All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (mandating the destruction of DNA collected from arrestees whose arrest does not result in a conviction); CONN. GEN. STAT. § 54-102l (2003) (same); LA. REV. STAT. ANN. § 15:614 (West 2004) (same).

30. *See, e.g.,* Roberts, *supra* note 22, at 14S ("[T]here are no regulations in Louisiana or other states to prevent [DNA profiles collected in dragnets] from being stored elsewhere and compared to evidence from any past or future crime anywhere.")

31. *See id.* at 1A (noting that London, Ohio police have private profiles from more than 1020 innocent people, and cities like Chicago and Miami have constructed "suspect databases"); Willing, *supra* note 9, at 3A (noting that police departments argue that they have a right to keep these samples); *see also*

II. THE FOURTH AMENDMENT'S REASONABLENESS TEST AND ITS RELEVANT EXCEPTIONS

In colonial America, suspicionless searches were not uncommon.³² A petty officer of the king, armed only with a general warrant, could break down a man's door, search for taxable goods, and seize whatever he considered to be "uncustomed goods."³³ Such searches were understandably bothersome to the early American colonists who retained the idea of a man's home as his castle.³⁴ The Fourth Amendment was designed to protect the home from these intrusions³⁵ by enumerating "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."³⁶

While the text of the Fourth Amendment specifically bars "unreasonable" government searches, it fails to specify the

Hansen, *supra* note 17, at 43 (stating that before conducting a dragnet, investigators can look at the DNA information already on file); Hawkins, *supra* note 22, at 59 (noting that profiles collected from persons caught up in the dragnet are not excluded from the suspects' databases and officials run searches including these nonsuspects' samples).

32. William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 WM. & MARY Q. 371, 371-72 (1980).

33. See EDWARD C. FISHER, SEARCH AND SEIZURE 3 (1970) (explaining the concept of a general warrant); David E. Steinberg, *High School Drug Testing and the Original Understanding of the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 263, 270-88 (2003) (explaining the historical understanding of the Fourth Amendment). See generally Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 939-50 (1997) (explaining general warrants and the historical factors that shaped the country's shift to a specific warrant preference).

34. See, e.g., JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 34 (1966) (quoting James Otis, Jr.: "[The Writ of Assistance] is against the fundamental principles of law, the privilege of house. A man who is quiet is as secure in his house as a prince in his castle . . ."); Cuddihy & Hardy, *supra* note 32, at 391-92 (describing some colonists' violent reaction to searches they felt were unreasonable).

35. See Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 16 (2003). The motivation behind the Amendment is only explainable by understanding the history of governmental abuses. See *Warden v. Hayden*, 387 U.S. 294, 301 (1967) (stating that the Fourth Amendment "was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies"); see also *Boyd v. United States*, 116 U.S. 616, 625 (1886) (recognizing that writs of assistance, and the anger they caused, were "fresh in the memories of those who . . . established our form of government"); FISHER, *supra* note 33, at 8; LANDYNSKI, *supra* note 34, at 19-20.

36. U.S. CONST. amend. IV. For a thorough examination of the historical practices, abuses, and precedents that shaped the Fourth Amendment, see generally, Cuddihy & Hardy, *supra* note 32.

meaning of "reasonable."³⁷ In most circumstances, courts have interpreted the reasonableness of any search to hinge upon the government's fulfillment of the Warrant Clause.³⁸ However, even without a warrant, a search may be permissible in certain circumstances.³⁹ In determining the reasonableness of a warrantless search, the court must balance "the degree to which [the search] intrudes upon an individual's privacy [with] the degree to which it is needed for the promotion of legitimate governmental interests."⁴⁰ While this reasonableness balancing test remains the traditional constitutional standard, there exist "a few specifically established and well-delineated exceptions,"⁴¹ such as governmental "special needs," the *Terry* stop, and voluntary consent.⁴²

A. THE "SPECIAL NEEDS" EXCEPTION

The "special needs" doctrine encompasses cases involving "searches conducted for important *non-law enforcement purposes* in contexts where adherence to the warrant-and-probable cause requirement would be impracticable."⁴³ The doctrine is

37. U.S. CONST. amend. IV; *see also* *Pennsylvania v. Mimms*, 434 U.S. 106, 108–09 (1977) (describing reasonableness as the "touchstone" of Fourth Amendment analysis); *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (describing "reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security" as the "central inquiry" under the Fourth Amendment); LANDYNSKI, *supra* note 34, at 45–46.

38. "[A]nd no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. The importance of obtaining a warrant has shifted through the years. WILLIAM W. GREENHALGH, *THE FOURTH AMENDMENT HANDBOOK: A CHRONOLOGICAL SURVEY OF SUPREME COURT DECISIONS* 8 (1995).

39. FISHER, *supra* note 33, at 65.

40. *Wyoming v. Houghton*, 526 U.S. 295, 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."). There is no "fixed formula" for determining the reasonableness of searches. *See* *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (suggesting that courts must consider the context of a search to measure the reasonableness of the search); *Ker v. California*, 374 U.S. 23, 33 (1963) (characterizing the task of laying down a fixed formula for determining reasonableness of searches as "impossible").

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

42. This list is not exclusive, but instead merely representative of those exceptions that may be relevant to the present issue. For a more complete list of these exceptions, *see* generally FISHER, *supra* note 33, at 65.

43. *United States v. Kincade*, 379 F.3d 813, 823 (9th Cir. 2004) (emphasis added).

usually applied to searches in schools and regulated industries, where the main objective of the search is something other than crime detection.⁴⁴ The “special needs” doctrine has been used to uphold information-gathering highway checkpoints⁴⁵ and non-intrusive searches of public employees to investigate potential misconduct,⁴⁶ as well as random drug tests of public school students participating in extracurricular activities,⁴⁷ U.S. customs officials,⁴⁸ and railroad employees.⁴⁹

In cases where police impose a regulatory scheme to detect general criminal wrongdoing, the Supreme Court has ruled the “special needs” doctrine inapplicable. For example, in *City of Indianapolis v. Edmond*,⁵⁰ the Court refused to apply the “special needs” doctrine to a highway checkpoint system where police randomly stopped cars to determine if the driver was conducting any illegal activity, because the primary purpose of the checkpoint was the general investigation of crime.⁵¹ Also, in *Ferguson v. City of Charleston*,⁵² the Court struck down a program where hospitals shared with police the medical information of patients who tested positive for narcotics because the program’s objective was to generate evidence for criminal investigations.⁵³

B. THE *TERRY* STOP-AND-FRISK EXCEPTION AND FINGERPRINTING DRAGNETS

A police officer is justified in briefly stopping and frisking an individual without probable cause if that officer reasonably believes the individual, whose suspicious activity the officer has observed at close range, is armed and poses a threat of harm to

44. See *Grand*, *supra* note 17, at 2300; see also, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) (“[P]reservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.”).

45. *Illinois v. Lidster*, 540 U.S. 419, 428 (2004).

46. *O’Connor v. Ortega*, 480 U.S. 709, 725–26 (1987).

47. *Bd. of Educ. v. Earls*, 536 U.S. 822, 838 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665–66 (1995).

48. *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 676–77 (1989).

49. *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 633–34 (1989).

50. 531 U.S. 32 (2000).

51. *Id.* at 42.

52. 532 U.S. 67 (2001).

53. See *id.* at 83.

the officer or others in the area.⁵⁴ However, “[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security”⁵⁵ and therefore must be limited to the scope and purpose of immediate public safety.⁵⁶ Nevertheless, the *Terry* stop has expanded to include investigatory stops as long as the officer’s initial suspicion is reasonable and his actions do not exceed that necessary to investigate that suspicion.⁵⁷

In the context of fingerprinting dragnets, *Davis v. Mississippi*⁵⁸ held that detentions without probable cause, for the purpose of collecting fingerprints, violate the Fourth Amendment.⁵⁹ *Davis* involved police taking dozens of African American youths into custody without warrants or probable cause, based solely on a victim’s vague description.⁶⁰ The youths were taken to police headquarters, fingerprinted, briefly interrogated, and then released without charge.⁶¹ The Court applied the Fourth Amendment to these “investigatory” seizures because failure to do so would “subject unlimited numbers of in-

54. *Terry v. Ohio*, 392 U.S. 1, 24 (1968).

55. *Id.* at 24–25.

