POLICING IDENTITY

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Identity has long played a critical role in policing. Learning "who" an individual is not only affords police knowledge of possible criminal history, but also of "what" an individual might have done. To date, however, these matters have eluded sustained scholarly attention, a deficit that has assumed ever greater significance as government databases have become more comprehensive and powerful. Identity evidence, in short, has and continues to suffer from an identity crisis, which this Article seeks to remedy. The Article does so by first surveying the methods historically used by police to identify individuals, from nineteenth-century efforts to measure bodies and note physical marks to today's sophisticated biometric identifiers. As this history makes clear, the American justice system has not kept pace with evolving developments and has failed to impose meaningful limits on identity evidence. The Article highlights this shortcoming and offers a remedy, focusing on two central, yet unresolved questions: (1) whether and how limits should be placed

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on the collection, retention and use of legally obtained identity evidence, DNA in particular, and (2) whether identity evidenced illegally secured by police should be subject to suppression. In doing so, the Article provides a much-needed analytic framework for courts as they seek to balance social control needs and individual civil liberties.

INTRODUCTION

In the summer of 2011, news outlets triggered public concern with reports of American police using hand-held, high-tech gadgets to record and analyze the eyes and faces of detained individuals.[1] To those unfamiliar with the history of American law enforcement, the reaction was perhaps understandable, affording further evidence of the nation's headlong descent into Orwellian totalitarianism.

Scholars familiar with longstanding police use of physical traits to overcome personal anonymity, however, were less alarmed. Indeed, physiognomy, from the earliest efforts to brand offenders, through nineteenth-century innovations like photography and fingerprinting, has figured centrally in law enforcement. Conceived in this broader historical context, the high-tech gadgetry reported on by the media represents a change in modus operandi, not principle.

What does warrant surprise, however, is the failure of modern day courts to impose meaningful limits on the identification methods used by police. Seemingly content to be the handmaidens of technology, state and federal courts alike have failed to grasp the critical significance of identity evidence and have left undeveloped an entire jurisprudence regarding when such evidence can be collection, retained, and used. With the advent of DNA sampling by police, a potent new form of identity evidence also capable of revealing sensitive personal information, courts have at last voiced a measure of concern. Yet courts remain largely oblivious to the need for limits on police authority to reveal personal identity more generally, a matter assuming ever-greater importance as state, local, and federal databases become more sophisticated and better integrated.

This Article constitutes a threshold effort to remedy the situation. It does so by looking at two central issues concerning identity evidence. First, the Article considers whether the collection, retention, and use of identity evidence – DNA samples in particular – qualify as an unreasonable search under the Fourth Amendment. The most important decision to date on the issue, from

[1] *See, e.g.*, Zach Howard, *Police to Begin iPhone Iris Scans amid Privacy Concerns*, REUTERS, July 20, 2011, http://www.reuters.com/assets/print?aid=USTRE76J4A120110720; D. Parvaz, *Mobile Biometrics to Hit U.S. Streets*, ALJAZEERA (Aug. 2, 1011), http://www.aljazeera.com/indepth/features/2011/07/20117258145965608.html; *New Police Scanner Raises "Facial Profiling" Concerns* (NPR radio broadcast Aug. 11, 2011); Emily Steel & Julia Angwin, *Device Raises Fear of Facial Profiling*, WALL ST. J., http://online.wsj.com/article/SB10001424052702303678704576440253307985070.html (last updated Aug. 16, 2011).

the Third Circuit Court of Appeals sitting en banc and splitting eight to six, evinces a basic confusion over the role of identity evidence, blurring a key distinction between identity verification and investigation.[2] The conflation of purposes (ascertaining *who* an individual is and *what* that individual might have done or will do) is hugely important given the unprecedented legal authority now enjoyed by police to seize individuals for major and minor offenses alike and ongoing government efforts to expand target populations for DNA collection.

