

1-1-2003

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Recommended Citation

8 Suffolk J. Trial & App. Advoc. 133 (2003)

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DNA DRAGNET PRACTICES: ARE THEY CONSTITUTIONAL?

I. INTRODUCTION

The police know who committed the atrocious murder of twenty-one-year-old Julie Busken - not by name, but by the DNA he left behind in Julie's car.¹ On December 20, 1996, Julie had just finished her final semester of college at the University of Oklahoma. She was on her way to Arkansas for Christmas break but never made it home. Police found Julie raped and shot to death near a lake in Oklahoma not far from her apartment.² Upon inspection of the crime scene, police found no evidence to link them to the suspect, except for the DNA evidence left behind as a result of the rape. Armed with nothing more than the perpetrator's DNA, the police tested 200 men who either lived near Julie or had a record of criminal violence.³ The warrantless search, referred to as a DNA dragnet, yielded no matches. Nevertheless, police plan to conduct another DNA dragnet of the same magnitude for Julie's murderer.⁴

In the past few years, at least five DNA dragnets have been conducted in America.⁵ Among the first occurred in San Diego, California during a police search for a serial killer who murdered six women between January and September 1990.⁶ Detectives investigated the neighborhoods near the crime scenes and requested blood and saliva samples from 800

¹ See *Oklahoma Police Launch DNA Dragnet*, OKLAHOMA CITY ASSOCIATED PRESS, June 7, 2001.

² See *id.*; see, e.g., Jennifer L. Brown, *Police Begin Genetic Dragnet: 200 Tested, Raising Privacy Concerns*, THE TIMES-PICAYUNE (NEW ORLEANS), May 31, 2001 (addressing DNA dragnet practices, focusing on case of Julie Busken); see Julie DelCour, *How Far Is Too Far? DNA Dragnets Widen To Catch Attackers*, THE TULSA WORLD, June 3, 2001 (addressing DNA dragnet practices, focusing on case of Julie Busken); see also *Good Morning America* (ABC World News television broadcast, June 1, 2001) (broadcast focused on case of Julie Busken, use of DNA dragnet to catch killer).

³ See *Oklahoma Police Launch DNA Dragnet*, OKLAHOMA CITY ASSOCIATED PRESS, June 7, 2001.

⁴ See *id.*

⁵ See Richard Willing, *Privacy Issue Is The Catch For Police DNA 'Dragnets,'* USA TODAY, Sept. 16, 1998.

⁶ See Philip P. Pan, *Pr. Georges, The Chief Has Used Serial Testing Before; Farrell Oversaw DNA Sampling of 2,300 in Florida*, WASH. POST, Jan. 31, 1998.

men matching a general description of the perpetrator.⁷ One of the men was the killer.⁸

In Dade County, Florida, 2,300 men were tested in 1995 in an attempt to locate the killer of six prostitutes who dumped his victims outside the Miami city limits.⁹ Yet again in 1995, a DNA dragnet was conducted in Ann Arbor, Michigan, for a serial rapist and murderer.¹⁰

In 1998, in Prince Georges' County, Maryland, a fifty-year-old nursing administrator was found bound, raped, and strangled to death in her office.¹¹ After discovering the crime, police performed a DNA dragnet to search for her killer.¹² Since then, the county police chief has been collecting saliva samples in a mass collection that is expected to total 400 men who either worked at or visited the medical center.¹³ The latest of these searches is the search for Julie Busken's killer.¹⁴ This tragic murder is the most recent case in the debate over the appropriateness of DNA dragnet practices in America.¹⁵

The practice of conducting DNA dragnets is a fast-growing evidentiary tool that has received wide acceptance abroad in countries such as England, Germany, and France.¹⁶ This international trend has influenced

⁷ See *id.*

⁸ See *id.*

⁹ See *id.*; see also Willing, *infra* note 16 and accompanying text.

¹⁰ See *Dateline NBC: Blood Simple* (NBC television broadcast, July 19, 1998); see also Willing, *infra* note 16 and accompanying text.

¹¹ See Philip P. Pan, *Pr. Georges' Does Mass DNA Testing; Police Request Saliva from All Men Questioned in Hospital Slaying Probe*, WASH. POST, Jan. 30, 1998.

¹² See Willing, *infra* note 16 and accompanying text; see also Philip P. Pan, *Pr. Georges' Does Mass DNA Testing; Police Request Saliva from All Men Questioned in Hospital Slaying Probe*, WASH. POST, Jan. 30, 1998; *Dateline NBC: Blood Simple* (NBC television broadcast, July 19, 1998).

¹³ See *id.*

¹⁴ See *Oklahoma Police Launch DNA Dragnet*, OKLAHOMA CITY ASSOCIATED PRESS, June 7, 2001 (focusing on case of Julie Busken); see also Julie DelCour, *How Far is Too Far? DNA Dragnets Widen to Catch Attackers*, THE TULSA WORLD, June 3, 2001 (focusing on case of Julie Busken); Jennifer L. Brown, *Police Begin Genetic Dragnet: 200 Tested, Raising Privacy Concerns*, THE TIMES-PICAYUNE (NEW ORLEANS), May 31, 2001 (focusing on case of Julie Busken - legitimacy of DNA dragnet in Oklahoma); *Good Morning America* (ABC World News television broadcast, June 1, 2001) (broadcast focused on case of Julie Busken, DNA dragnet legitimacy).

¹⁵ See *Good Morning America* (ABC World News television broadcast, June 1, 2001).

¹⁶ See Lynn Fereday, *Comments at the Meeting of National Commission on the Future of DNA Evidence* (July 26, 1999); see also Richard Willing, *Many Rapists Were Thieves First; Results May Lead to Taking Of DNA For Lesser Crimes*, USA TODAY, July 10, 2000, at 3A. This article outlines the fact that the dragnetting approach is more common in Europe. *Id.* For example, in Germany, 16,400 men were tested in connection with the investigation of a single rape and murder. *Id.* Following the Narborough murders, British police made extensive use of DNA dragnet practices in investigations, allowing sampling based only on an officer's suspicions. *Id.*; see also Richard Willing, *Privacy Issue*

American evidentiary processes as well as American courts.¹⁷ Moreover, each of the fifty United States have passed legislation authorizing the use of criminal DNA databases.¹⁸ As of March 2000, all fifty states maintain operational DNA databases that include the DNA records for sex offenders and perpetrators of several felonies and lesser crimes.¹⁹

Although this debate has not yet come before the Supreme Court, it is ripe for consideration. Arguably, if the Supreme Court were to consider whether the practice of conducting DNA dragnets was constitutional, the

Is The Catch For Police DNA 'Dragnets,' USA TODAY, Sept. 16, 1998.

¹⁷ See Aaron P. Stevens, *Arresting Crime: Expanding The Scope Of DNA Databases In America*, 79 TEX. L. REV. 921 (March 2001); see also Allison Puri, *An International DNA Database: Balancing Hope, Privacy And Scientific Error*, 24 B.C. INT'L & COMP. L. REV. 341 (Spring 2001); Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 WAKE FOREST L. REV. 767 (Fall 1999); see also *People v. King*, 99 Cal. Rptr. 2d 220, 227 (2000) (noting DNA testing helps government ensure innocent persons not needlessly investigated). The California court held that the government had an interest in solving past and future crimes and in discouraging criminals from recidivist activities. *Id.* The court also noted, while DNA evidence works toward achieving these objectives, it also serves the purpose of helping investigators rule out innocent suspects. *Id.*