56. *See id.* at 26 (“Thus [the stop-and-frisk search] must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a ‘full’ search, even though it remains a serious intrusion.”). Because the government’s purpose in the frisk is limited to safety of the officer or the immediate public, the frisk is severely limited in scope and the officer must have an articulable suspicion that the person is armed. GREENHALGH, *supra* note 38, at 12.

57. *See United States v. Sharpe*, 470 U.S. 675, 682 (1985) (citing *Terry*, 392 U.S. at 20); *see also* *Hiibel v. Sixth Judicial Dist. Court*, 124 S. Ct. 2451, 2458 (2004) (upholding a statutory requirement that an individual identify himself when asked by the police as a reasonable *Terry* stop); *Florida v. Rodriguez*, 469 U.S. 1, 5–6 (1984); *Adams v. Williams*, 407 U.S. 143, 146 (1972) (“A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.”). *But see Florida v. Royer*, 460 U.S. 491, 500 (1983) (noting that investigative stops must be temporary and employ the least intrusive search means reasonably available); *Ybarra v. Illinois*, 444 U.S. 85, 93–94 (1979) (“Nothing in *Terry* can be understood to allow . . . any search whatever for anything but weapons.”); 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 539 (2d ed. 1987) (“[T]here is no search-for-evidence counterpart to the *Terry* weapons search, permissible on only a reasonable suspicion that such evidence would be found.”).

58. 394 U.S. 721 (1969).

59. *Id.* at 728.

60. *See id.* at 722.

61. *See id.*

nocent persons to the harassment and ignominy [of] involuntary detention"⁶²—an intrusion the Fourth Amendment was clearly designed to prohibit.⁶³ Sixteen years later, *Hayes v. Florida*⁶⁴ followed the *Davis* Court's reasoning, holding the constitutional line to be crossed "when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes."⁶⁵

Despite the *Davis* Court's application of the Fourth Amendment, the *Hayes* Court did not exclude the possibility that narrowly circumscribed procedures could permit the constitutional acquisition of fingerprints without probable cause.⁶⁶ Expanding on this dictum, the *Hayes* Court suggested that under some circumstances the Fourth Amendment would allow in-field searches⁶⁷ to obtain fingerprints with only reasonable cause.⁶⁸ Accordingly, prolonged detention for the purpose of obtaining fingerprints resembles arrest and is unconstitutional without probable cause, while brief detention for that limited purpose *may* be permissible with only reasonable suspicion that the individual has committed a crime.⁶⁹

C. THE STANDARD FOR CONSENT TO SEARCHES

Absent a search warrant, probable cause, or one of the exceptions mentioned above, police can still conduct searches with the individual's consent.⁷⁰ The key inquiry is whether or

62. *Id.* at 726.

63. *Id.* at 726-27 ("Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'").

64. 470 U.S. 811 (1985).

65. *Id.* at 816.

66. *See Davis*, 394 U.S. at 728.

67. In-field searches are those conducted outside the police station when an individual is not removed from a place where he or she is entitled to be, but only detained briefly for the purpose of collecting fingerprints. *See Hayes*, 470 U.S. at 816-17.

68. *See id.* *But see id.* at 819 (Brennan, J., concurring) (characterizing the majority's dicta as a "regrettable assault on the Fourth Amendment").

69. Only a few state courts have affirmatively followed the dicta in *Hayes*. *See e.g.*, *Harrison v. Florida*, 524 So. 2d 1139, 1140 (Fla. Dist. Ct. App. 1988); *Washington v. Hoffpauir*, 722 P.2d 113, 115-16 (Wash. Ct. App. 1986).

70. *See Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991) ("[W]e have long approved consensual searches because it is no doubt reasonable for the police

not the consent was truly voluntary.⁷¹ Since the standard for all searches is reasonableness, and it is the police officer conducting the search, it is through his eyes that the consent must seem reasonable.⁷² Thus, the inquiry is whether an objective police officer reasonably believes that the subject's consent is voluntary.⁷³

Determining the reasonableness of the police officer's belief is a factual question, to be answered by examining the surrounding circumstances.⁷⁴ Factors that aid the court in determining the presence of duress or coercion include: the consenting party's vulnerability, age, education, intelligence, and knowledge of his right to refuse consent, as well as the physical environment in which he is consenting.⁷⁵ While none of these factors alone substantiates duress, some weigh more heavily on that finding than others.⁷⁶ For instance, in *Bumper v. North*

to conduct a search once they have been permitted to do so." (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)); see also GREENHALGH, *supra* note 38, at 13 ("Some Fourth Amendment commentators preferred to think of consent as an instance of Fourth Amendment inapplicability rather than as an instance of Fourth Amendment satisfaction. The theory was that any constitutional right, including a Fourth Amendment protection, may be waived.").

71. See *Schneckloth*, 412 U.S. at 248 (holding that when the "State attempts to justify a search on the basis of . . . consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied").

72. See GREENHALGH, *supra* note 38, at 13; see also LAFAVE, *supra* note 57, at 158–60 (noting that the relevant case law favors the objective "reasonable belief by the police" view over the "actual consentor's state of mind" view); cf. *Illinois v. Rodriguez*, 497 U.S. 177, 185–86 (1990) ("[I]n order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable.").

73. Police must recognize instances where their actions intimidate or coerce, and such instances, viewed objectively, are unreasonable. See, e.g., *United States v. Timberlake*, 896 F.2d 592, 595–96 (D.C. Cir. 1990) (holding consent inapplicable because it was tainted by police illegal entry into home); *United States v. Mapp*, 476 F.2d 67, 78 (2d Cir. 1973) (holding that no consent was present when police entered bedroom of suspect with guns drawn and demanded he surrender property).

74. See LAFAVE, *supra* note 57, at 158.

75. See *Grand*, *supra* note 17, at 2303. See generally LAFAVE, *supra* note 57, at 174–228 (explaining various factors bearing upon validity of consent).

76. See ROBERT M. BLOOM, SEARCHES, SEIZURES, AND WARRANTS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 115–17 (2003); LAFAVE, *supra* note 57, at 175–76.

Carolina,⁷⁷ the police officer's misrepresentation that they had a warrant in hand created a situation "instinct with coercion."⁷⁸

To reiterate, for a search to be reasonable, the government's need to conduct the search must outweigh the search's impact on the privacy of the individual. Because the court must take into account the totality of the circumstances when making this determination, the privacy expectations of the person searched are particularly relevant.⁷⁹

III. THE LIMITED PRIVACY EXPECTATIONS OF POST-CONVICTED PERSONS ARE PARTICULARLY RELEVANT IN DNA ACT CASES

When applying the Fourth Amendment, courts distinguish the privacy expectations of post-convicted persons from those of free citizens. For instance, in *Griffin v. Wisconsin*,⁸⁰ the Court upheld a warrantless search of a probationer's home.⁸¹ Although recognizing that a probationer's home, like any other citizen's home, is protected from unreasonable searches under the Fourth Amendment, the Court nevertheless ruled that the Constitution permits searches of parolees and probationers based on no more than *reasonable* suspicion.⁸² Utilizing the "special needs" exception, Justice Scalia explained that the "State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."⁸³

The situation in *United States v. Knights*⁸⁴ was similar to that in *Griffin* with a few exceptions. Like *Griffin*, *Knights* was a probationer whose home was searched without a warrant. However, unlike *Griffin*, the warrantless search in *Knights* was not pursuant to a general regulatory system and therefore did not fall under the "special needs" doctrine.⁸⁵ Nevertheless, the Court utilized the traditional standards balancing test and

77. 391 U.S. 543 (1968).

78. *Id.* at 550.

79. *See* *United States v. Kincade*, 379 F.3d 813, 840 (9th Cir. 2004).

80. 483 U.S. 868 (1987).

81. *Id.* at 870-72.

82. *See id.* at 873.

83. *Id.* at 873-74.

84. 534 U.S. 112 (2001).