Second, the Article examines the judicial failure to clarify how identity evidence should be handled when police illegally seize an individual and secure such evidence, a matter Professor Wayne LaFave notes "has caused the courts particular difficulty."[3] The uncertainty was manifest in the Supreme Court's recent decision to grant and then dismiss certiorari in a case concerning the issue after a remarkably rambling and disjointed oral argument.[4] Lacking direction, courts have adopted strikingly different positions on whether, and to what extent, identity evidence can be the proper subject of suppression.[5]

The confusion exhibited by courts in these two areas highlights the critical need for an analytic framework for handling identity evidence, which this Article seeks to provide. Part I offers an overview of the enduring desire of individuals and governments alike to overcome anonymity, especially in the face of possible criminal risk. Part II surveys the evolving array of identification methods used by police, from the nineteenth century to the present. Part III examines the ways in which the justice system handled identity evidence over this same period. While at the outset the collection, retention, and use of identity evidence was permitted under limited circumstances, over time courts became far more indulgent, based on a misapprehension of the historical record and a disregard for the synergistic relationship between the growing sophistication of identification methods and the legal authority of police. To illustrate this failing, the Article examines caselaw in the two contexts noted above and explores the significant doctrinal and practical difficulties presented by each. Part IV closes with a discussion of the ways in which the currently under-regulated and under-theorized state of affairs can be improved, providing an analytic framework for courts as they address the challenges presented by identity evidence.

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[2] *See* United States v. Mitchell, 652 F.3d 387 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1741 (2012).

[3] WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4, at 347 (4th ed. 2004).

[4] *See* Tolentino v. New York, 131 S. Ct. 1387 (2011).

[5] *See infra* Part III.B.2.

I. OVERCOMING ANONYMITY

The desire to know one's fellow community members, especially those prone to engage in criminal activity, has deep and enduring roots.[6] To satisfy this desire societies have resorted to a variety of methods, including the physical branding and mutilation of offenders.[7] Over time, however, as corporeal techniques passed from acceptability,[8] governments sought more bureaucratic and systematic means of identification.[9]

In England, for instance, London's court at Bow Street initiated a registry in 1753 containing names and descriptions of all persons suspected of having committed fraud or a felony, highlighting the reality of repeat offending.[10] In 1844, the French ascribed semantic distinction to the phenomenon, coining the term *récidiviste*.[11] By the mid-nineteenth century, the reality of individual recidivism had influenced a change in perspective, with European governments shifting their concern from dangerous classes to dangerous individuals. As historian John Pratt described it, criminal danger became

> a quality that is no longer possessed by a class but by individuals or small groups of criminals; it is a quality that no longer threatens to tear down the portals of the state in an orgy of blood and destruction; instead, it is targeted at the quality of life of its individual subjects.[12]

Developing awareness of the individualized nature of criminality had a critically important influence on the administration of justice, which during the late eighteenth and early nineteenth centuries increasingly sought to individualize sanctions. This was especially evident in the early American republic, where two developments, both contingent on the ability to distinguish

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[6] Jeremy Bentham captured this anxiety in his plaintive query in 1843: "Who are you, with whom I have to deal?" 1 JEREMY BENTHAM, *Principles of Penal Law*, *in* WORKS OF JEREMY BENTHAM 557 (John Hill Burton et al. eds, Russell & Russell, Inc. 1962) (1843).

[7] *See* Pieter Spierenburg, *The Body and the State: Early Modern Europe*, *in* THE OXFORD HISTORY OF THE PRISON 45, 48, 53 (Norval Morris & David J. Rothman eds., 1998).

[8] *Id*. at 53.

[9] This impetus first manifested in the late thirteenth century, with governments exchanging names and basic physical descriptions of outlaws. Valentin Groebner, *Describing the Person, Reading the Signs in Late Medieval and Renaissance Europe: Identity Papers, Vested Figures, and the Limits of Identification, 1400-1600*, *in* DOCUMENTING INDIVIDUAL IDENTITY: THE DEVELOPMENT OF STATE PRACTICES IN THE MODERN WORLD 15, 25-26 (Jane Caplan & John Torpey eds., 2001).

[10] 2 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 46-47 (1956). Shortly thereafter, coordination and communication was enhanced by a Police Gazette, disseminated throughout the country on a quarterly and weekly basis, which contained information on offenders-at-large and their crimes. *Id*. at 47-54.

[11] SIMON A. COLE, SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION 15 (2001).