¹⁸ See ALA. CODE § 36-18-24 (Supp. 2000); ALASKA STAT. § 44.41.035 (Michie 2000); ARIZ. REV. STAT. ANN. § 13-4438 (West Supp. 2000); ARK. CODE ANN. § 12-12-1105 (Michie 1999); CAL. PENAL CODE § 295 (West 1999); COLO. REV. STAT. § 17-2-201 (1998); CONN. GEN. STAT. ANN. § 54-102g (West Supp. 2000); DEL. CODE ANN. tit. 28, § 4713 (1997); FLA. STAT. ANN. § 943.325 (West 1996 & Supp. 2001); GA. CODE ANN. § 24-4-60 (1995 & Supp. 2000); HAW. REV. STAT. ANN. § 706-603 (Michie 1999); IDAHO CODE § 19-5501 (Michie 1997); 730 ILL. COMP. STAT. ANN. 5/5-4-3 (West 1997 & Supp. 2000); IND. CODE ANN. § 10-1-9-1 (West Supp. 2000); IOWA CODE ANN. § 13.10 (West 2000); KAN. STAT. ANN. § 21-2511 (1995 & Supp. 2000); KY. REV. STAT. ANN. § 17.170 (Michie 1996); LA. REV. STAT. ANN. § 15:605 (West Supp. 2000); ME. REV. STAT. ANN. tit. § 25, 1571 (West Supp. 2000); MD. CODE ANN., CTS. & JUD. PROC. § 10-915 (1998 & Supp. 2000); MASS. GEN. LAWS CH. 22E, § 2 (West Supp. 2000); MICH. COMP. LAWS ANN. § 28.171 (West Supp. 2000); MINN. STAT. ANN. § 299C.155 (West 1999); MISS. CODE ANN. § 45-3337 (2000); MO. REV. STAT. § 650.050 (Supp. 1992); MONT. CODE ANN. § 44-6-102 (1999); NEB. REV. STAT. § 29-4104 (Supp. 2000); NEV. REV. STAT. 176.0913 (2000); N.H. REV. STAT. ANN. § 632-A: 21 (Supp. 2000); N.J. STAT. ANN. § 53:1-20.18 (West Supp. 2000); N.M. STAT. ANN. § 29-16-4 (Michie 1997); N.Y. EXEC. LAW § 995-c (McKinney 1996 & Supp. 2001); N.C. GEN. STAT. § 15A-266.4 (1999); N.D. CENT. CODE § 31-13-03 (1996 & Supp. 1999); OHIO REV. CODE ANN. § 2801.07 (West 1997 & Supp. 2000); OKLA. STAT. ANN. tit. § 74, 150.27 (West 1995); OR. REV. STAT. § 137.076 (1999); 35 PA. CONS. STAT. ANN. § 76511.302 (West Supp. 2000); R.I. GEN. LAWS § 12-1.5-4 (2000); S.C. CODE ANN. § 23-3-610 (Law. Co-op. 1997); S.D. CODIFIED LAWS § 23-5-14 (Michie 1998 & Supp. 2000); TENN. CODE ANN. § 40-35-321 (1997 & Supp. 2000); TEX. GOV'T CODE ANN. § 411.142 (Vernon 1998); UTAH CODE ANN. § 53-5-212.4 (1998); VT. STAT. ANN. tit. § 20, 1936 (2000); VA. CODE ANN. § 19.2-310.2 (Michie 2000); WASH. REV. CODE ANN. § 43.43.f752 (West 1998); W. VA. CODE ANN. § 15-2B-4 (Michie 2000); WIS. STAT. ANN. § 165.77 (West 1997 & Supp. 2000); WYO. STAT. ANN. § 7-19-402 (Michie 1999).

¹⁹ See *id.*; see also Kathey Pruitt, *House Oks DNA Prisoner File*, THE ATLANTA J. & CONST., Mar. 10, 2000, at E1, available at 2000 WL 5445627 (attributing explosion of state DNA databases to availability of federal funding for such undertakings).

large weight of the cases would suggest that it would pass constitutional muster. The shocking implications this would have would be to subject free citizens to DNA dragnets absent a warrant or probable cause. These searches and seizures, albeit violating the most fundamental mandates of the Fourth Amendment, are presumably supported by notions of legitimate governmental interests and therefore could be upheld as constitutional. This practice should not be allowed and the Supreme Court should strike down any efforts to legitimize the enforcement of DNA dragnets upon free citizens.

Part I of this Note addressed the practice of conducting DNA dragnets across America. Part II examines the constitutional implications of conducting DNA dragnets, including an analysis of the seminal Fourth Amendment decisions regarding searches and seizures, the warrant clause, and issues that will ultimately influence how the Supreme Court will handle this controversy. Part III examines the levels of privacy expectations of Americans, comparing free citizens' expectations of privacy to those of convicted felons. Part IV raises and analyzes decisions in Massachusetts that will impact the choice of whether or not to implement DNA dragnet practices within the Commonwealth. Part V concludes the discussion by offering the premise that DNA dragnet practices should not be upheld as constitutional and that the Supreme Court should not support their validity because to do so would be to compromise the protections that the Fourth Amendment guarantees all free citizens of the United States.

II. HISTORY

The Fourth Amendment provides “[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause”²⁰ This is a fundamental right to privacy that is guaranteed to all free persons in the United States implicit in the concept of ordered liberty and recognized by the Supreme Court through the Fourth Amendment to the United States Constitution.²¹ It should be noted, however, that “the Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as ‘legitimate.’”²² As a result, not all

²⁰ U.S. CONST. amend. IV. The Fourth Amendment applies to the states through the Fourteenth Amendment. See *Shepherd v. State*, 690 N.E.2d 318, 322 (Ind. Ct. App. 1997).

²¹ See *Katz v. U.S.*, 389 U.S. 347, 351 (1967) (explaining Fourth Amendment provides no general right to privacy, but protects what citizens seek to preserve as private).

²² See *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 654 (1995) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985)) (holding legitimate privacy expectation depends upon individual's location and relationship to state when violation occurs).

aspects of one's private life are safe from governmental searches and seizures, even without a warrant and even absent probable cause.²³

For example, in 1966, the Supreme Court in *Schmerber v. California*²⁴ held that the taking of a blood sample from an individual constitutes a search within the meaning of the Fourth Amendment.²⁵ The Court asserted that this type of search expressly delves into the protections of personal privacy and dignity that Americans deem basic necessities for a free society.²⁶ In *Schmerber*, the petitioner was arrested for driving while intoxicated and subjected to a blood test without his consent.²⁷ The Court held that this search and seizure, while conducted without a warrant, was not considered a violation of petitioner's Fourth Amendment rights because the police had probable cause to believe the suspect was intoxicated prior to taking the blood sample.²⁸ The Court further reasoned that obtaining a warrant could have resulted in the loss of evidence because of the time delay in securing the warrant.²⁹ This case, for the first time, addressed the Fourth Amendment issue with respect to intrusions into the human body rather than with respect to state interferences with private property, houses, and effects.³⁰

The Supreme Court ultimately holds that whether a particular search violates an individual's Fourth Amendment rights depends upon whether

²³ See *id.*

²⁴ 384 U.S. 757 (1966).

²⁵ See *id.* at 767.

²⁶ See *id.* (holding blood tests conducted in reasonable manner do not violate person's Fourth Amendment rights). The issue in *Schmerber* was whether the chemical analysis, introduced as evidence in the case, should have been excluded as the product of an unconstitutional search and seizure. *Id.* at 767. The controversy rested on whether the police were justified in requiring petitioner to submit to the blood test and whether the means of taking his blood respected relevant Fourth Amendment standards of reasonableness. *Id.* at 767-68. The Court concluded that blood tests were conducted in a reasonable manner and did not violate petitioner's Fourth Amendment rights. *Id.* at 771-72.

²⁷ See *id.* at 758-59. The facts in *Schmerber* establish that police had 'probable cause' to conduct the blood tests, but that no warrant was issued. *Id.* at 768-70.

²⁸ See *id.* at 771-72. The Court reasoned that the Fourth Amendment's warrant requirement was waived because the police officer might have reasonably believed he was confronted with an emergency situation in which the delay necessary to obtain a warrant threatened to destroy the evidence (i.e., the blood alcohol level apparent in the petitioner's body at the time his blood was drawn). *Id.* at 770. The Court carved out a 'special needs exception' to the warrant requirement: i.e., if time is of the essence in procuring evidence, the police in that situation may deem the circumstances an 'emergency.' *Id.* If those circumstances are present, the warrant requirement of the Fourth Amendment is waived. *Id.* at 770-71.

²⁹ See *id.* at 770-71. This decision created an exception to the standard Fourth Amendment Warrant Clause (when time is of the essence to obtain evidence based upon probable cause, a warrant need not be necessary, rendering the warrantless search constitutional). See *id.* at 768-71.

³⁰ See *Schmerber*, 384 U.S. at 767. This decision was controversial because it was the first time the Court held intra-body intrusions constitutional absent a warrant. *Id.*

that individual's privacy expectations fall within the scope of protection guaranteed by the Fourth Amendment.³¹

A. *Decisional Interpretations Of "Search And Seizure," "Bodily Intrusions," And "The Warrant Clause" Of The Fourth Amendment*

In a number of recent decisions, federal and state courts held that DNA searches fall within the realm of the Fourth Amendment.³² For example, in *Patterson v. State*,³³ the Indiana Court of Appeals allowed the admissibility of a DNA sample into evidence because the state's interest in solving crimes outweighed the defendant's slight privacy interests in securing his DNA.³⁴ In addition, courts recognize DNA sampling and profiling as routine criminal investigative tools in America.³⁵ American courts interpret the validity of statutory and regulatory requirements for DNA sampling under Fourth Amendment analysis by weighing individual privacy rights against state interests.³⁶ Specifically, these courts seek to determine the standards for reasonableness of the particular search and the degree to which each search impinges upon fundamental rights.³⁷

In *Schmerber*, the Court held that blood tests do not necessarily constitute an unduly extensive imposition on an individual's privacy and bodily integrity.³⁸ Blood tests, the Court held, are considered reasonable

³¹ See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 624-27 (1989).

³² See *Patterson v. State*, 742 N.E.2d 4, 8-9 (Ind. Ct. App. 2000) (reaffirming *Schmerber* holding: testing procedures within meaning of search and seizures are within scope of Fourth Amendment). See also *Vernonia Sch. Dist. v. Acton*, 505 U.S. 646 (1995); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Schmerber v. California*, 384 U.S. 757 (1966).