85. *Id.* at 117.

ruled that the government can conduct a search of a probationer's home based on reasonable suspicion.⁸⁶ In deciding this case, the unanimous Court measured Knights's privacy interest, which had been lowered by virtue of his post-convicted status, with the government's interest, which was raised by a general concern that past offenders tend to be future offenders.⁸⁷

The privacy expectations of post-convicted persons became even more limited when Congress passed the DNA Act of 2000.⁸⁸ The purpose of the DNA Act was to provide funding to states to expedite the admission of DNA evidence into the Combined DNA Index System (CODIS), thereby facilitating states' potential to solve crime.⁸⁹ The DNA Act expanded CODIS by including DNA evidence from crimes without suspects, and mandating the collection of DNA from felons of qualified crimes, whether they are currently incarcerated, on release, or on probation.⁹⁰ While challenged multiple times in different circuits as an unreasonable, suspicionless search in violation of a felon's Fourth Amendment rights,⁹¹ the courts have upheld the DNA Act and similar state DNA acts each time, although for different reasons.⁹² As of yet, the Supreme Court has not considered this issue.

In 1999, the Second Circuit handed down a decision regarding a constitutional challenge to the Connecticut DNA statute.⁹³ *Roe v. Marcotte* involved Thomas Cobb, a convicted sex offender, who objected to the law that required sex offenders to surrender samples of their DNA for storage in a criminal databank.⁹⁴ The Second Circuit denied Cobb's appeal, reasoning that the DNA statute was permissible under the "special

86. *Id.* at 118.

87. *Id.* at 118–22.

88. DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. § 14135 (2000).

89. *Id.* §§ 14134–14135.

90. *Id.* § 14135a.

91. *See, e.g.*, *United States v. Kincade*, 379 F.3d 813, 821 (9th Cir. 2004); *Green v. Berge*, 354 F.3d 675, 676 (7th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1137–38 (10th Cir. 2003); *Roe v. Marcotte*, 193 F.3d 72, 74 (2d Cir. 1999); *Maryland v. Raines*, 857 A.2d 19, 20 (Md. 2004).

92. *Raines*, 857 A.2d at 26–27 (stating that every court they could find has upheld all DNA collection statutes before them, then listing multiple examples).

93. *Marcotte*, 193 F.3d 72.

94. *Id.* at 75–76.

needs" doctrine.⁹⁵ The court relied heavily on the *Griffin* opinion, ultimately concluding that "[b]ecause studies cited by defendants indicate a high rate of recidivism among sexual offenders, and because DNA evidence is particularly useful in solving such crimes, the statute passes the 'special needs' balancing test."⁹⁶ The Seventh, Ninth, and Tenth Circuits, as well as a sampling of district courts, have also upheld similar statutes in this manner.⁹⁷

However, not every court has found the "special needs" analysis persuasive. Other courts have relied on the traditional standards balancing test to justify DNA acts. For example, the plurality in *United States v. Kincade*⁹⁸ held that the government's interest in maintaining a DNA database outweighs the intrusion compulsory DNA profiling represents to convicted offenders.⁹⁹ The plurality reasoned that warrantless searches of post-convicted persons are constitutional because these persons, by virtue of being legally convicted, no longer share the full panoply of rights as free citizens and because the state now has a "far more substantial interest in invading their privacy than it does in interfering with the liberty of law-abiding citizens."¹⁰⁰ Because of differing privacy expectations between free citizens and post-convicted persons, the Ninth Circuit's use of the reasonableness balancing test to uphold the DNA Act is particularly relevant to the issue of DNA dragnets.

95. *Id.* at 79.

96. *Id.* at 82.

97. See *United States v. Kincade*, 379 F.3d 813, 830–31 (9th Cir. 2004) (referencing *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003); *Vore v. U.S. Dep't of Justice*, 281 F. Supp. 2d 1129, 1133–35 (D. Ariz. 2003); *Miller v. U.S. Parole Comm'n*, 259 F. Supp. 2d 1166, 1175–78 (D. Kan. 2003)).

98. *Id.* at 813–40. *Kincade* has an interesting procedural posture. In October 2003, a three-judge panel ruled in favor of *Kincade* and held the DNA Act unconstitutional. See *United States v. Kincade*, 345 F.3d 1095, 1113 (9th Cir. 2003). The entire Ninth Circuit, however, vacated that judgment and voted to rehear the case en banc. See *United States v. Kincade*, 354 F.3d 1000 (9th Cir. 2004). This Note discusses the resulting en banc decision at length.

99. *Kincade*, 379 F.3d at 832.

100. *Id.* at 834.

IV. DNA DRAGNETS VIOLATE THE FOURTH AMENDMENT'S PROTECTIONS AGAINST UNREASONABLE SEARCH AND SEIZURE

DNA acts push the boundaries of constitutionality and survive primarily because of the status of the individual as a post-convicted person. When individuals subjected to testing do not have diminished privacy expectations, as in the context of DNA dragnets, the government interest in compelling DNA collection fails to outweigh the intrusion upon the individual under the reasonableness balancing test. Without a non-law enforcement purpose in collecting DNA in mass sweeps, the "special needs" exception does not apply. Nor can a DNA sample be compelled as part of an investigatory stop, because the seizure of DNA falls outside the scope of the *Terry* stop-and-frisk exception. The only way to obtain a DNA sample from a nonsuspect, free citizen is through consent, but the very purpose behind the DNA dragnet may make voluntary consent practically impossible. Therefore, DNA searches of free citizens without individualized suspicion are unconstitutional.

A. THE NEEDS OF THE GOVERNMENT DO NOT OUTWEIGH THE IMPACT UPON THE INDIVIDUAL UNDER THE REASONABLENESS BALANCING TEST

The plurality in *Kincade* and the majority in *Maryland v. Raines* concluded that the state's compelling interest in collecting DNA from a convicted person outweighs that person's reasonable expectation of privacy, given the level of intrusion an oral swab or a blood sampling represents.¹⁰¹ However, both courts narrowly upheld the respective DNA acts under consideration,¹⁰² incurring strong dissent, which argued that DNA acts invade upon the legitimate privacy interests of post-convicted persons.¹⁰³ Analyzing both courts' use of the reasonableness balancing test demonstrates the unconstitutionality of DNA dragnets, because the balance of interests should shift in favor of the individual when the privacy of free citizens is in question.

101. *Id.* at 839; *Maryland v. Raines*, 857 A.2d 19, 43 (Md. 2004).

102. *Kincade*, 379 F.3d at 840; *Raines*, 857 A.2d at 43.

103. *See infra* notes 106–10.

1. The Reduced Expectation of Privacy of Post-Convicted Persons Does Not Apply to DNA Dragnets

The plurality opinion in *Kincade* first considered the level of privacy to which post-convicted persons are entitled.¹⁰⁴ According to the plurality, it is a “well-established principle that parolees and other conditional releasees are not entitled to the full panoply of rights and protections possessed by the general public.”¹⁰⁵ Conditional releasees may therefore only claim those rights that have not been restricted by the parole board.¹⁰⁶ In addition, by virtue of their custodianship, presently incarcerated persons, such as *Raines*, retain even less privacy expectations than parolees.¹⁰⁷

The dissent in both cases conceded the general principle that prisoners have diminished privacy expectations. However, they disagreed with their respective court’s opinion regarding the scope of the remaining rights. For example, in his dissenting opinion in *Kincade*, Judge Stephen Reinhardt argued that a post-convicted person’s right to privacy is not *eliminated* by virtue of being lawfully convicted, and that even parolees and probationers still maintain an expectation of privacy.¹⁰⁸ Chief Judge Robert M. Bell’s dissent in *Raines* noted that collecting DNA for identification purposes bears no relation to the functioning of an efficient prison.¹⁰⁹ The true purpose of collecting DNA must be crime detection, and the diminished privacy rights of incarcerated persons are not related to such a

104. *Kincade*, 379 F.3d at 833.

105. *Id.* The court supports this statement by referencing *McKune v. Lile*, 536 U.S. 24 (2002); *Pennsylvania Board of Probation & Parole v. Scott*, 524 U.S. 357 (1998); and others. *Id.*

106. *Kincade*, 379 F.3d, at 834. For example, parolees are typically restricted in their right to consume liquor, associate with certain individuals, vote, and bear arms. *Id.* at 833 n.28. Most parolees must maintain regular contact with their parole officer and obtain permission before changing jobs, living situations, or residences. *Id.*

107. *Raines*, 857 A.2d at 33 (acknowledging that “incarcerated persons have a severely diminished expectation of privacy”). Judge Alan M. Wilner agrees: “As a group, defined by their own judicially-determined conduct, [presently incarcerated convicts] have a much reduced expectation of privacy. They are routinely fingerprinted and photographed upon arrest, and those fingerprints and photographs are stored and used for much the same purpose as the DNA samples will be used.” *Id.* at 49 (Wilner, J., concurring).