[12] JOHN PRATT, GOVERNING THE DANGEROUS: DANGEROUSNESS, LAW AND SOCIAL CHANGE 13, 17 (1997).

criminal actors, were taking hold. The first was the imposition of sentence enhancements on repeat offenders.[13] If such individuals were to be held accountable and singled out for heightened punishment, they had to be reliably identified.

The second development concerned the goal of offender rehabilitation, which took root in late-eighteenth-century, Quaker-dominated Pennsylvania and grew to be the dominant model in emergent prisons in Jacksonian America.[14] Under the rehabilitative model, not all convicts were seen as similarly predisposed to recidivism. If prisons were to avoid serving as "schools for crime," repeat criminal offenders needed to be identified and isolated from their less crime-prone peers.[15] Moreover, in order for reform to be successful, punishments needed to be tailored to the offending histories and backgrounds of individual offenders.

To this end, between 1790 and the 1820s, officials at Philadelphia's Walnut Street Jail endeavored to distinguish newly arrived offenders using criminal history as a basis for categorization.[16] Such efforts, however, were unsuccessful for two chief reasons. First, clerks failed to consistently and comprehensively record identity data on convicts.[17] For instance, one clerk might note the height of a convict, while another would not. Furthermore, the data points recorded often included vague or relative matters or descriptors (e.g., "quick" speech, "sallow" complexion) and focused on too few unalterable features (e.g., height); worse yet, records reflected matters capable of fabrication (e.g., place or date of birth).[18]

Second, and equally important, the information gathered was not amenable to easy or systematic retrieval. Records were stored according to sentencing date with no capacity for cross referencing, requiring officials to review the entirety of jail records.[19] While the mid-1820s saw an increase in the

[13] *See* Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511, 511 n.1 (1982).

[14] David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, *in* THE OXFORD HISTORY OF THE PRISON, *supra* note 7, at 100, 105-07 (discussing Jacksonian reformers' belief that "prison [should] transform the deviant into a law-abiding citizen, that is, rehabilitate the offender").

[15] Pamela Sankar, State Power and Record-Keeping: The History of Individualized Surveillance in the United States, 1790-1935, at 70-72 (Jan. 1, 1992) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with Lillian Goldman Library, Yale Law School) (highlighting the concern that "uncontrolled contact made prisons into schools for crime," where "new criminals were created out of the contact between innocents . . . and hardened criminals who were housed together").

[16] *Id*. at 71-72 (describing how prisoners in Walnut Street Jail were "divided into groups based initially on their criminal history" and later "on their behavior while in the prison").

[17] *Id*. at 81-82 (recounting the "lack of standardization in detail and type of information" found in descriptions of prisoners).

[18] *Id*. at 85.

[19] *Id*. at 86.

complexity of information gathered and the ease with which it could be retrieved, jail records remained of limited use in detecting recidivists.[20]

The desire to identify criminally risky individuals, however, did not diminish over time; indeed, it grew. In a society beset by massive social and economic changes driven by rapid industrialization and major increases in mobility, urbanization, population growth, and immigration, anonymity became the new American social norm. No longer did neighbors necessarily know one another; America became, in the words of historian Michael Ignatieff, a "society of strangers."[21] In 1829, Gustave de Beaumont and Alexis de Tocqueville, visiting the country under the auspices of the French government to study American penal reforms, observed that in America "[n]othing is easier than to pass from one state to another, and it is the criminal's interest to do so."[22] Without a reliable, centralized means of identification, they wrote, "the courts condemn, almost always, without knowing the true name of the criminal, and still less his previous life."[23]

II. POLICING IDENTITY

The job of fulfilling this need fell to an emerging institutional entity: the police, which starting in the mid-1800s had become better organized and more professional and had assumed a more proactive and preventive role in securing public safety.[24] A key ingredient in this ongoing transformation was the formulation of a reliable means of identifying and monitoring potential recidivists. As Peter Becker observed, "stigma was no longer directly inscribed on the body of the perpetrator, but was rather administered in collections of data by the police."[25]

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[20] *Id*. at 103-05.