³³ 742 N.E.2d 4 (Ind. Ct. App. 2000).

³⁴ See *id.* (holding special needs render warrant and probable cause requirements of Fourth Amendment impracticable).

³⁵ See *People v. King*, 99 Cal. Rptr. 2d 220, 227 (2000) (noting DNA testing furthers government interests in solving past and future crimes). The *King* court recognized the government's interest in solving past and future crimes and in discouraging criminals from recidivist activities. *Id.* See also *Roe v. Marcotte*, 193 F.3d 72, 79 (2d Cir. 1999) (noting DNA profiling can have effect of restraining future acts of criminals).

³⁶ See *Roe v. Marcotte*, 193 F.3d 72, 80 (2d Cir. 1999) (holding inmate sex offenders required to submit blood to DNA data bank constitutional). The Second Circuit held the procedure by which the inmates were required to submit blood samples for the state DNA data bank required minimal intrusion when weighed against the inmates' Fourth Amendment rights and promoted an important state interest in maintaining public safety. *Id.*

³⁷ See *Vernonia Sch. Dist.*, 515 U.S. at 652 (stating student athletes have diminished expectation of privacy). *Vernonia* stands for the proposition that student athletes are not entitled to full Fourth Amendment protection because the state's interest in preventing drug addiction among student athletes is compelling. *Id.* at 661-62. Student athletes, therefore, have a decreased expectation of privacy, and mandatory testing is not a significant invasion of privacy. *Id.* at 657.

³⁸ See *Schmerber v. California*, 384 U.S. 757, 771-72 (1966) (noting circumstances surrounding blood extraction may make intrusion reasonable even without warrant).

intrusions when time is of the essence in obtaining a blood sample.³⁹ Two years later in *Terry v. Ohio*,⁴⁰ the Court established a principle for individualized suspicion in weighing law enforcement's discretion while conducting warrantless searches of an individual by using a more objective standard.⁴¹ This standard requires an objective threshold that law enforcement officers are required to overcome when conducting warrantless searches.⁴² Similarly, the Supreme Court in *Skinner v. Railway Labor Executives' Ass'n*⁴³ considered the nature of blood tests, noting that the intrusion occasioned by a blood test is not significant, since such tests are "commonplace in these days of periodic physical examinations."⁴⁴ The Supreme Court held experience shows that the amount of "blood extracted is minimal, and for most people the procedure involves virtually no risk, trauma or pain."⁴⁵

In *Skinner*, the Court ruled that the collection and subsequent analysis of biological samples, while constituting a search under the Fourth Amendment, are reasonable if justified by "special needs beyond the normal need for law enforcement" that render the warrant and probable cause requirements of the Fourth Amendment impracticable.⁴⁶ The Court con-

³⁹ See *id.* at 770-71 (holding extraction of blood samples highly effective means of determining degree of intoxication). The Court held that, while the taking of a blood sample without a warrant is a search and seizure well within the confines of the Fourth Amendment, if the circumstances render the taking of the blood sample an emergency situation, such as a situation where the destruction of evidence is imminent if the police take the time to obtain a warrant, then the warrant requirement is waived in this special circumstance. *Id.*

⁴⁰ 392 U.S. 1 (1968).

⁴¹ *Id.* at 4 (describing more objective standard for weighing law enforcement's discretion in conducting warrantless searches). The decision in *Terry* sought to implement a "totality of the circumstances" test that would balance the privacy expectations of the suspect against law enforcement concerns to determine if the search was reasonable. *Id.* at 21-22.

⁴² See *id.*

⁴³ 489 U.S. 602 (1989).

⁴⁴ *Id.* at 624-25. In *Skinner*, the Court held that the permissibility of a particular practice of bodily intrusion "is judged by balancing the intrusion on the individual's Fourth Amendment interests against the state's promotion of legitimate governmental interests." *Id.* at 619; see also *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1975).

⁴⁵ See *Skinner*, 489 U.S. at 624-25 (quoting *Schmerber v. California*, 384 U.S. 757, 771 (1966)) (declaring society recognizes notion that blood tests do not compromise individual expectations of privacy or bodily integrity).

⁴⁶ See *id.* at 619 (quoting *Griffin v. Wisc.*, 483 U.S. 868, 873 (1987)) (referring to federal regulation requiring railroad industry to conduct breath and urine analysis in pursuit of public safety). In *Skinner*, the Court acknowledged that during the operations of a regulated industry, such as a railroad, it is necessary to conduct toxicological tests because they are not administered to produce evidence in the prosecution of its employees, but rather to prevent accidents and casualties in railroad operations that could result from the impairment of railroad employees. *Id.* at 620-21. The Court further explained that the interest of the

cluded that while a nonconsensual blood extraction is an invasion of Fourth Amendment rights, the railway is a "regulated" industry with compelling safety interests.⁴⁷ Thus, the threshold for privacy rights is lowered for employees who work in governmentally regulated industries.⁴⁸ Ultimately, as seen in *Griffin v. Wisconsin*,⁴⁹ when the state regulates a particular industry, a court may find there are special needs beyond normal law enforcement that may justify departures from usual warrant and probable cause requirements.⁵⁰

Decided on the same day as *Skinner*, the Court in *National Treasury Employees Union v. Von Raab*,⁵¹ held a warrant is not required when balancing individual privacy rights of United States Customs' Service employees, who were required to take drug tests in the course of their employment, against compelling governmental interests.⁵² If, in the course of their employment these employees were directly involved in drug interdiction, were required to carry a firearm, or handled classified material, then the government had a compelling interest in ensuring that they were physically fit and had unimpeachable judgment that outweighed those employees' privacy interests.⁵³ The Court reasoned, since the Customs Service's program narrowly defined the specific circumstances justifying the testing

traveling public justifies the privacy intrusions at issue absent a warrant or individualized suspicion. *Id.* at 621.

⁴⁷ See *id.* at 616-17 (holding even less intrusive methods of collecting samples, and later chemical analysis, implicates Fourth Amendment privacy interests). The Court also held that the railway's safety interests outweighed its employee's privacy rights because the railway is a regulated industry, and thus, the need for regulation thereof provides an exception to the usual requirements of the Fourth Amendment. *Id.* at 633.

⁴⁸ See *id.* at 620.

⁴⁹ 483 U.S. 868 (1987).

⁵⁰ *Id.* at 873-74.

⁵¹ 489 U.S. 656 (1989).

⁵² *Id.* at 666-67 (holding U.S. Customs' Employees have diminished expectation of privacy in course of employment). In this case, the U.S. Customs' Service required drug testing of employees directly involved in drug interdiction operations, who were required to carry a firearm in the course of their employment, or who handled classified material. *Id.* The drug tests were designed to detect the presence of either marijuana, cocaine, opiates, amphetamines, or phencyclidine. *Id.* The union argued that the drug testing program was unreasonable because it was not based on individualized suspicion of the employees who were tested. *Id.* The Court rejected these arguments holding that the government's compelling interest in ensuring that employees directly involved in drug interdiction or who were required to carry firearms, be physically fit and have unimpeachable integrity and judgment, which outweighed the employees' privacy interests. *Id.*

⁵³ See *id.* at 670-72 (holding Customs employees have diminished expectation of privacy). The Court in *National Treasury* established another 'special needs' exception to the warrant and probable cause requirements of the Fourth Amendment. *Id.* As with the railroad industry, the U.S. Customs industry is another regulated industry, and as such, its employees have a diminished expectation of privacy because of the nature of the employment. *Id.* The Customs industry requires a heightened measure of security and public safety that outweighs the privacy interests of its employees. *Id.*

and the permissible limits of such intrusions, the blood testing withstood constitutional scrutiny.⁵⁴ The Court went on to hold that the Customs Service's drug testing program was not designed to serve the "ordinary needs of law enforcement" because they could not be used in a criminal prosecution of the employee without his consent.⁵⁵ The purpose of this program was to "deter drug use among those eligible for promotion to sensitive positions with[in] the Service and to prevent the promotion of drug users in those positions."⁵⁶ The Court in *National Treasury* reasoned that these governmental interests, as previously seen in *Skinner*, presented a special need that justified the departure from the ordinary warrant and probable cause requirements of the Fourth Amendment.⁵⁷ These cases seem to suggest that under similar circumstances, a DNA dragnet, if conducted in response to a 'special need' such as one present within a governmentally regulated industry, would be upheld as constitutional.⁵⁸

Both the *Skinner* and *National Treasury* decisions carved out the first special needs exception to the warrant and probable cause requirements of the Fourth Amendment in determining that employees of regulated industries have diminished expectations of privacy.⁵⁹ Six years later, the Court added the second special needs exception to the warrant and probable cause requirements of the Fourth Amendment when it decided that student athletes also have a diminished expectation of privacy.⁶⁰ In *Vernonia School District v. Acton*,⁶¹ petitioner school district required student athletes to submit to random drug testing.⁶² Respondents, a seventh grade student and his parents, refused to sign the testing consent form.⁶³ The Court held that the student athlete's Fourth Amendment interests were outweighed by the state's compelling interest in preventing drug addiction among student athletes.⁶⁴ In *Vernonia*, the Court held that the standard of

⁵⁴ See *id.* at 666-67. The Court reasoned that in light of the evidence of the case, which demonstrated that there was a national crisis in law enforcement caused by the smuggling of illicit narcotics, the Government had a "compelling interest in ensuring that front-line interdiction personnel were physically fit and had unimpeachable integrity and judgment." *Id.* at 670.