108. *Kincade*, 379 F.3d at 868 (Reinhardt, J., dissenting) (“[T]he error the plurality makes is treating a reduction of ‘some freedoms’ as if it were equivalent to the elimination of all.”).

109. *Raines*, 857 A.2d at 61 (Bell, C.J., dissenting).

search.¹¹⁰ Judge Irma S. Raker agreed with the chief judge regarding prisoners' rights of bodily integrity,¹¹¹ but concurred with the result of the majority, because she accepted the State's argument that collection of DNA is no different than collection of fingerprints.¹¹² Therefore, a majority of the Maryland court agreed that the diminished privacy rights of incarcerated persons are not, in and of themselves, enough to justify a suspicionless search involving a violation of bodily integrity.

DNA dragnets inherently rely on suspicionless searches. Rarely do police have even reasonable suspicion, let alone probable cause, in testing DNA in mass sweeps.¹¹³ The subjects are usually free citizens who, unlike Kincade or Raines, have not lost any expectation of privacy and maintain their full panoply of rights.¹¹⁴ Since the difference in privacy between free persons and post-convicted persons is a "compelling distinction,"¹¹⁵ it would seem to follow that probable cause or a warrant would be necessary to compel a DNA sample from a free citizen, barring an immensely significant governmental interest.¹¹⁶

110. *Id.* at 61–62 (Bell, C.J., dissenting).

111. *Id.* at 45 (Raker, J., concurring).

112. *See id. But see id.* at 63 (Bell, C.J., dissenting) (criticizing Judge Raker for abandoning her principles and adopting a position where the ends justify the means).

113. *See supra* notes 23–27 and accompanying text. *But see* Hansen, *supra* note 17, at 43 (noting that the dragnet conducted in Lawrence, Massachusetts was successful because police searched the narrow group of people who had access to the victim in a nursing home).

114. *See* Rise v. Oregon, 59 F.3d 1556, 1560 (9th Cir. 1995). ("[Post-convicted] persons do not have the same expectations of privacy in their identifying genetic information that 'free persons' have.>").

115. *See id.*

116. *See id.* (noting that while usually a warrant is needed to compel a blood sample of a free person, that "absence of a warrant does not *a fortiori* establish a violation of Fourth Amendment rights"). For example, a warrant is not needed if there are exigent circumstances. *See, e.g.,* United States v. Chapel, 55 F.3d 1416, 1419 (9th Cir. 1995) (noting that police may compel a blood sample from a person not yet arrested if they have probable cause and a belief that evidence will be destroyed if a sample is not taken immediately, such as in a drunk driving case). Because DNA is consistent throughout one's lifetime, however, there are no exigent circumstances in the case of DNA identification. Jonathan F. Will, Comment, *DNA as Property: Implications on the Constitutionality of DNA Dragnets*, 65 U. PITT. L. REV. 129, 138–39 (2003).

2. DNA Profiling Is a More Significant Intrusion than a Simple Oral Swab or Blood Test

Both *Kincade* and *Raines* considered the impact of the intrusion at the time the sample is extracted,¹¹⁷ but failed to fully take into account what is done with the sample once it has been collected.¹¹⁸ While *Kincade* seemed to recognize the importance of unlocking the DNA sequence, the plurality assumed that DNA profiles contain only a record of the subject's identity, much like a fingerprint.¹¹⁹ In fact, it is possible that "DNA fingerprints" contain more information than initially believed, increasing the potential harm if DNA databases were ever abused.¹²⁰ Based on the hypothesis that ever-increasing advances in technology will lead to ever-increasing intrusions of the person, Judge Reinhardt constructs a classic parade of horrors argument.¹²¹ "The power to assemble a permanent national DNA database . . . has catastrophic potential. If placed in the hands of an administration that chooses to 'exalt order at the cost of liberty,' the database could be used to repress dissent or, quite literally, to eliminate political opposition."¹²²

The potential threat to liberty concerns the profiles extracted from persons during the DNA dragnet who are not charged with the crime. The DNA Act does not allow for states to include DNA profiles of free citizens or even mere arrestees

117. *United States v. Kincade*, 379 F.3d 813, 836 (9th Cir. 2004).

[I]t is firmly established that "the intrusion occasioned by a blood test is not significant, since such tests are a 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."

Id. (quoting *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 625 (1989)) (internal quotation omitted); see also *Maryland v. Raines*, 857 A.2d 19, 31 (Md. 2004) (holding that a swab of the inner cheek is a minimal intrusion).

118. For an explanation of how forensic scientists use a DNA sample to construct a genetic fingerprint, see generally DNA EVIDENCE, *supra* note 24, at 65-69.

119. *Kincade*, 379 F.3d at 837.

120. Opponents of DNA fingerprinting reference scientific reports that suggest these genetic profiles may contain personal data including the contributor's race, sex, possible genetic defects, and genetic predisposition to diseases. See *Kincade*, 379 F.3d at 849-50 (Reinhardt, J., dissenting).

121. *Id.* at 847-55 (Reinhardt, J., dissenting).

122. *Id.* at 847 (Reinhardt, J., dissenting) (quoting *Whitney v. California*, 274 U.S. 357, 374 (1927) (Brandeis, J., dissenting)). The plurality brushes these concerns aside, however, suggesting the court will cross that bridge when it comes to it. *Id.* at 837-38.

into CODIS.¹²³ However, the DNA Act does not prevent police departments from keeping “suspect databases” containing the profiles of those swept up during the dragnet.¹²⁴ 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.¹²⁵

Additionally, the practice of retaining a physical DNA sample along with the DNA profile represents another possible threat to liberty.¹²⁶ While privacy risks associated with genetic fingerprints are debatable, it is scientifically well established that a physical DNA sample contains intimate personal information.¹²⁷ If the FBI or individual police departments were to release these genetic samples,¹²⁸ threats of genetic discrimination could arise.¹²⁹ While privacy legislation could reduce these

123. See 42 U.S.C. § 14132 (2000), amended by Justice For All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (setting qualifications for information in CODIS); DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. § 14135 (2000); cf. *Kincade*, 379 F.3d at 848 (Reinhardt, J., dissenting) (“CODIS also contains profiles of individuals who have been convicted of *no crime whatsoever* but have merely had the misfortune of *being arrested* in Louisiana, Texas, or Virginia.”).

124. It is common practice among police departments to retain these samples for private department-wide databases. See *supra* notes 30–31 and accompanying text.

125. See Grand, *supra* note 17, at 2307–09 (arguing that while case law permits the use of evidence in subsequent investigations, the continued use of DNA evidence extracted from free persons during a dragnet may fall outside the scope of consent).

126. *Kincade*, 379 F.3d at 850 (Reinhardt, J., dissenting) (noting that the FBI encourages all DNA labs to retain a physical sample of all evidence they collect for purposes of future retesting).

127. See COMM. ON DNA TECH. IN FORENSIC SCI., NAT’L RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE 113 (1992); Yeshulas, *supra* note 6, at 146–53. See generally Rebecca M. Bratspies, *Biotechnology Primer for Lawyers*, in ALI-ABA COMM. ON PROF’L EDUC., ENVIRONMENTAL, HEALTH, AND SAFETY REGULATION (2003) (explaining how DNA encodes genetic information).

128. Such information retained by the government may not be as secure as many people would desire. See Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1105 (2002) (arguing that information maintained by bureaucracies is “poorly regulated and susceptible to abuse”); Will, *supra* note 116, at 132–33 (explaining the highly personal and private nature of a person’s DNA).

129. One possible scenario of genetic discrimination involves a job applicant who is denied employment because he is genetically more likely to take sick leave, resign, or retire early for health reasons. Council for Responsible Genetics, *Genetic Discrimination: Position Paper*, at http://www.gene-watch.org/educational/genetic_discrimination.pdf (last visited May 4, 2005). Another scenario involves an insurance company denying coverage to certain individu-

threats, the absence of physical samples would go further toward eliminating the possibility of abuse.

Taken together, the threats to liberty produced by genetic testing represent a more serious level of intrusion than a mere swab of the inner cheek. Even if the government passed legislation requiring police departments to erase all “suspect databases” and destroy all physical samples, unlocking the DNA sequence remains an intrusion of its own.¹³⁰ Courts addressing DNA dragnets, as well as the DNA Act, should take this heightened level of intrusion into account when they balance the government’s need against the intrusion upon the individual.