[21] Michael Ignatieff, *State, Civil Society and Total Institutions: A Critique of Recent Social Histories of Punishment*, *in* SOCIAL CONTROL AND THE STATE: HISTORICAL AND COMPARATIVE ESSAYS 87 (Stanley Cohen & Andrew Scull eds., 1983).

[22] GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 101 (Francis Leiber trans., S. Ill. Univ. Press 1964) (1833). Their concern stemmed from the vast differences between the highly migratory United States and the sedentary French populations, and the fact that French prison releasees were required to return to their village of origin until allowed by police to relocate. *Id*. at 131 (explaining that while an American prisoner could move to another state after release and begin a new life, French prisoners were "condemned to live in the place where [their] first crime [was] officially known").

[23] *Id*. at 101-02.

[24] For more on this transformation, especially evident in the nation's urban areas, see LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 27-30, 66-68 (1993); ERIC H. MONKKONEN, POLICE IN URBAN AMERICA, 1860-1920, at 34-35 (1981); JOHN C. SCHNEIDER, DETROIT AND THE PROBLEM OF ORDER, 1830-1880, at 100-01, 119 (1980).

[25] Peter Becker, *The Standardized Gaze: The Standardization of the Search Warrant in Nineteenth-Century Germany*, *in* DOCUMENTING INDIVIDUAL IDENTITY: THE DEVELOPMENT

A. *Early Methods*

1. "Spotting," Photos, and Registries

The challenge for police turned on discovery of an identification method that was both reliable and sufficiently user-friendly to be of practical utility. In Europe, police had used standardized forms to identify suspected perpetrators since the early 1700s, and Prussian police were required to do so by decree in 1828.[26] By the mid- to late nineteenth century, American police had been assigned to specific geographic zones or "beats" in cities, and were trained to recall the faces and backgrounds of dangerous individuals prone to be in their areas.[27] Officers – and the newly formed ranks of detectives – adopted various "spotting" techniques. A select few were thought "human encyclopedias," whose memory enabled them to mentally store the faces of criminals.[28]

Soon, verbal descriptions and the mnemonic prowess of individual officers came to be supplemented by more formalized visual displays. In 1851, Boston began conducting a weekly "show-up of rogues" for the benefit of police and locals,[29] and New York City, building upon the early photographic innovations of the British and French in the 1840s,[30] staged the first-known "rogues' gallery" in 1857.[31] Legal historian Howard Sprogle describes the rogues gallery used in 1880s Philadelphia as

> [a large walnut cabinet] which stands about five feet high, [inside of which] are ten walnut racks, which are pivoted at the side, and open like

OF STATE PRACTICES IN THE MODERN WORLD, *supra* note 9, at 139, 155. For more on the nineteenth century shift toward the objectification and rationalization of criminality, evident in efforts to identify and catalog criminal actors more generally, see George Pavlich, *The Subjects of Criminal Identification*, 11 PUNISHMENT & SOC'Y 171 (2009).

[26] Becker, *supra* note 25, at 144-45.

[27] *See, e.g.*, SCHNEIDER, *supra* note 24, at 100 (discussing the evolving role of officers in Detroit).

[28] *See* HOWARD O. SPROGLE, THE PHILADELPHIA POLICE, PAST AND PRESENT 273, 653 (1971). In Philadelphia, a "secret service" of detectives, known only to the chief of police, was acquainted with the visages, backgrounds, and methods of "known criminals," using their expertise to solve crimes and monitor transport hubs. *Id.* at 117-18.

[29] ROGER LANE, POLICING THE CITY: BOSTON 1822-1885, at 66 (1967). Upon their release, the seventy-six targets of the first showing were subjected to a "gauntlet of crowing citizens who tore their clothing and marked their backs with crosses in chalk." *Id.*

[30] Previously, in 1819, Germany and France experimented with predecessor technologies: in Germany, portraits, and in France, use of the "physionotrace," a device that permitted a person's bodily shadow to be projected onto paper in silhouette form when the person was placed between the device and a light. Becker, *supra* note 25, at 124, 154-56. Portraits, however, had the drawback of reflecting the subjective impression of the artist and required a talented artist to be available. Silhouettes, while more mechanical, lacked sufficient detail to permit identification. *Id.* at 156.