⁵⁵ See *id.* at 666.

⁵⁶ See *id.*

⁵⁷ See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989).

⁵⁸ See *supra* notes 37-57 and accompanying text (supporting proposition).

⁵⁹ See *id.*; see also *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

⁶⁰ See *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995).

⁶¹ 515 U.S. 646 (1995).

⁶² *Id.* at 650.

⁶³ See *id.* at 651-52.

⁶⁴ See *id.* at 664-65. The Court noted that school children are regularly submitted to physical examinations and are required to be vaccinated against communicable diseases. *Id.* at 656. It further reasoned that student athletes have an even lower expectation of privacy because students engaging in sports regularly change clothes and shower in locker-rooms together. *Id.* at 657. The Court reasoned that by choosing to join a school athletic

reviewing the “constitutionality of a governmental search is reasonableness.”⁶⁵ It noted, “whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of a legitimate governmental interest.”⁶⁶ If the governmental interests are compelling, and the intrusion on the individual is minimal in light of that compelling interest, courts will find the intrusion does not violate any Fourth Amendment rights.⁶⁷

The convicted felon class is the third special needs exception to the warrant and probable cause requirements of the Fourth Amendment, but it is not without considerable opposition.⁶⁸ Justice Dorothy W. Nelson for the Ninth Circuit strongly dissented in *Rise v. State of Oregon*,⁶⁹ in which the majority held a state statute “does not violate the Fourth Amendment by requiring convicted murderers and sex offenders to submit a blood sample for DNA analysis to create an identification data bank.”⁷⁰ Judge

team, students voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. *Id.* For example, it noted that student athletes routinely have to submit to a preseason physical exam that includes giving a urine sample. *Id.* Consequently, “students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.” *Id.*

⁶⁵ 515 U.S. 646 (1995) (holding student athletes not entitled to full Fourth Amendment protection). The Court held that the state’s interest in preventing drug addiction among student athletes was compelling given that the testing requirements were not a significant invasion of privacy and the students’ decreased expectation of privacy due to their involvement in school athletic programs. *Id.* at 662.

⁶⁶ See *id.* at 652-53 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)) (holding where search undertaken by law enforcement officers, reasonableness standard requires officers to obtain warrant). This standard is inapposite to the present set of facts in that the search conducted in *Vernonia* was not designed to discover evidence of criminal wrongdoing, but to deter drug addiction among student athletes. *Id.* at 650.

⁶⁷ See *Vernonia Sch. Dist.*, 515 U.S. at 655-56 (holding schoolchildren have diminished expectation of privacy as school officials act in loco parentis capacity). The Court in *Vernonia* acknowledged that public schools, like private schools, have a degree of responsibility for schoolchildren. *Id.* School officials have a degree of control over students and the duty to teach the habits and manners of social life. *Id.* The Court, however, pointed out that while students do not abandon all of their fundamental rights when they enter the classroom, school officials do have a right to administer appropriate disciplinary measures. *Id.*

⁶⁸ See *Rise v. State of Oregon*, 59 F.3d 1556 (9th Cir. 1995) (holding genetic information gathering from convicted felons for identification purposes does not violate Fourth Amendment).

⁶⁹ 59 F.3d 1556 (9th Cir. 1995).

⁷⁰ *Id.* at 1564. The majority in *Rise* held that Oregon’s Ch. 669, which allowed for the extraction of DNA information from convicted murderers or sex offenders absent a warrant or probable cause, did not result in an unreasonable intrusion into the individual’s privacy rights and was justified by law enforcement purposes. *Id.* at 1559. The court drew the distinction between gathering genetic information from free persons, which generally does require a warrant supported by probable cause, as opposed to gathering the same type of information from the convicted murderer or sex offender. *Id.* at 1560. It reasoned that Ch. 669 only authorized the Department of Corrections to obtain blood samples from certain classes of convicted felons in order to create an identification record for possible future

Nelson's dissent asserted DNA testing is an intrusion into bodily integrity that compromises the cherished value of privacy in our society.⁷¹ Judge Nelson further stated that the Fourth Amendment forbids any such intrusions on the "mere chance that desired evidence might be obtained."⁷² Judge Nelson urged "forced blood extraction intrudes on the private personal sphere and infringes upon an individual's 'most personal and deep-rooted expectations of privacy.'"⁷³ Though unpersuasive to the majority, Judge Nelson's dissent was recognized nationally as a preeminent counterargument to forced DNA sampling (i.e., DNA dragnet practices).⁷⁴

In 1997, the Court heard a case that helped to define and restrain government programs that called for drug testing of official candidates.⁷⁵ In *Chandler v. Miller*,⁷⁶ a Georgia statute requiring candidates for designated state offices to undergo urinalysis drug testing was held to violate the Fourth Amendment.⁷⁷ The Court opined that to be reasonable under the Fourth Amendment, "a search ordinarily must be based on individualized suspicion of wrongdoing."⁷⁸ The Court held that there are certain exceptions to the warrant and probable cause requirements of the Fourth Amendment that are accepted based upon special societal interests.⁷⁹ When these special societal interests are alleged by the government, such as public safety in maintaining regulated industries, and the interest in drug

use. *Id.* In addition, these persons did not have the same expectations of privacy in their genetic information that free persons had. *Id.* Lastly, The Ninth Circuit held once a person has been convicted of one of the enumerated felonies "under Chapter 669, his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sampling." *Id.*

⁷¹ See *id.* at 1564 (Nelson, J., dissenting) (arguing majority erred in failing to find Fourth Amendment violation in nonconsensual DNA analysis of convicts).

⁷² See *id.* (quoting *Schmerber v. California*, 384 U.S. 757, 769-70 (1966)) (holding individual privacy interests protected by Fourth Amendment forbids unwarranted, intrusive searches on possibility of match). Judge Nelson noted that in *Schmerber*, the Court reasoned that only when law enforcement personnel are faced with exigent circumstances, such as the need to preserve evidence of a crime and the police have probable cause to link the DNA evidence to a crime already under investigation, is it allowable to conduct non-consensual blood extraction from a suspect absent a warrant. *Id.*

⁷³ See *id.* at 1565 (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)).

⁷⁴ See *Rise v. State of Oregon*, 59 F.3d 1556, 1565 (9th Cir. 1995).

⁷⁵ See *Chandler v. Miller*, 520 U.S. 305 (1997).

⁷⁶ 520 U.S. 305 (1997).

⁷⁷ *Id.* (holding requirement that official candidates pass drug test not within category of constitutionally permissible suspicionless searches). The *Chandler* Court held that where neither public safety nor a special need beyond normal law enforcement is a genuine concern for the state, the Fourth Amendment prohibits suspicionless searches absent a warrant or probable cause. *Id.* at 323. The majority concluded the state had failed to show a special need sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion. *Id.* at 317-22.

⁷⁸ See *id.* at 313 (quoting *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 664 (1995)).

⁷⁹ See *id.* at 313 (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989)).

testing student athletes, the courts must conduct an inquiry examining the competing individual privacy issues and those public interests advanced by the government.⁸⁰ Searches conducted without grounds for suspicion have been upheld, but only in certain limited circumstances.⁸¹ The Court then had to determine if this program ranked among the limited circumstances in which suspicionless searches were allowed.⁸² Ultimately, the Court held that Georgia's program did not fit into the same category as drug testing for student athletes or for customs and railway employees because the governmental interests in requiring urinalysis were not as compelling as in the prior cases.⁸³

While requiring official candidates for public office to submit to suspicionless testing exploits the candidate's expectation of privacy, it is clear that convicted felons do not enjoy the same privacy privilege.⁸⁴ In *Roe v. Marcotte*,⁸⁵ the Second Circuit held that Connecticut General Statute § 54-102g, requiring all convicted sex offenders to submit blood samples for inclusion in a DNA data bank, was constitutional.⁸⁶ The court held the Connecticut DNA statute survived Fourth Amendment scrutiny because of the minimal intrusion involved in conducting the DNA testing

⁸⁰ See *id.* at 314; see also *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 656-66 (1989).

⁸¹ See *id.* at 314; see also *Nat'l Treasury*, 489 U.S. at 656-66. These circumstances include brief stops for questioning and observation at a fixed border patrol checkpoint (see *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 545-50 (1975)), or at sobriety checkpoints (see *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 447 (1990)), and administrative inspections in 'closely regulated' businesses (see *New York v. Burger*, 482 U.S. 691, 703-04 (1987)).