3. The Government’s Interest in Crime Control, While Significant, Does Not Outweigh the Level of Intrusion upon the Individual

a. Raines Demonstrates that Even the Privacy Expectations of Incarcerated Persons Challenge the Government Interest in Crime Control

The court in *Raines* did not interpret the purpose of the Maryland DNA Act to be one of general crime control. Instead, the majority focused on Maryland’s “profound” interest in identifying criminals with DNA, as it does with mug shots or fingerprints.¹³¹ Judge Alan M. Wilner and Chief Judge Bell both disagreed with the majority on this interpretation, recognizing the true purpose of the Maryland DNA Act to be crime prevention.¹³² Both judges balanced the State’s interest in crime pre-

als because their genetic predispositions to diseases are preexisting conditions for insurance purposes. *Id.*; Human Genome Project Information, *Genetics Privacy and Legislation; Why Legislation Is Needed Now*, at http://www.ornl.gov/sci/techresources/Human_Genome/elsi/legislat.shtml (last modified Oct. 19, 2004).

130. *Maryland v. Raines*, 857 A.2d 19, 48–49 (Md. 2004) (Wilner, J., concurring) (arguing that the court should take into account the massive amount of information DNA contains when analyzing the impact of the intrusion upon the individual). For an interesting argument that genetic information is inseparable from the self and unlocking that information is an intrusion upon the self, see June Mary Z. Makdisi, *Genetic Privacy: New Intrusion a New Tort?*, 34 CREIGHTON L. REV. 965 (2001).

131. *Raines*, 857 A.2d at 29. Judge Raker concurs and writes separately because she argues that “the statute is constitutional on the narrow grounds that DNA sampling is an acceptable means of identifying prisoners, and on this basis alone, is reasonable.” *Id.* at 44 (Raker, J., concurring).

132. *Id.* at 49 (Wilner, J., concurring) (citing statistics that presently incar-

vention against the intrusion of DNA collection on the individual, the same analysis used by the plurality in *Kincade*. Judge Wilner weighed these interests in favor of Maryland,¹³³ but Chief Judge Bell came to the opposite conclusion, ruling against Maryland, because Maryland failed to articulate any argument to defeat the need for individualized suspicion.¹³⁴

In the final tally, three members of the Maryland Court of Appeals believed the State's interest to be identifying criminals, and four believed the State's interest to be crime prevention.¹³⁵ Four judges found that the State's interest, whatever it might be, outweighed the incarcerated person's expectation of privacy, and three judges believed that it did not.¹³⁶ Interestingly enough, three of the four judges who believed the State's interest to be crime prevention ruled against Maryland, favoring a presently incarcerated, convicted person's expectation of privacy over the State's interest in crime control.¹³⁷

Because the government interest in conducting DNA dragnets is undoubtedly crime resolution as opposed to citizen identification, these four judges' opinions are the most relevant to the present inquiry, suggesting that the Maryland Court of Appeals may rule against the State in a DNA dragnet case.

b. DNA Dragnets Are an Inefficient Means of Fulfilling the State's Legitimate Interest in Crime Control

The plurality in *Kincade* considered the government's interests in the federal DNA Act to be "undeniably compelling" for three reasons.¹³⁸ First, the Act created a means of identification to link current releasees to criminal acts they may commit while at large. Second, the Act provided a theoretical deter-

cerated persons have a high rate of recidivism and commenting on the State's interest in keeping tabs on their future criminal activity); *Id.* at 62 (Bell, C.J., dissenting).

133. *Id.* at 52 (Wilner, J., concurring).

134. *Id.* at 63 (Bell, C.J., dissenting).

135. Judge Dale R. Cathell, Judge Lynne A. Battaglia, and Judge Raker believe that the State's interest was to identify criminals, while Chief Judge Bell, Judge Wilner, Judge Glenn T. Harrell, and Judge Clayton Greene believe that the State's interest was crime prevention. *Id.* at 19.

136. Judge Cathell, Judge Battaglia, Judge Raker, and Judge Wilner rule in favor of the State, while Judge Harrell and Judge Greene join in Chief Judge Bell's dissent. *Id.*

137. Only Judge Wilner held that the State's interest is compelling over the privacy interest of the convict. *Id.* at 48-49 (Wilner, J., concurring).

138. *United States v. Kincade*, 379 F.3d 813, 838 (9th Cir. 2004).

rent for future crime because the releasees know their DNA is on file. Finally, the profiles may serve to facilitate the solving of past crimes.¹³⁹ Despite their exuberant tone, however, the plurality described interests that boil down to monitoring criminal activity, deterrence, and crime prevention—interests the state already effectively advances without the need for compulsive DNA profiling.¹⁴⁰

While the government's interest in crime prevention is undeniably significant, DNA dragnets are an inefficient means of fulfilling that interest. The profiles created during DNA dragnets are not fed into CODIS and thus do not provide a significant link from DNA to the identity of the individual.¹⁴¹ "Suspect databases" maintained by individual police departments may aid in the resolution of future crimes, but these local databases are less helpful than national databases because they are geographically limited. The dragnets themselves theoretically aid in solving crime by eliminating potential suspects, but these sweeps are "extremely unproductive" with police successfully identifying only one perpetrator in eighteen dragnets.¹⁴²

Further, *Kincade* noted that an individual's knowledge that their DNA is on file provides a theoretical deterrent for parolees and releasees. However, while the same deterrent would exist for free persons, most dragnetees are not told their sample will be kept and used against them in future investigations.¹⁴³ Without this knowledge, there is no deterrent.

Finally, DNA profiles of a free person might potentially aid in resolving past crimes, but the extent of that potential is unknown. While studies show post-convicted persons are prone to recidivism,¹⁴⁴ this reasoning does not apply to free persons, who have committed no crimes.¹⁴⁵

139. *Id.* at 838–39. The plurality considers the weight of these three interests together to be "monumental." *Id.* at 839.

140. *Id.* at 868–69 (Reinhardt, J., dissenting). Judge Reinhardt also criticizes the plurality for using superfluous language when describing the state's interest. *Id.*

141. See *supra* notes 30–31 and accompanying text.

142. See *DNA Dragnets*, *supra* note 22, at 6A (referencing a national study released by the University of Nebraska at Omaha in September 2004).

143. See Grand, *supra* note 17, at 2306–09.

144. *Kincade*, 379 F.3d at 839.

145. Nevertheless, it cannot be assumed that someone has never committed a crime, just because they have never been convicted of a crime. Thus, unless one assumes free persons are less likely to have committed a crime in the past, then suspect databases may be as helpful in solving past crimes

In conclusion, the government's interest in using DNA dragnets is outweighed by the privacy expectations of free persons. DNA dragnets may aid in solving specific crimes by eliminating potential suspects, or help solve past and future crimes by the use of "suspect databases" to store genetic fingerprints. However, this interest remains one of general crime control. The important Fourth Amendment question is whether the state's general crime-control interest outweighs the intrusion DNA dragnets represent to the privacy interests of the citizenry. If collecting DNA from post-convicted persons pushes the boundaries of constitutionality, as demonstrated by the contentious decisions in *Kincade* and *Raines*, then once free persons are singled out, the balance of interests should shift in favor of the free citizen. If states desire to continue using DNA dragnets, those searches cannot be justified by traditional Fourth Amendment balancing, and must find a home within a Fourth Amendment exception.

B. THE GOVERNMENT DOES NOT HAVE A "SPECIAL NEED" IN EITHER CONDUCTING DNA DRAGNETS OR MAINTAINING DNA DATABASES OF FREE CITIZENS

The "special needs" doctrine has been used to justify warrantless, suspicionless searches in various contexts, including compelled DNA collection from post-convicted persons.¹⁴⁶ However, the primary law enforcement purpose of DNA dragnets controverts the justification for the "special needs" exception.

In his concurring opinion in *Kincade*, Judge Ronald M. Gould upheld the DNA Act because its potential deterrent effect on those prone to recidivism represented a legitimate governmental "special need."¹⁴⁷ The Second¹⁴⁸ and Seventh Circuits have also upheld DNA acts by similar reasoning. For instance, in *Green v. Berge*, the Seventh Circuit upheld a Wisconsin DNA act because the program served as an effective means of identifying persons already seized by the State, much the same as fingerprints or mug shots.¹⁴⁹ However, these deci-

within their geographical limitations.