[31] JAMES F. RICHARDSON, THE NEW YORK POLICE: COLONIAL TIMES TO 1901, at 122 (1970). Within a year of its creation, the gallery contained approximately 700 photos. *Id.*

> the leaves of a large photograph album. The ten leaves will hold two thousand card photographs arranged in rows of ten pictures, or one hundred to each page, or two hundred to the leaf. On the back of each card is the name of the individual, with points concerning his personality. Burglars, counterfeiters, forgers, highwaymen, pickpockets, . . . etc., are arranged together under appropriate headings. An index is kept, giving the number of each portrait, with the name, age, height, marks and other particulars of the personal appearance of the criminal.[32]

Initially limited to local offenders, Philadelphia's gallery eventually contained images from other cities, and the public was invited to view the assortment.[33]

The rogues-gallery method, however, suffered from an age-old administrative problem: the images were difficult to assemble in such a way as to ensure their subsequent retrieval.[34] Moreover, the utility of the stored images was significantly undercut by the protean nature of individuals' physical appearances, which could change either as a result of time and circumstance[35] or overt effort to deceive.[36]

In Europe, governments were experimenting with other, more systematic methods. The French in 1850, for instance, instituted *casiers judiciares*, the brainchild of penal reformer Arnould Bonneville de Marsangy, which soon revolutionized criminal recordkeeping efforts.[37] Instead of storing convict records solely in courts where convictions took place, Bonneville's strategy required that a copy of each conviction and sentence be sent to a court located in an offender's place of birth, or if such place was not known or the offender was foreign-born, to a central repository in Paris.[38] With such information consolidated, it was thought that authorities could hold repeat offenders accountable and first-time offenders could benefit from lenience, while offenders in general would be better deterred from misdeeds.[39]

Germany, by 1867, had its *Meldewesen*, which required all citizens to register with the police and to report all travel and changes of residence.[40] While the French system was static, reflecting only name and conviction-related information, the German registry contained individuals' names and

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[32] SPROGLE, *supra* note 28, at 265-66.

[33] *Id*. at 117-18, 275.

[34] COLE, *supra* note 11, at 26.

[35] *See id*. at 48.

[36] *See infra* note 57 and accompanying text.

[37] André Normandeau, *Pioneers in Criminology: Arnould Bonneville de Marsangy (1802-1894)*, 60 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 28, 30 (1969).

[38] PRISON ASS'N OF N.Y., 24TH ANNUAL REPORT OF THE EXECUTIVE COMMITTEE OF THE PRISON 546, 553 (1869), *available at* http://books.google.com/books?id=KyUSAAAAYAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

[39] *Id*. at 553-54.

[40] RAYMOND B. FOSDICK, EUROPEAN POLICE SYSTEMS 354-55 (1915).

addresses in each locality in which they lived or visited.[41] The registry had a variety of purposes, including identifying children subject to compulsory vaccination and allowing police to apprehend criminal suspects.[42] Writing in his seminal book, *European Police Systems*, American penal reformer Raymond Fosdick observed that "[n]o laws in Germany are more rigidly enforced than those relating to the *Meldewesen*. Evasion is difficult and when detected is severely punished."[43]

In Berlin, which had maintained its own registration system since 1836, twelve million cards were on file, containing data on all persons who had at any time been in Berlin.[44] Fosdick wrote that in Germany the *Meldewesen* constituted the "core of the detective department. Through its agency the police can put their hands on any citizen when they want him."[45] The *Meldewesen* was also used by police to check the identities of "suspicious persons or persons inhabiting disorderly houses" to determine if they were wanted for crimes.[46] With the system, Mathieu Deflem more recently wrote, "German police squads would raid hotels, lodging houses and public places, and check apprehended persons with information collected in the registration system."[47]

The *Meldewesen* system was complemented by the *Steckbrief*, a daily or weekly notice containing the names or descriptions of criminal suspects sought in Germany and elsewhere.[48] The notice was used to apprehend fugitives and to check the identity of arrestees more generally to learn if they were otherwise wanted.[49]

Fosdick had high praise for the two strategies, writing that they "together form[ed] an intricate network."[50] Police were trained to know the inhabitants of their beat and unknown individuals immediately attracted attention. Providing a false name was the only way for the system to be defeated, and even this was of little avail with German citizens, "who must satisfy the police as to their identity by means of military papers or their employment and insurance cards. In cases of doubt, men are held pending further investigation."[51]

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[41] *Id*.