⁸² See *Chandler v. Miller*, 520 U.S. 305, 314 (1997) (holding requirement that official candidates pass drug test not within category of constitutionally permissible suspicionless searches); see *supra* note 77 and accompanying text.

⁸³ See *id.* at 319-23 (stating Georgia's program failed to meet special needs requirement for suspicionless testing of individuals). In *Chandler*, the Court compared Georgia's program of requiring candidates to state office to submit to genetic testing against other circumstances where the Supreme Court found exigent circumstances allowing for suspicionless testing of individuals. *Id.* The Court determined that Georgia's program failed to establish a special need that would allow for suspicionless testing of individuals seeking public office absent a warrant supported by probable cause. *Id.*

⁸⁴ See *Roe v. Marcotte*, 193 F.3d 72, 74 (2d Cir. 1999) (holding DNA statute survives Fourth Amendment scrutiny, required minimal intrusion and promoted state interest).

⁸⁵ 193 F.3d 72 (2d Cir. 1999).

⁸⁶ *Id.* at 74. The statute at issue in *Roe* required all convicted sex offenders to submit a blood sample for inclusion in Connecticut's DNA data bank. *Id.* The petitioner argued that this statute violated his Fourth Amendment rights because it compelled the taking of DNA evidence unsupported by a warrant based upon probable cause. *Id.* The Court in *Roe* rejected this argument holding that the state had a right to maintain public safety and institutional security that outweighed privacy expectations of convicted felons. *Id.* at 77-78. It joined three other circuit courts in carving out a special need exception to the warrant and probable cause requirements of the Fourth Amendment with respect to convicted felons. *Id.* at 82.

when weighed against the important state interest in public safety.⁸⁷ In *Roe*, the Second Circuit found support for its holding based upon the precedent established by three other circuit courts that had examined the constitutionality of nearly identical DNA statutes.⁸⁸ The subject of convicted felons provides the Supreme Court with the most compelling argument for allowing DNA dragnet practices – the legitimate governmental interest of promoting the health, safety, comfort, morals, and welfare of the general public and is more thoroughly examined in Section III of this Note.⁸⁹

B. The Balancing Act: What The Supreme Court and the Commonwealth of Massachusetts Should Look To In Determining Whether To Implement DNA Dragnet Practices

According to the Supreme Court, the question of whether state DNA testing procedures pass Fourth Amendment muster should be determined by balancing its intrusion on the individual's privacy interests against the promotion of legitimate governmental interests.⁹⁰ In determining whether the balance permits warrantless, suspicionless testing (i.e., DNA dragnets), courts consider "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."⁹¹ If the governmental interest outweighs an individual's expectations of privacy, the procedure will pass constitutional muster.⁹²

⁸⁷ See *id.* at 79-80 (holding against inmate sex offenders' challenges to state statute requiring submission of blood to DNA data bank). The Second Circuit held that the Connecticut DNA testing procedure required a minimal intrusion to the individual inmate while it promoted an important state interest in maintaining public safety. *Id.*

⁸⁸ See *id.*; see also *Boling v. Romer*, 101 F.3d 1336, 1338-40 (10th Cir. 1996) (holding governmental goal in making permanent identification record of convicted felons outweighs inmates' privacy rights). The U.S. Court of Appeals for the Tenth Circuit relied on the Ninth and Fourth Circuits, which faced similar challenges to similar statutes and concluded that although obtaining blood and/or saliva samples is a search and seizure implicating Fourth Amendment concerns, these concerns were not applicable given the governmental interest in making a permanent identification record of convicted felons for the purpose of resolving future crimes. *Id.* at 1340; see *Rise v. State of Oregon*, 59 F.3d 1556 (9th Cir. 1995); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992).

⁸⁹ See *infra* notes 123 and 124 and accompanying text.

⁹⁰ See *People v. King*, 99 Cal. Rptr. 2d 220, 228 (Cal. Ct. App. 2000); see also *People v. Wealer*, 636 N.E.2d 1129 (Ill. App. Ct. 1994); *State v. Olivas*, 856 P.2d 1076 (Wash. 1993) (drawing blood from convicted felons to establish DNA data bank for use in future prosecution of recidivist acts does not violate Fourth Amendment). *Id.* at 1085-91.

⁹¹ See *People*, 99 Cal. Rptr. 2d at 225 (quoting *Bell v. Wolfish*, 441 U.S. 530, 559 (1979)).

⁹² See *id.* at 228. In analyzing the Fourth Amendment issues, the *King* court acknowledged that the nonconsensual extraction of blood is an invasion of the rights protected by the Fourth Amendment. *Id.* at 224. The court noted, however, that only unreasonable

III. EXPECTATIONS OF PRIVACY

The right to privacy is not explicitly expressed in any section of the United States Constitution.⁹³ Nevertheless, courts find a right to privacy to be implicit in the concept of ordered liberty derived from the Fourteenth Amendment.⁹⁴ This right to privacy includes the right to be free from illegal searches and seizures.⁹⁵ Courts classify the analysis of DNA samples as searches within the meaning of the Fourth Amendment, applicable to the states through the Fourteenth Amendment.⁹⁶ It is in the context of the Fourth Amendment that courts analyze the right to privacy issues with regard to DNA sampling.⁹⁷ Opponents of utilizing DNA dragnet practices in America draw upon the concept of the preservation of individual privacy interests as their core argument.⁹⁸ They argue that, at a minimum, DNA test results provide extremely personal data about an individual and thus, constitute an intrusion into an individual's bodily integrity.⁹⁹ Whether or

searches and seizures violate Fourth Amendment requirements. *Id.* It then announced a balancing test whereby the court's task is to balance the intrusion on the individual's Fourth Amendment interests against the legitimate governmental interests at stake. *Id.* The court held that the ultimate measure of the constitutionality of a governmental search is reasonableness. *Id.* at 225. The final holding in *King* was that the search was reasonable because along with imprisonment for convicted offenses comes the loss of significant rights. *Id.* at 226. The court concluded that "any argument that Fourth Amendment privacy interests do not prohibit gathering information concerning identity from the person of one who has been convicted of a serious crime, or of retaining that information for crime enforcement purposes, is an argument that long ago was resolved in favor of the government." *Id.* at 227. The rationale behind the holding is: "[t]he government has an undeniable interest in crime prevention. . . . [I]t has interests in solving crimes that have been committed, in bringing the perpetrators to justice and in preventing, or at least discouraging, them from committing additional crimes. . . . DNA testing unquestionably furthers these interests." *Id.* at 227-28.

⁹³ See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁹⁴ See *Webb v. Goldstein*, 117 F. Supp. 2d 289, 296 (E.D.N.Y. 2000); see also *Whalen v. Roe*, 429 U.S. 589, 598 (1977); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994). The above cited cases focus on the evolution of the right to privacy.

⁹⁵ See *Webb v. Goldstein*, 117 F. Supp. 2d 289, 296 (E.D.N.Y. 2000); see also *Whalen v. Roe*, 429 U.S. 589, 598 (1977); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994).

⁹⁶ See *Patterson v. State*, 742 N.E.2d 4, 8 (Ind. Ct. App. 2000) (reaffirming *Schmerber* holding; testing procedures within meaning of search and seizures; within scope of Fourth Amendment); see also *Shepherd v. State*, 690 N.E.2d 318 (Ind. Ct. App. 1997) (holding collection and analysis of blood search within meaning of the Fourth Amendment). The *Patterson* court held the Fourth Amendment applies to states through the Fourteenth Amendment. *Id.* Further, the court held that "the analyses of biological samples are searches within the meaning of the Fourth Amendment." *Id.*

⁹⁷ See *Shepherd v. State*, 690 N.E.2d 318 (Ind. Ct. App. 1997).

⁹⁸ See *Rise v. State of Oregon*, 59 F.3d 1556, 1564-65 (9th Cir. 1995) (Nelson, J. dissenting); *supra* notes 70-72 and accompanying text.

⁹⁹ See *id.*; see also Dan L. Burke & Jennifer A. Hess; *Genetic Privacy: Constitutional Considerations In Forensic DNA Testing*, 5 GEO. MASON U. CIV. RTS. L.J. 22 (1995); Michael Avery, *Landry v. Attorney General: DNA Databanks Hold A Mortgage*

not a particular individual has an expectation of privacy is the central axis upon which this controversy turns.

A. *The Free Citizen*

Recent cases give guidelines for analyzing when and who has a valid expectation of privacy.¹⁰⁰ In *Whalen v. Roe*,¹⁰¹ a case involving a person's right to maintain the confidentiality of prescription drug use, the Supreme Court held that the right to privacy is not absolute.¹⁰² Each case depends upon balancing the severity of any privacy invasion against the state's interest in obtaining it.¹⁰³ In *Doe v. City of New York*,¹⁰⁴ the Second Circuit ruled that only a substantial state interest could outweigh the individual's interest in the confidentiality of his medical condition.¹⁰⁵ While courts recognize the free citizen's right to privacy in his serious medical condition, courts have also held that where governmental interests outweigh the privacy expectations of free citizens, the citizens' rights can be legally compromised.¹⁰⁶

B. *The Convicted Felon*

Unlike free citizens, convicted felons' privacy expectations are diminished with respect to DNA sampling.¹⁰⁷ In *Rise v. State of Oregon*,¹⁰⁸

On Privacy Rights, BOSTON BAR JOURNAL (2000).