146. See *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003); *Roe v. Marcotte*, 193 F.3d 72, 78-82 (2d Cir. 1999); *supra* notes 80-83 and accompanying text.

147. See *Kincade*, 379 F.3d at 840-42 (Gould, J., concurring).

148. See *supra* notes 93-96 and accompanying text (discussing *Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999)).

149. *Green*, 354 F.3d at 679.

sions specifically limit their reasoning to databases of post-convicted persons, meaning these holdings are not directly applicable to programs that involve free persons.¹⁵⁰

Nevertheless, it may be possible to construct a “special needs” exception for the dragnets themselves or the “suspect databases” they create. In determining the legitimacy of a “special need,” the Supreme Court has considered “the governmental interest involved, the nature of the intrusion, the privacy expectations of the object of the search and, to some extent, the manner in which the search is carried out.”¹⁵¹ However, the Court has been “particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.”¹⁵²

In *City of Indianapolis v. Edmond*, the Court explicitly refused to extend the “special needs” exception to an automobile checkpoint program “justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.”¹⁵³ While the *Edmond* Court recognized the possibility of exigent circumstances justifying a checkpoint program, the Court distinguished between such emergency scenarios¹⁵⁴ and programs that “simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction.”¹⁵⁵ DNA dragnets, which search for a suspect by collecting DNA from persons vaguely connected to a victim, more closely resemble the

150. *Kincade*, 379 F.3d at 841 (Gould, J., concurring) (stating that the special need to maintain DNA from post-convicted persons is gone once that person has fully paid his or her debt to society and consequently their DNA profile should be erased); *Green*, 354 F.3d at 680 (Easterbrook, J., concurring) (stating that DNA collection from free persons would require “person-specific-cause” or at least a separate “special needs” analysis and stating that “[w]hat is ‘reasonable’ under the fourth amendment for a person on conditional release, or a felon, may be unreasonable for the general population”); *Marcotte*, 193 F.3d at 79–80 (referencing the statute’s provision for expungement of the profiles upon reversal or dismissal of a conviction as a necessary “safeguard” to temper the database’s intrusion into individual privacy).

151. *Green*, 354 F.3d at 678 (quoting *Shelton v. Gudmanson*, 934 F. Supp. 1048 (W.D. Wis. 1996)).

152. *City of Indianapolis v. Edmond*, 531 U.S. 32, 43 (2000).

153. *Id.* at 44.

154. For example, an emergency scenario may justify “an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.” *Id.*

155. *Id.*

latter scenario rejected by the Court.¹⁵⁶ Since the “special needs” doctrine only encompasses needs beyond ordinary law enforcement, and DNA dragnets are “indistinguishable from the general interest in crime control,” the dragnets cannot find a bastion within the exception.¹⁵⁷

As for the “suspect databases” the dragnets produce, the government could argue that it has a significant interest in creating a DNA database that falls into the “special needs” exception. In *United States v. Kimler*,¹⁵⁸ the Tenth Circuit upheld the DNA Act under the “special needs” exception because “the desire to build a DNA database goes beyond the ordinary law enforcement need.”¹⁵⁹ While this reasoning could also apply to DNA databases of free persons, the context of *Kimler* indicated that the Tenth Circuit was only referring to the existence of databases created by the DNA Act.¹⁶⁰ Further, in *Green v. Berge*,¹⁶¹ the Seventh Circuit, discussing *Kimler*, balanced the government’s interest in maintaining a DNA database with the “limited privacy interests that prisoners retain.”¹⁶²

With respect to “suspect databases,” any court examining a special need beyond normal law enforcement purposes must balance the government’s interest with the full expectation of privacy that free persons enjoy. While a complete DNA database of all citizens would certainly aid in solving crime, such a mass intrusion upon the populace would run contrary to the intent of the Founders.¹⁶³ Because police have little reason to suspect persons in “suspect databases” of ever having committed a crime, the balance of interest should once again weigh in favor of the individual.¹⁶⁴ Therefore, police departments will need to justify these practices by other means. One possibility

156. *Id.*

157. *Id.*

158. 335 F.3d 1132 (10th Cir. 2003).

159. *Id.* at 1146.

160. The preceding sentence in the opinion refers specifically to the DNA Act and its implication of the Fourth Amendment. *Id.*

161. 354 F.3d 675 (7th Cir. 2004).

162. *Id.* at 677.

163. See *United States v. Kincade*, 379 F.3d 813, 842–50 (9th Cir. 2004) (Reinhardt, J., dissenting) (discussing the purpose of the Fourth Amendment and the expansion of CODIS); *supra* notes 36–40 and accompanying text.

164. “Suspect databases” contain the DNA profiles of DNA dragnet “volunteers.” See Roberts, *supra* note 22, at 14A. Since these “volunteers” were never suspects, and they “volunteered” a sample simply to eliminate themselves as suspects, police have no reason to suspect them of ever committing a crime. See *id.*

is to include DNA extraction as part of an investigatory stop, while another is to ask people to waive their Fourth Amendment rights and consent to the searches.

C. CONDUCTING WARRANTLESS, SUSPICIONLESS SEARCHES FOR DNA FALLS OUTSIDE THE SCOPE OF INVESTIGATORY TERRY STOPS

1. Involuntary Detentions, However Brief, for the Purpose of Obtaining a DNA Sample Are Unconstitutional

Davis v. Mississippi and *Hayes v. Florida* both held that warrantless detentions for the purpose of obtaining fingerprints violate the Fourth Amendment.¹⁶⁵ The story of at least one dragnetee, Floyd Wagster, eerily resembles that of John Davis. In August 2002, Baton Rouge police contacted Wagster, telling him that he was wanted for questioning.¹⁶⁶ After attempting unsuccessfully to contact his lawyer, Wagster left the house to run some errands.¹⁶⁷ Less than a half mile from his house he was stopped by a local deputy, ordered to exit his van, handcuffed, taken to the police station, interrogated, and asked to provide a DNA sample.¹⁶⁸ In 1965, John Davis experienced similar trouble from police. After a rape, in which the victim could only identify the assailant as African American, police questioned forty or fifty African American youths. Davis, who occasionally worked for the victim, was brought into the station, questioned, and fingerprinted without probable cause.¹⁶⁹

The Court found in favor of Davis, holding warrantless seizures for the purpose of collecting fingerprints unconstitutional.¹⁷⁰ After recognizing the reliability of fingerprinting and the limited intrusion that fingerprinting represents, the Court nevertheless held that because there is no danger of destruction of fingerprints, no exception applied to justify the absence

165. See *supra* notes 58–65 and accompanying text.

166. See Hansen, *supra* note 17, at 38.

167. See *id.*

168. See *id.*

169. See *Davis v. Mississippi*, 394 U.S. 721, 722 (1969). Joe Hayes received treatment similar to Davis. See *Hayes v. Florida*, 470 U.S. 811, 814 (1985) (“Here, as in *Davis*, there was no probable cause to arrest, no consent to the journey to the police station, and no judicial authorization for such a detention for fingerprinting purposes.”).

170. See *supra* notes 58–63 and accompanying text.

of a warrant.¹⁷¹ DNA samples, which are more intrusive than fingerprints, share the same permanence as fingerprints.¹⁷² Thus, involuntary detentions for the purpose of collecting DNA should be unconstitutional according to *Davis*, meaning Wagster's Fourth Amendment rights were violated.¹⁷³ Had Wagster been charged with the Louisiana slayings, the admission of DNA evidence would certainly have been objectionable.

2. Without Reasonable Suspicion, Police Have No Authority To Compel DNA Samples in the Field

The dictum in *Hayes*, regarding the permissibility of in-field fingerprinting, does not apply to Wagster, because Wagster was involuntarily detained. However, it is likely that most dragnetees succumb to DNA tests in the field.¹⁷⁴ The majority in *Hayes* suggested a three-part test for determining the constitutionality of seizures in the field to obtain fingerprints: (1) if there was reasonable suspicion that the suspect committed a criminal act, (2) if there is a reasonable basis for believing that fingerprints will establish or negate the suspect's connection with that crime, and (3) if the procedure is carried out with dispatch.¹⁷⁵

In the context of DNA dragnets, the second factor is easily met. If police recover DNA from a crime scene, collecting DNA from any person will help establish or negate that person's connection to the crime. The third factor is also easily fulfilled, because collecting DNA involves only a swab of the inner cheek, which can be accomplished in seconds. However, the standard DNA dragnet procedure cannot satisfy the first requirement—reasonable suspicion.