[42] *Id*.

[43] *Id*. at 352.

[44] *Id*. at 353. The registration bureau had 200 employees who occupied 130 rooms. *Id*.

[45] *Id*. at 356.

[46] *Id*. at 357-58.

[47] Mathieu Deflem, *Surveillance and Criminal Statistics: Historical Foundations of Governmentality*, 17 STUD. L. POL. & SOC'Y 149, 162 (1997).

[48] FOSDICK, *supra* note 40, at 358.

[49] *Id*.

[50] *Id*.

[51] *Id*. The Nazis, coming to power several decades later, were greatly aided by the system. *See* Robert M. W. Kempner, *The German National Registration System as Means*

Around the same time, the British were experimenting with registration systems of their own. No longer able to jettison their criminal lawbreakers to faraway lands by means of transportation, the crown, by the mid-1800s, was acutely aware of the need to monitor and control them domestically.[52] As legal historians Sir Leon Radzinowicz and Roger Hood observed, "[t]he perception of a mass of offenders at home, moving about and yet anonymous, fostered an escalating fear of a criminal or dangerous class and a resolve to do something drastic about it."[53] In response, the government enacted a series of laws allowing for the registration and monitoring of criminal offenders, as well as heightened sentences for recidivists.

In 1869, the Habitual Criminals Bill required that all felons and certain misdemeanants register with police and provide a photo, and in 1877 the "Alphabetical Register of Habitual Criminals" was created.[54] Upon recognizing that both methods were subject to defeat, such as by providing a false name or address,[55] the British soon inaugurated the "Register of Distinctive Marks," containing photos and information on bodily marks, as well as criminal modus operandi.[56] The Register apportioned the body into nine parts, and what was deemed the most distinctive permanent mark, such as a scar or tattoo, determined where the individual's name was placed in the register. While better organized, the technique remained problematic because savvy individuals could alter the location and appearance of their marks; moreover, the register proved too cumbersome and labor-intensive to enjoy continued use, resulting in its eventual demise in the 1890s.[57]

2. Anthropometry

The foregoing efforts, despite their growing sophistication, highlighted the ongoing need for a method allowing for the reliable and systematic collection, storage, and retrieval of offender information. A key innovation came with a regimen of bodily (anthropometric) identification offered by a French police

of Police Control of Population, 36 J. CRIM. L. & CRIMINOLOGY 362, 366, 378-81 (1946). The Reich Criminal Police kept separate card indices of "professional criminals," gypsies, and wanted criminals, allowing for their ready identification and detention. *Id*. at 382.

[52] Leon Radzinowicz & Roger Hood, *Incapacitating the Habitual Criminal: The English Experience*, 78 MICH. L. REV. 1305, 1308 (1980).

[53] *Id*.

[54] *Id*. at 1340-43, 1348.

[55] *Id*. at 1342-43, 1348-49. This vulnerability was embodied in the behavior of one Lacenaire, described as a "professional criminal," who "adopted false names, multiplied forgeries and disguises, and preyed actively on society." HAVELOCK ELLIS, THE CRIMINAL 22-23 (2d ed. 1895).

[56] *See* Edmund R. Spearman, *Known to the Police*, 36 NINETEENTH CENTURY 356, 357 (1894), *reprinted in* CRIME AND PUNISHMENT IN ENGLAND: A SOURCEBOOK 256-57 (Andrew Barrett & Christopher Harrison eds., 1999).