¹⁰⁰ See *Bond v. United States*, 529 U.S. 334 (2000).

¹⁰¹ 429 U.S. 589 (1977).

¹⁰² *Id.* at 598 (holding New York state's program constitutional). The court held the New York program's purpose was to maintain computer files identifying persons using prescriptions drugs and did not pose a threat to individual's privacy interest in confidentiality of medical treatment when compared to the state's legitimate concern with minimizing abuse of controlled substances. *Id.*

¹⁰³ See *id.*

¹⁰⁴ 15 F.3d 264 (2d Cir. 1994).

¹⁰⁵ *Id.* at 267 (held plaintiff had constitutional right to privacy in HIV status because such personal information protected). The Court held *Doe* had a right to keep private his positive HIV status because one's personal medical condition is generally a matter one is entitled to keep private. *Id.* at 269.

¹⁰⁶ See *id.*; see also *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Schmerber v. California*, 384 U.S. 757 (1966); *Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999); *Shaffer v. Saffle*, 148 F.3d 1180 (10th Cir. 1998); *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996); *Rise v. State of Oregon*, 59 F.3d 1556 (9th Cir. 1995); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992); *Patterson v. State*, 742 N.E.2d 4 (Ind. Ct. App. 2000); *People v. King*, 99 Cal. Rptr. 2d 220 (Cal. Ct. App. 2000); *People v. Wealer*, 636 N.E.2d 1129 (Ill. App. Ct. 1994); *Kruger v. Erickson*, 875 F. Supp. 583 (D. Minn. 1994); *Patrick (Damon) Smith v. State of Indiana*, 744 N.E.2d 437 (Ind. 2001); *State v. Olivias*, 856 P.2d 1076 (Wash. 1993); *Doles v. State*, 994 P.2d 315 (Wyo. 1999).

¹⁰⁷ See *Rise*, 59 F.3d at 1559-60; *supra* notes 70-72 and accompanying text.

¹⁰⁸ 59 F.3d 1556 (9th Cir. 1995).

the Ninth Circuit held that procuring genetic information from a convicted felon through blood sampling for identification purposes did not create more than a minimal intrusion upon the individual's Fourth Amendment privacy rights.¹⁰⁹ In addition, the court noted that the type of DNA testing conducted in *Rise* was applied only to certain classes of convicted felons to create a record for future identification purposes.¹¹⁰ The court in *Rise* reasoned these specifically identified classes of convicted felons did not have the same expectations of privacy in their genetic information that "free persons" had.¹¹¹ The court held, "[o]nce a person is convicted of one of the felonies included as predicate offenses under Chapter 669, his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sampling."¹¹²

Similarly, the Fourth Circuit held in *Jones v. Murray*¹¹³ that while intrusions into a free person's privacy, without Fourth Amendment protections, are not permissible, those same protections are not afforded to individuals lawfully convicted and incarcerated of criminal offenses.¹¹⁴ Based on the holding in *Jones*, the Fourth Circuit held in *People v. King*¹¹⁵ that once a felon is convicted and incarcerated, his identity becomes a matter of state interest for prison officials.¹¹⁶ Further, the Fourth Circuit held, "there is no question that the state's interest extends to maintaining a permanent record of identity to be used as an aid in solving past and future crimes, and this interest overcomes any privacy rights the individual might re-

¹⁰⁹ *Id.* at 1564 (holding Oregon ch. 669 does not violate Fourth Amendment). The Ninth Circuit ruled that requiring convicted murderers and sex offenders to submit blood samples for DNA analysis and to create identification data bank was constitutional. *Id.* The Court held that the intrusion to convicted felons was not unconstitutional because the statute only required samples from specifically convicted murderers and sex offenders who have diminished expectations of privacy. *Id.* at 1559-60; *see supra* notes 70-72 and accompanying text.

¹¹⁰ *See id.* at 1559-60. The Court held that only specific classes of offenders were subjected to blood sampling, and as such, ch. 669 did not violate the Fourth Amendment because it was 'narrowly tailored' to meet the state's interests. *Id.*

¹¹¹ *See id.* (holding specific class of convicted felons' privacy expectations diminished).

¹¹² *See id.* at 1560 (holding specific class of convicted felons' identities are matters of state interest).

¹¹³ 962 F.2d 302 (4th Cir. 1992).

¹¹⁴ *Id.* at 306 (holding convicted felons' privacy protections diminished once confined to custody of state). The Fourth Circuit analogized the taking of blood samples to fingerprinting suspects. *Id.* It announced in *Jones* that the Fourth Amendment does not require an additional finding of individualized suspicion before blood can be taken absent a warrant or probable cause from an incarcerated felon for the purposes of identifying him. *Id.* at 306-07.

¹¹⁵ 99 Cal. Rptr. 2d 220 (Cal. Ct. App. 2002).

¹¹⁶ *Id.* at 227; *see supra* note 92 and accompanying text.

tain.”¹¹⁷ By committing crimes, persons such as the appellant in *King* have essentially forfeited any legitimate expectations of privacy in their identities.¹¹⁸ With respect to DNA sampling, the *King* court held the state has an irrefutable interest in preventing crimes from occurring, in solving past crimes, and ensuring that criminals answer for their wrongdoings.¹¹⁹ DNA testing indisputably helps to further these goals because of its ability to match profiles derived from crime scene evidence to DNA profiles already existing in data banks.¹²⁰ The Fourth Circuit maintains that DNA technology helps law enforcement officials in solving crimes accurately and expeditiously while simultaneously preventing unnecessary intrusions into privacy expectations of the innocent.¹²¹

C. *The Governmental Interest*

The ultimate measure of the constitutionality of a governmental search, including a DNA dragnet, is “reasonableness.”¹²² States claim to have an interest in promoting DNA dragnets in criminal investigations as a function of their police powers.¹²³ It is an accepted premise that the government may exercise its police powers to promote the health, safety, comfort, morals, and welfare of the general public.¹²⁴ States promote the use of DNA analysis as a powerful investigative tool that can connect suspects to crimes or can exonerate the innocently accused.¹²⁵ As a result, states assert a substantial interest under the Fourth Amendment balancing test in promoting the use of DNA testing.¹²⁶ This premise leads to the conclusion that DNA dragnet practices, although conducted in violation of Fourth

¹¹⁷ See *People*, 99 Cal. Rptr. 2d at 227; *supra* note 92 and accompanying text.

¹¹⁸ See *People*, 99 Cal. Rptr. 2d at 227; *supra* note 92 and accompanying text.

¹¹⁹ See *People*, 99 Cal. Rptr. 2d at 227; *supra* note 92 and accompanying text.

¹²⁰ See *People*, 99 Cal. Rptr. 2d at 227; *supra* note 92 and accompanying text.

¹²¹ See *People*, 99 Cal. Rptr. 2d at 227 (citing support for using DNA testing to further law enforcement objectives); *supra* note 92 and accompanying text.

¹²² See *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 652 (1995) (announcing reasonableness standard in evaluating constitutionality of governmental search). In *Vernonia*, the Court held that the state’s interest in preventing drug addiction among student athletes was reasonable given the student’s decreased expectation of privacy and that the testing requirements were not a significant invasion of privacy. *Id.* at 662.

¹²³ See *Patterson v. State*, 742 N.E.2d 4, 11 (Ind. Ct. App. 2000). In *Patterson*, the Indiana Court of Appeals affirmed the defendant’s convictions because the state’s interest in solving crimes outweighed the defendant’s slight privacy interests. *Id.*

¹²⁴ See *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 621-22 (1989) (holding government has interest in ensuring safety of traveling public); see also *Roe v. Marcotte*, 193 F.3d 72, 78 (2d Cir. 1999) (DNA statute survived constitutional scrutiny because of promoted state interest in maintaining public safety).

¹²⁵ See *People v. King*, 99 Cal. Rptr. 2d 220, 227 (2000) (noting DNA testing helps government ensure innocent persons are not needlessly investigated); *People*, *supra* note 17 and accompany text.