"Articulating precisely what 'reasonable suspicion'... mean[s] is not possible. [It is a] commonsense, nontechnical conception[] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men . . . act."¹⁷⁶ Nevertheless, when detaining someone based

171. *Davis*, 394 U.S. at 727–28.

172. *See supra* Part IV.A.2.

173. *Cf. Grand, supra* note 17, at 2294–98.

174. *Cf. Will, supra* note 116, at 138, 143 (suggesting that the dicta in *Davis* might be sufficient to sustain warrantless stops for the purpose of collecting DNA).

175. *See Hayes v. Florida*, 470 U.S. 811, 816–17 (1985).

176. *See Ornelas v. United States*, 517 U.S. 690, 695 (1996) (internal quotations and citations omitted).

upon reasonable suspicion, the “detaining officers must have a *particularized and objective* basis for suspecting the particular person stopped of criminal activity.”¹⁷⁷ For example, in *Knights*, when Napa County police deputies entered Knights’s apartment with “reasonable suspicion,” they had eyewitness accounts of Knights disposing of objects believed to be pipe bombs.¹⁷⁸ Further, in *Adams v. Williams*, a *Terry* stop case upon which *Hayes* draws support for its dicta, Police Sergeant John Connolly’s “reasonable suspicion” arose when a known informant told Connolly that Williams was carrying a weapon.¹⁷⁹

Unlike *Knights* and *Williams*, the typical dragnetee has not engaged in any suspicious activity. By definition, DNA dragnets involve persons who are not suspects, and who have only a vague connection to the victim or the crime scene.¹⁸⁰ Being the neighbor, fellow student, or co-worker of a victim is not a particularized fact relevant enough to cause a prudent person to reasonably suspect an individual of committing a crime. Police may still talk to individuals on the street without detaining them, but simply asking for a DNA sample might represent sufficient authority to constitute a seizure of the person.¹⁸¹ Consequently, without reasonable suspicion, police have no authority to detain a person in the field for the purpose of collecting their DNA.¹⁸² If investigatory stops for the purpose of collecting DNA violate the subject’s Fourth Amendment rights according to *Terry*, *Davis*, and *Hayes*, then the only avenue remaining for the constitutionality of DNA dragnets is for police to obtain consent from all dragnetees.

177. *United States v. Cortez*, 449 U.S. 411, 417–18 (1981) (emphasis added).

178. *See United States v. Knights*, 534 U.S. 112, 114–15 (2001).

179. *See Hayes*, 470 U.S. at 816; *Adams v. Williams*, 407 U.S. 143, 144–45 (1972). Indeed, for a *Terry* stop to be reasonable the officer must observe the individual’s suspicious behavior at close range. *Terry v. Ohio*, 392 U.S. 1, 24–25 (1968). This criterion suggests that the officer must have some particularized reason to suspect the individual of not only carrying a weapon, but also be involved in some sort of criminal activity. *See id.*

180. *See supra* notes 23–27 and accompanying text.

181. *Cf. Dunaway v. New York*, 442 U.S. 222 (1979) (Rehnquist, C.J., dissenting) (arguing that nothing in the Constitution forbids police officers from asking people if they are willing to talk). The circuit courts have identified several factors for determining when an investigatory seizure has taken place; many involve the individual’s belief that he has no right to leave the conversation. For an argument that DNA dragnets may constitute a seizure in violation of the Fourth Amendment on these grounds, see Grand, *supra* note 17, at 2293–98.

182. *See LAFAVE, supra* note 57, at 545–46.

D. IT MAY BE IMPOSSIBLE TO VOLUNTARILY CONSENT TO THESE DNA SEARCHES

The constitutionality of DNA dragnets becomes a nonissue if all dragnetees waive their Fourth Amendment protections. DNA dragnets are usually conducted on a consent basis for this reason.¹⁸³ However, consent is not legitimate unless it is voluntary, and the very purpose of DNA dragnets—to stir up a suspect—may preclude the possibility of voluntary consent.

In some cases, elements of coercion predominate the encounter between police officers and dragnetees.¹⁸⁴ For example, when Floyd Wagster was taken into police custody, Major Bud Connor, the chief of detectives, told him, “You gonna give DNA. We’re gonna go get a court order to get it from you.”¹⁸⁵ According to Wagster, Connor threatened him with jail time and threatened to tell the media that Wagster was not cooperating, making him a suspect in a high-profile murder investigation.¹⁸⁶

Based upon Wagster’s own statements, an objective police officer could not reasonably believe the consent to be voluntary.¹⁸⁷ Connor’s threats of jail time, informing the media, and obtaining a court order each constituted coercion. However, Wagster’s case was probably an outlier, as the typical dragnetee is probably not threatened to this extent. Nevertheless, the nature of the dragnet implies strong elements of coercion, including the threat to apply for or obtain a court order, the psychological impact of being a suspect, the lack of knowledge regarding one’s right to refuse consent, and the lack of knowledge regarding the scope of one’s consent.

Threatening to obtain a search warrant when there is not probable cause to obtain one carries a similar level of coercion as the *Bumper* situation, where police officers falsely represented they had a search warrant.¹⁸⁸ “[I]t may generally be said

183. See *supra* note 26 and accompanying text.

184. See, e.g., Grand, *supra* note 17, at 2305 (discussing Blair Shelton’s alleged harassment); Hansen, *supra* note 17, at 38–41 (discussing Floyd Wagster’s allegations of coercion).

185. Hansen, *supra* note 17, at 40.

186. *Id.*

187. See *DNA Suit Issues*, *supra* note 11, at 6A; Hansen, *supra* note 17, at 40; Roberts, *supra* note 22, at 14A.

188. *United States v. Faruolo*, 506 F.2d 490, 496 (2d Cir. 1974) (Newman, J., concurring) (“If he consents because he has been led to believe that obtaining a warrant is a virtually automatic formality, then regardless of his apparent willingness to permit the search, he has responded to a situation as ‘instinct with coercion’ as the one in *Bumper*.”); LAFAYE, *supra* note 57, at 187

that a threat to *obtain* a search warrant is likely to be held to invalidate a subsequent consent if there were not then grounds upon which a warrant could issue. . . ."¹⁸⁹ Refusal alone cannot constitute such grounds because the Court has "consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."¹⁹⁰ Since there could be many reasons why a dragnetee would not want to yield a sample that does not relate to the particular case the police are investigating,¹⁹¹ police should need more than mere refusal to obtain a court order. Consequently, threats to obtain such an order misrepresent police authority and are strongly coercive.¹⁹²

The difference between threatening to *obtain* a court order and threatening to *apply for* a court order permits police to represent to dragnetees that they will become suspects if they do not consent to the search.¹⁹³ However, because of psychological

("The only noticeable difference between a false claim that a warrant *has been* obtained and a false claim that a warrant *will* be obtained is that the latter is less immediate; it threatens a search soon but not instantly.")

189. LAFAVE, *supra* note 57, at 188.

190. *Florida v. Bostick*, 501 U.S. 429, 437 (1991). Further, refusal alone cannot constitute reasonable suspicion because reasonable suspicion based solely on refusal to consent to a search produces a situation where police get a sample regardless of whether an individual consents or not. This catch-22 situation seems to invalidate the need for consent-based searches and disregard the Fourth Amendment entirely. *Cf. Davis v. Mississippi*, 394 U.S. 721, 726 (1969) ("[T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purpose of the Fourth Amendment . . . to prevent wholesale intrusions upon the personal security of our citizenry.")

191. William Moffitt, past president of the National Association of Criminal Defense Lawyers argued:

You could have 100 reasons why you don't want to give your DNA that doesn't relate to this particular case. . . . You don't know what's going to happen to it, you don't know where it's going to be kept, you don't know whether they're holding a database. Another good reason is "I may have committed another crime that I don't want you to know about."

60 *Minutes*, *supra* note 14.

192. Police cannot misrepresent their authority for the purpose of obtaining consent. *See Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968); *Holloway v. Wolff*, 482 F.2d 110, 114 (8th Cir. 1973); *United States v. Cruz*, 701 F. Supp. 440, 447-48 (S.D.N.Y. 1988) (favoring a public policy that excludes evidence obtained by misrepresentation of facts); *see also Grand*, *supra* note 17, at 2305 (arguing that DNA dragnets represent the same type of coercion present in *Bumper* and suggesting that a court would not uphold such a search on these grounds).