[57] LEON RADZINOWICZ & ROGER HOOD, THE EMERGENCE OF PENAL POLICY IN VICTORIAN AND EDWARDIAN BRITAIN 261 (1990).

official, Alphonse Bertillon. The ornate method depended on three data points: (1) body part dimensions, such as the head, finger, and ear; (2) descriptions of facial features; and (3) notations of "peculiar marks," such as scars, birthmarks, and tattoos.[58] Measurements were taken with calipers and other tools by specially trained clerks, and were complemented by full-face and profile photographs, as well as more subjective considerations such as complexion, demeanor, voice, and hair color, based on Bertillon's specific "morphological vocabulary."[59]

The recordings consisted of the "signalment" phase; anthropometry's appeal, however, also stemmed from its classification system. Measurements taken by clerks were inscribed on index cards and assembled in large specially built cabinets with multiple rows and columns, each concerning a distinct body part.[60] Cards were first separated by gender, then by head length (small, medium, or large), each subject to quantitative definition. Operators then sub-classified cards by head breadth; and divided again by middle finger length and other bodily measures; and divided yet again by eye color. Each group was then placed in a separate file drawer and arrayed by ear length.[61] With a new suspect in custody, operators would endeavor to match information taken from the suspect with the anthropometric information filed.[62]

With anthropometry, officials could link individuals with quantified corporeal data, on replicable, systematically collected measures that were far more objective than those used in the past. In addition, rather than having to rely on the personal knowledge or recollection of officials, the records were systematically organized, and hence accessible.[63]

Bertillon's regime derived from and reflected ongoing developments in the social sciences.[64] Like evolutionary theorists Charles Darwin and Herbert

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[58] ALPHONSE BERTILLON, INSTRUCTIONS FOR TAKING DESCRIPTIVE FOR THE IDENTIFICATION OF CRIMINALS AND OTHERS BY THE MEANS OF ANTHROPOMETRIC INDICATIONS 72 (Gallus Muller trans., AMS Press 1977) (1889).

[59] COLE, *supra* note 11, at 37.

[60] *Id*. at 45.

[61] *Id*.

[62] Martha Merrill Umphrey, *"The Sun Has Been Too Quick for Them": Criminal Portraiture and the Police in the Late Nineteenth Century*, 16 STUD. L. POL. & SOC'Y 139, 149 (1997).

[63] Not all were convinced of the superiority of the new regime, however, including New York City Police Lieutenant William Sheridan, "known and feared the world around among professional criminals as 'The Man with the Camera Eye.'" *Duels with the Underworld*, LEXINGTON HERALD, Oct. 23, 1910, at 4. To Sheridan, "[n]othing . . . has been found to replace the human memory as a dependable agency for police detection and identification." *Id*.

[64] *See* RONALD R. THOMAS, DETECTIVE FICTION AND THE RISE OF FORENSIC SCIENCE 223 (1999) (stating that anthropometry was predicated on the idea that "the body betrays the truth about the criminal in the form of an automatic anatomical writing that is legible to the eyes of the trained expert").

Spencer; eugenic theorist Sir Francis Galton; and criminal anthropologists such as Cesar Lombroso, who ascribed criminological significance to biological features, including skull sizes and shapes, tattoos, and the like,[65] Bertillon sought predictability. However, anthropometry emphasized the importance of painstaking individualized assessment, not "criminal types."[66]

Anthropometry was first adopted in the United States in 1887 by the Illinois State Penitentiary and by 1888 roughly a dozen large U.S. prisons used the system.[67] In 1889, the federal government urged public support for creation of a centralized anthropometric identification bureau in the nation's capital.[68] Singing the praises of anthropometry, an 1896 editorial in Indiana's Fort Wayne News explained that the system was essential to the development of a "general system of criminal registration . . . . Properly used[, the system] will be as nearly infallible as a system designed by man can be."[69]

While anthropometry never caught on nationwide with prison officials, due mainly to concern over the accuracy of its measurements,[70] it received a warmer reception from police, desperate for help in their effort to monitor growing urban populations.[71] In 1893, the year of the World Columbian

[65] On Lombroso's work and the broader movement of which it was a part, see CHARLES COLBERT, A MEASURE OF PERFECTION: PHRENOLOGY AND THE FINE ARTS IN AMERICA (1997), and DAVID G. HORN, THE CRIMINAL BODY: LOMBROSO AND THE ANATOMY OF DEVIANCE (2003). For discussion of the reasons behind Lombroso's popularity in particular, see Nicole Hahn Rafter, *Criminal Anthropology: Its Reception in the United States and the Nature of Its Appeal*, *in* CRIMINALS AND THEIR SCIENTISTS: THE HISTORY OF CRIMINOLOGY IN INTERNATIONAL PERSPECTIVE 159-81 (Peter Becker & Richard F. Wetzell eds., 2006).