¹²⁶ See *id.*

Amendment requirements, may be found to be an extension of state police powers, if conducted in accordance with a legitimate governmental interest.¹²⁷

For example, when Minnesota's DNA database statute came under Fourth Amendment attack in 1995, it was upheld because of the institutional security needs inside Minnesota's prisons.¹²⁸ Similarly, in 1998 an Oklahoma statute came under fire for requiring retrieval of DNA samples from perpetrators of "sex-related crimes, violent crimes or other crimes in which biological evidence is recovered."¹²⁹ The prisoners in Oklahoma argued that the statute violated their Fourth Amendment rights, but the Tenth Circuit upheld the statute as reasonable due to the inmates' diminished privacy rights, the minimal intrusion involved in collecting the DNA samples, and the legitimate government interest in using DNA evidence to investigate and prosecute crimes.¹³⁰

In 1999, Wyoming's DNA database was questioned, but nonetheless, was held constitutional.¹³¹ A Wyoming court held that collecting DNA samples either from the blood, saliva or hair of inmates did not violate the Fourth Amendment prohibition against unreasonable searches and seizures because the procedures were minimally intrusive and convicted felons had diminished privacy rights.¹³² In conclusion, the Wyoming state court held that the purpose of the DNA database was to collect identification information to advance the legitimate state interest of criminal law enforcement.¹³³ Also in 1999, a Pennsylvania court held that the slight intrusion occasioned by the withdrawal of blood is outweighed by the spe-

¹²⁷ See *supra* notes 122-25 and accompanying text.

¹²⁸ See *Kruger v. Erickson*, 875 F. Supp. 583, 588-89 (D. Minn. 1994) (holding Minn. Stat. § 609.3461 constitutional). In *Kruger*, petitioner/inmate was subjected to blood sampling while he was unconscious. *Id.* at 587. Petitioner argued that the statute allowing the sampling was penal in nature, and therefore, unconstitutional under the Fourth Amendment. *Id.* at 588. The Minnesota District Court disagreed, holding individuals who are lawfully incarcerated have diminished expectations of privacy resulting from their status as prisoners, regardless of the governmental purpose for the search. *Id.*

¹²⁹ See *Shaffer v. Saffle*, 148 F.3d 1180, 1181 (10th Cir. 1998) (citing OKLA. STAT. ANN. tit. 74, 150 270(A) (West 1996)) (holding DNA sampling reasonable due to inmate's diminished privacy rights and legitimate government interests).

¹³⁰ See *id.* at 1181.

¹³¹ See *Doles v. State*, 994 P.2d 315, 316 (Wyo. 1999) (declaring WYO. STAT. ANN. §§ 7-19-401-406 constitutional). The statute at issue in *Doles* required every person convicted of a felony to provide a DNA tissue sample for inclusion in Wyoming's DNA Identification Record System. *Id.* at 316. *Doles*, a convicted felon, argued that the statute violated his Fourth Amendment right to be free from unreasonable searches and seizures. *Id.* at 317. The court rejected *Doles'* argument relying on other circuit court decisions and declared Wyoming's statute mandating DNA collection from convicted felons reasonable and not violative of inmates' Fourth Amendment privacy rights. *Id.* at 319.

¹³² See *id.* at 319.

¹³³ See *id.*

cial interest in maintaining an identification data bank of convicted felons.¹³⁴

More recently in 2000, California examined its requirement of inmates to surrender DNA evidence to prison officials.¹³⁵ The California court found an inmate's expectation of privacy was greatly diminished in light of the government's interests in fighting crime.¹³⁶ The California Court of Appeals held that "the reduction of an inmate's reasonable expectation of privacy specifically extends to a prisoner's identity."¹³⁷ The state's interest, therefore, in maintaining a permanent record of identity to be used as an aid in solving past and future crimes overcomes a prisoner's individual privacy rights.¹³⁸ In short, the government has an undeniable interest in crime prevention.¹³⁹ Finally, the California court held that DNA testing is an efficient means of promoting these governmental interests.¹⁴⁰

Also in 2000, the Supreme Court of Indiana examined Indiana's procedures in collecting DNA evidence.¹⁴¹ In *Smith v. State of Indiana*,¹⁴² authorities obtained a DNA sample from a rape victim and subsequently produced a DNA profile using that sample.¹⁴³ Several months after the rape, Patrick (Damon) Smith was arrested for a separate rape and ordered to provide blood and saliva samples.¹⁴⁴ Although Smith was acquitted of the second rape, his DNA matched the profile created during the first rape investigation.¹⁴⁵ Smith tried to suppress the evidence claiming a possessory right in his DNA, but the Indiana Supreme Court held that he had no

¹³⁴ See *Dial v. Vaughn*, 733 A.2d 1, 7 (Pa. 1999).

¹³⁵ See *People v. King*, 99 Cal. Rptr. 2d 220, 226-27 (Cal. Ct. App. 2000); *supra* note 92 and accompanying text.

¹³⁶ See *id.*; *supra* note 92 and accompanying text.

¹³⁷ See *id.* at 227; *supra* note 92 and accompanying text.

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ See *People v. King*, 99 Cal. Rptr. 2d 220, 229-30 (Cal. Ct. App. 2000); *supra* note 92 and accompanying text.

¹⁴¹ See *Smith v. State of Indiana*, 744 N.E.2d 437, 440 (Ind. 2001) (holding police action in obtaining DNA sample from rape suspect and comparing to profile reasonable, not invasion of privacy).

¹⁴² 744 N.E.2d 437 (Ind. 2001).

¹⁴³ *Id.*

¹⁴⁴ See *id.* at 439. In *Smith*, a victim was raped in her home but was unable to identify the perpetrator. *Id.* at 438. Police created a DNA profile utilizing samples collected from the victim. *Id.* Later, Damon Smith was arrested and charged with an unrelated crime. *Id.* Smith was required to provide hair, blood and saliva samples to create a DNA profile on him. *Id.* In compliance with police procedures, Smith's DNA profile was compared to profiles maintained in the state's DNA data bank. *Id.* Smith's DNA profile matched that of the profile created earlier from the rape victim. *Id.* Smith was arrested and tried for rape. *Id.* Smith moved to suppress the DNA evidence arguing that it's admission violated his Fourth Amendment rights. *Id.* The Court subsequently rejected Smith's argument and allowed the evidence. *Id.* at 442.

¹⁴⁵ See *id.*

ownership interests in his legitimately obtained DNA.¹⁴⁶ The advancement of legitimate state interests of criminal law enforcement and in solving and preventing crimes provides the government with its strongest support for upholding DNA dragnets.¹⁴⁷

IV. MASSACHUSETTS DECISIONS: AN OVERVIEW

A Supreme Court decision in this area will greatly impact Massachusetts' law enforcement practices, as well as the admissibility of DNA evidence into trial. What follows is a look at Massachusetts' decisions that will impact whether the Commonwealth should implement DNA dragnet practices if they are ultimately found to be constitutional by the Supreme Court. In 1994, the Supreme Judicial Court of Massachusetts (SJC) held that the seizure of a blood sample pursuant to a warrant before an arrest or indictment is reasonable where there is probable cause to believe that the person whose blood is sought committed the crime and where that person is afforded a hearing at which a judge makes a finding as to the degree of intrusion involved and the need for the evidence sought in assisting the state in the criminal investigation.¹⁴⁸ In *The Matter of Lavigne*,¹⁴⁹ appellant was the prime suspect in a murder that occurred twenty-one years prior to the Commonwealth's request for a blood sample.¹⁵⁰ Although Lavigne was the prime suspect in the murder, he had not been charged with the offense nor was he the subject of a grand jury investigation.¹⁵¹ Nevertheless, a warrant was issued and the police obtained a blood sample from him

¹⁴⁶ See *id.* at 439.

¹⁴⁷ See *People v. King*, 99 Cal. Rptr. 2d 220, 227 (Cal. Ct. App. 2000) (noting DNA testing furthers government interests in solving past and future crimes); *Doles v. State*, 994 P.2d 315, 316 (Wyo. 1999); *Rise v. State of Oregon*, 59 F.3d 1556 (9th Cir. 1995) (holding genetic information gathering from convicted felons for identification purposes does not violate Fourth Amendment).

¹⁴⁸ See *In the Matter of Richard R. Lavigne*, 641 N.E.2d 1328, 1329-31, 418 Mass. 831, 832-35, (1994) (held search of unindicted, unarrested suspect reasonable, if conducted with probable cause, after judicial hearing). The Supreme Judicial Court of Massachusetts (SJC) noted that prior to this case police had the right to search the body of a suspect who had been arrested on probable cause. *Id.* (citing *Commonwealth v. Brown*, 237 N.E.2d 53, 58-59, 354 Mass. 337, 342-43 (1968)). Compounding the decision in *Brown*, the SJC in *Lavigne* announced that it would extend the common law rule to provide that in order to extract the DNA sample from an uncharged, unarrested suspect, the police need probable cause to believe that the suspect committed the crime in question. *Id.* The SJC also held that the suspect is entitled to a hearing to determine whether it is reasonable to compel the suspect to submit to the DNA extraction. *Id.* At the hearing, the judge must weigh the degree of intrusion on the suspect against the need for the evidence sought and the seriousness of the crime. *Id.* If the intrusion is minimal and the need for evidence is high, then the intrusion will be considered reasonable and the extraction will be allowed. *Id.*

¹⁴⁹ 641 N.E.2d 1328, 418 Mass. 831 (1994).

¹⁵⁰ *Id.* at 1329-30, 418 Mass. at 832-33.