193. *See LAFAVE*, *supra* note 57, at 185-86 (arguing that only the most sophisticated of persons can distinguish between threat to obtain an order now

factors inherent in DNA dragnets, these scenarios are distinguishable from the day-to-day situations where police advise citizens that a warrant can be issued. Dragnetees must choose between maintaining their genetic privacy for the limited time before a warrant can be issued and being a suspect in a high-profile rape or murder investigation.¹⁹⁴

Psychological studies suggest that an ethos of obedience is socially ingrained in most people to such a large extent that being faced with legitimate authority impairs one's ability to make decisions affecting their constitutional rights.¹⁹⁵ When this innate tendency toward obedience is coupled with the threat of both the police and the news media prying into all aspects of a dragnetee's personal life, refusing consent might not seem like a choice at all.¹⁹⁶ Since psychological factors, such as coercive situations or locations, can play a role in the voluntariness of consent,¹⁹⁷ being asked to eliminate oneself as a potential suspect should constitute an element of coercion.¹⁹⁸

Further, dragnetees may not realize the total scope of their consent, because they are not fully informed about what may happen to their DNA.¹⁹⁹ They may falsely assume that it will be destroyed when they are ruled out as a suspect, and may not realize that their DNA is likely to be kept on file with the local police for an extended period of time.²⁰⁰ If knowledge of one's right to refuse consent is a relevant factor in determining voluntariness,²⁰¹ then knowledge of the scope of one's consent also

and the threat that an order may be obtained).

194. Compare this to *Hayes v. Florida*, 470 U.S. 811, 812 (1985), where the Court frowned on police approaching Hayes at his home, asking him to submit to fingerprinting, and threatening to arrest him if he did not comply.

195. Marcy Strauss, *Criminal Law: Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 236-44 (2001) (referencing numerous psychological studies to argue that most people would not feel free to deny an officer's request, even if it was against their best interest to do so).

196. See, e.g., Willing, *supra* note 17, at 2A.

197. Cf. *Florida v. Bostick*, 501 U.S. 429, 439 (1991) (recognizing the significance of the cramped confines of a bus on a consenting person's state of mind).

198. The only benefit of consenting is being released as a suspect, but courts in other contexts have found coercion when police obtain consent by offering a carrot with one hand and holding a stick with the other. See, e.g., *Louisiana v. Alexis*, 514 So. 2d 561, 564-65 (La. Ct. App. 1987).

199. See Grand, *supra* note 17, at 2306-10.

200. See *id.* (arguing that even if the initial consent is voluntary, keeping a DNA sample on file falls outside the scope of consent).

201. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *People v. Richards*, 500 N.Y.S.2d 767, 768 (N.Y. App. Div. 1986); *Pennsylvania v. Walsh*,

seems to be relevant. Thus, the dragnetees' lack of knowledge regarding the scope of their consent should play a role in determining voluntariness. Taken together with the fear of becoming a suspect and the threat to obtain a court order, simply asking for a DNA sample might represent enough coercion to negate the voluntariness of consent.

Proponents of DNA dragnets may argue that pointing out individual instances of police misconduct or identifying individual elements of coercion does not mean the practice is inherently coercive. For instance, courts generally permit police officers to engage in the "knock and talk" procedure,²⁰² a similar police practice to dragnets, where officers confront individuals at their homes, and ask permission to search their residences.²⁰³ Even courts that find the situation to be inherently coercive nevertheless allow the practice in the absence of further police misconduct.²⁰⁴ The "knock and talk" procedure may push the envelope of constitutionality and should be scrutinized carefully, but it is not per se unconstitutional.²⁰⁵

However, the analogy between DNA dragnets and "knock and talk" encounters is not entirely apt, as "knock and talk" encounters are used to investigate suspicious activity while DNA dragnets are used to create suspicion.²⁰⁶ If "knock and talk" searches push the boundaries of constitutionality as they are, it is doubtful that any court would uphold the use of such inherently coercive tactics when police have absolutely no suspicion of wrongdoing. Further, DNA dragnets are arguably more coercive than "knock and talk" encounters because dragnetees often

460 A.2d 767, 771 (Pa. 1983).

202. See *United States v. Hardeman*, 36 F. Supp. 2d 770, 777-78 (E.D. Mich. 1999) (defining the "knock and talk" as "a noncustodial procedure [in which] the officer identifies himself and asks to talk to the home occupant and then eventually requests permission to search the residence" (internal citations omitted)).

203. See *Estate of Smith v. Marasco*, 318 F.3d 497, 519 (3d Cir. 2003); *United States v. Jerez*, 108 F.3d 684, 691-92 (7th Cir. 1997).

204. See, e.g., *Washington v. Ferrier*, 960 P.2d 927, 933-34 (Wash. 1998).

205. See *Hayes v. Indiana*, 794 N.E.2d 492, 497 (Ind. Ct. App. 2003).

206. See, e.g., *United States v. Holt*, 264 F.3d 1215, 1219 (10th Cir. 2001) (documenting an instance where an assistant district attorney concluded that there was not enough evidence to obtain a warrant, but suggested that police utilize the "knock and talk" technique). The "knock and talk" procedure is most commonly used in drug enforcement cases when police have complaints about drugs being sold out of a house, but do not have enough evidence to obtain a warrant. See, e.g., *United States v. Johnson*, 170 F.3d 708, 711 (7th Cir. 1999); Craig Hemmens, *I Hear You Knocking: The Supreme Court Revisits the Knock and Announce Rule*, 66 UMKC L. REV. 559, 595 n.382 (1998).

do not have the ability to retreat into their home, and “knock and talk” encounters do not usually involve the threat of becoming a suspect in a high-profile investigation.²⁰⁷

Nevertheless, proponents might argue that DNA dragnets could be constitutional if steps were taken to reduce the elements of coercion. However, the purpose of the dragnet precludes the application of mitigating procedures. To mitigate the coercive effects of DNA dragnets, dragnetees must be informed of their right to refuse consent and be released from the burden of being a suspect if they exercise that right. Dragnetees must also be made aware that their DNA sample could be used against them in future criminal investigations if they comply with the search. If significantly fewer people consent as a result of learning this information, then the dragnet has failed to reduce the field of potential suspects. Instead, the search merely yields a database of persons who have probably never committed a crime.²⁰⁸ The limited usefulness of the search conducted using mitigating procedures seems to negate the purposes in conducting the dragnet in the first place—catching a specific criminal and stirring up a potential suspect. Consequently, to stir up a suspect and ensure the dragnet’s effectiveness, police *must* represent to persons that they *will* become suspects if they do not consent. Once police make that representation, the elements of coercion once again arise and voluntary consent becomes unlikely.

CONCLUSION

The fact that the government can approach an individual, obtain a sample of his or her DNA without voluntary consent, and use that sample to construct a genetic profile that could be used against that person in a future criminal investigation is disturbing to the very core of the Fourth Amendment. Courts have allowed such searches on people like Thomas Kincade and Charles Raines because of their status as post-convicted persons. Because of this status, Kincade and Raines have a lowered expectation of privacy and the government has a raised interest in their identity. However, as the cases of *Kincade* and *Raines* demonstrate, compelled DNA collection from post-

207. Since the police utilize the “knock and talk” technique to investigate suspicion, residents are more or less placed on notice of that suspicion, while dragnetees are given a choice between being suspected of a crime or allowing the search.

208. See *supra* note 27.

convicted persons satisfies the Fourth Amendment only by the narrowest of margins.

Despite this, states increasingly conduct DNA searches of free persons in DNA dragnets. The full privacy expectations of free citizens should shift the balance in favor of the individual, making compelled extraction unconstitutional. Further, these warrantless, suspicionless searches are instinct with coercion, making voluntary consent unlikely, if not impossible. Nevertheless, individuals like Floyd Wagster, who have committed no crime and who have no diminished privacy expectations, are required to provide a DNA sample to the state. Passing legislation to regulate DNA dragnets is not the answer, because the practice itself violates the Fourth Amendment. As Thomas Jefferson once warned, “[t]he time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.”²⁰⁹

209. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 121 (William Peden ed., 1982).