¹⁵¹ See *id.*; 418 Mass. at 832-33.

twenty-one years later.¹⁵² Lavigne argued that the taking of his DNA was an intrusion and as such, a violation of his Fourth Amendment rights to be free of illegal searches and seizures.¹⁵³ The SJC ruled in favor of the seizure of blood for criminal investigation purposes if based upon probable cause and after a judicial hearing allowing the seizure.¹⁵⁴ The dissent disagreed with the majority's holding because it effectively authorized the forcible taking of blood from an unarrested, uncharged, and unindicted person.¹⁵⁵ This decision effectively allows a suspect's blood to be taken absent being charged with a crime, but based upon probable cause.¹⁵⁶

In 1997, Massachusetts adopted St. 1997, ch. 106, an Act codifying its DNA database statute.¹⁵⁷ Chapter 106 required that any person convicted of any one of the 33 enumerated crimes outlined therein was required to submit a DNA sample for inclusion in the Commonwealth's DNA database.¹⁵⁸ In 1999, that statute came under constitutional attack in *Landry v. Harshbarger*.¹⁵⁹ In *Landry*, plaintiff convicts tried to prevent the collection of blood samples for inclusion in Massachusetts' DNA database, as authorized by Chapter 106.¹⁶⁰ The statute applied to inmates convicted of specific crimes and permitted the use of reasonable force to obtain the samples from non-consenting inmates.¹⁶¹ The Court held that involuntary blood testing was not an unreasonable search and seizure in light of a convicted person's diminished privacy rights and the state's legitimate interest in the investigation and prosecution of criminal acts.¹⁶² The SJC also held that the Commonwealth had a right to preserve permanent identification records of convicted persons for the purposes of resolving past and future

¹⁵² See *id.*; 418 Mass. at 832-33.

¹⁵³ See *id.*; 418 Mass. at 832-33.

¹⁵⁴ See *id.* at 1331-32, 418 Mass. at 834-35.

¹⁵⁵ See *In the Matter of Richard R. Lavigne*, 641 N.E.2d 1328, 1335-36, 418 Mass. 831, 837-39, (1994) (Liacos, J., dissenting).

¹⁵⁶ See *id.* at 1329-1330, 418 Mass. 832-33.

¹⁵⁷ See MASS. GEN. LAWS ch. 22E, §§ 1-15.

¹⁵⁸ *Id.*

¹⁵⁹ 709 N.E.2d 1085, 1086, 429 Mass. 336, 337, (1999) (holding extraction of blood from convicts for inclusion in state database reasonable). This Act created a new policy in the Commonwealth whereby any person convicted of one of 33 enumerated crimes must submit a DNA sample to the state crime lab. *Id.* at 1087, 429 Mass. at 338.

¹⁶⁰ See *id.* at 1089, 429 Mass. at 340. See also MASS. GEN. LAWS ch. 22E, §§ 1-15. The statute provides that the director shall establish protocol governing the testing and analysis of DNA samples and a quality assurance program. *Id.* The statute mandates that these protocols and quality assurance programs be compatible with those utilized by the FBI. *Id.*

¹⁶¹ See *id.* at 1087, 429 Mass. at 338.

¹⁶² See *id.* at 1091-92, 429 Mass. 441-42. The SJC recognized the Commonwealth had an indisputable interest in preserving a permanent identification record of convicted persons for resolving past and future crimes. *Id.* The court announced that it will now use DNA identification procedures for these purposes. *Id.*

crimes.¹⁶³ The SJC held the intrusion occasioned by the blood test was not significant and was reasonable under the Fourth Amendment and under MASS. CONST. art. XIV.¹⁶⁴ The SJC announced:

[W]hile obtaining and analyzing the DNA [under the Act] is a search and seizure implicating Fourth Amendment concerns, it is a reasonable search and seizure . . . in light of [a convicted person's] diminished privacy rights . . . the minimal intrusion of . . . blood tests; and the legitimate government interest in the investigation and prosecution of unsolved and future criminal acts by the use of DNA in a manner not significantly different from the use of fingerprints.¹⁶⁵

In 1999, the SJC visited the issue of whether the Commonwealth's DNA database statute burdened inmates' fundamental privacy rights guaranteed by the Fourth Amendment.¹⁶⁶ In *Murphy v. Department of Corrections*,¹⁶⁷ Murphy challenged the statute holding that it should be subjected to strict constitutional scrutiny and would, therefore, be found unconstitutional under this analysis.¹⁶⁸ The SJC upheld Chapter 106 citing its recent decision in *Landry* for authority.¹⁶⁹ As the SJC held in *Landry*, taking blood samples from convicts to be used in the Commonwealth's DNA database does not violate fundamental rights because convicted persons have a diminished expectation of privacy and the extraction of blood by a pin prick is only minimally intrusive.¹⁷⁰ The SJC concluded that the proper level of scrutiny, therefore, is rational basis rendering the statute constitutional under this analysis.¹⁷¹ These cases provide the Commonwealth with a strong foundation for upholding DNA dragnet practices, i.e., the legiti-

¹⁶³ See *id.*

¹⁶⁴ See *Landry v. Harshbarger*, 709 N.E.2d 1085, 1092-93, 429 Mass. 336, 442-43, (1999) (holding DNA results similar to use of fingerprints). The SJC held that DNA results were similar to the use of fingerprint information in preserving a record of convicts. *Id.* The procedure by which these results were obtained, as well as statutory restrictions, prevented the results from being used for obtaining impermissible genetic information. *Id.*

¹⁶⁵ See *id.* at 1091-92, 429 Mass. at 441-42 (citing *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1996)) (holding Act provides for legitimate state interests and does not violate Fourth Amendment).

¹⁶⁶ See *Murphy v. Dep't of Corrections*, 711 N.E.2d 149, 429 Mass. 736 (1999).

¹⁶⁷ 711 N.E.2d 149, 429 Mass. 736 (1999).

¹⁶⁸ *Id.* at 152-53, 429 Mass. at 739-40 (statute applies to anyone convicted of one of 33 enumerated crimes on or after statute's effective date). Murphy argued that the Act violated his fundamental right to privacy under the Fourth Amendment. *Id.* at 152, 429 Mass. at 739. Relying on its decision in *Landry*, the SJC held that taking blood samples from convicted criminals for use in the Commonwealth's DNA identification database does not violate an inmate's fundamental rights. *Id.*

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See *id.*

mate governmental interest of investigating and prosecuting criminal actions.¹⁷²

V. CONCLUSION

In most privacy cases, whether a state is justified in searching and seizing an individual's DNA turns on whether the compelling interest of the state justifies the intrusion upon an individual's privacy. The test for a compelling interest is whether the government's interest is reasonable enough to justify the particular invasion of the constitutional right in question. The purpose must be fundamental and the state's legislation must bear a reasonable relation to the achievement of that purpose.¹⁷³ Thus, a compelling interest must be based upon the necessities of national or community life such as clear threats to public health, safety, and welfare.

Proponents of DNA dragnet practices argue that the government is justified in conducting such searches and seizures, absent a warrant or probable cause. They base their argument on legitimate interests such as creating records of identification, in preventing criminal activity, in solving past and future crimes, and the advancement of criminal law enforcement. They argue these interests outweigh a citizen's right not to be compelled to give-up his DNA absent a warrant or probable cause.

Opponents, on the other hand, argue that these governmental interests, while legitimate and justified, must be confined to the restrictions of the Fourth Amendment guarantying all persons to be free from illegal searches and seizures.

The final question to be addressed before the Supreme Court is whether DNA dragnet practices are an effective means for meeting these governmental interests. Government representatives argue there is no question that by providing an effective means of identification, DNA testing is an efficient method of promoting legitimate governmental interests. However, this argument fails to address the reality that DNA dragnets impinge upon the very right that citizens of a free society deem as fundamental: the right to privacy.

The right to privacy should be preserved as a fundamental guaranty provided to free citizens by the Fourth Amendment. By conducting DNA

¹⁷² See *supra* notes 148-68 and accompanying text.

¹⁷³ See *Robinson v. City of Seattle*, 10 P.3d 452 (Wash. App. 2000) (citing *Munns v. Martin*, 930 P.2d 318 (Wash. App. 1997)). The *Robinson* court held suspicionless pre-employment drug testing provisions within the State of Washington as proper and abiding concern for government. *Id.* at 467. It holds that even with these compelling state interests in keeping drugs off streets, courts must guard against government's abridgment of fundamental constitutional rights afforded every citizen. *Id.* at 469-70. The court concluded that government's compelling right did not outweigh fundamental rights of its citizens. *Id.*

dragnets, as a society, we are sanctioning the violation of one of the most basic fundamental rights of any free society. Therefore, the preservation of privacy requires the Supreme Court to refrain from holding DNA dragnet practices constitutional.

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¹⁷⁴ This Note is dedicated in loving memory of Samuel N. Stroum, whose selfless generosity made this endeavor possible. I would also like to thank my grandparents, Herman I. Stroum and Alice B. Stroum for their endless support and encouragement.