[66] The competing positions clashed in 1907 when Bertillon refuted Lombroso's conclusion that the hands of a Parisian hostler made clear that he was a "born criminal," when the man's hands actually were misshapen as a result of his manual labor. *Bertillon and Lombroso at Odds over Palmistry*, BALT. AM., Dec. 1, 1907, at 12.

[67] Sankar, *supra* note 15, at 196-97.

[68] *Id*. at 197.

[69] Editorial, *Prison Reform V: The Incorrigible Criminal*, FORT WAYNE NEWS, Dec. 30, 1896, at 2. If nothing else, the system seemed more tenable than the method once used in New York's Sing Sing State Prison. *See Defense of the Bertillon System*, N.Y. TIMES, Jan. 20, 1896, at 3 (quoting a prison official as stating: "they build up around a man a frame something like a coffin, and if the man is again arrested they put him into the frame and see whether it fits; but it is not very practical, as the great number of boxes would become very cumbersome").

[70] For instance, each measurement had to be consistently taken, which was difficult because the quality of training was uneven and because there were inaccuracies in translations of Bertillon's work from its original French. *See* COLE, *supra* note 11, at 147-49. In addition, despite the seeming quantitative objectivity of its measures, anthropometry depended on humans to carry out and record the measures, which could be transcribed improperly and subject to rounding inconsistencies. *Id*.

[71] *See* WILBUR R. MILLER, COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON, 1830-1870, at 147 (1973) ("The development of preventive police had followed

Exposition, police in host city Chicago employed Bertillon's system[72] and the National Chiefs of Police Union (later to be renamed the International Association of Chiefs of Police (IACP)) unanimously endorsed its use.[73] The group soon created a National Bureau for Criminal Identification (NBCI), in the hope of spawning a network of offices that would collect anthropometric information on criminal offenders and store it in a centralized office in the nation's capital.[74]

Although the NBCI never achieved universal use among the nation's police departments, within a few years it stored 3000 index cards annually. Moreover, during the 1890s several large urban police departments, including those in New York and Washington, as well as the Pinkerton Detective Agency, instituted stand-alone anthropometric departments.[75] As with corrections, however, the promise went unfulfilled. Local police failed to follow prescribed methods, or otherwise erred in entering physical data, undercutting both the comprehensiveness and reliability of the system.[76]

3. Fingerprinting

Bertillon's calipers held dominant sway until around 1910, when they faced competition from yet another criminal identification tool: fingerprint recording and analysis. Having originated in seventh-century China, the first Western use of fingerprints in criminal justice is variously attributed to Englishmen William Herschel in the 1870s or Henry Faulds in 1880.[77] The idea, however, did not achieve public notice until Sir Francis Galton, respected statistician, eugenicist, and cousin of Charles Darwin, refined and championed the idea at the turn of the century.[78] In 1904, dazzling feats of fingerprint matches at the World's Fair in St. Louis captivated and impressed huge crowds.[79]

The system eventually developed, consisting of fingerprint pattern types containing "arches," "loops," and "whorls," with distinct sub-classifications

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the growth of prison reform in America . . . . [H]owever, the police functions of surveillance and apprehension outlived the prisons' reformatory efforts and became the dominant means of coping with crime in the nineteenth century.").

[72] Sankar, s*upra* note 15, at 201-02.

[73] *Id*. at 202.

[74] IDENTIFICATION WANTED: DEVELOPMENT OF THE AMERICAN CRIMINAL IDENTIFICATION SYSTEM, 1893-1943, at 31-33 (Donald C. Dilworth ed., 1977). The clarion call for greater national police cooperation in the sharing of information (in particular, photos) was issued before, in 1871, at the National Police Convention in St. Louis, but officials did not gather again to address such issues for another two decades. SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM 40, 47-48 (1977).

[75] Sankar, *supra* note 15, at 204.

[76] *See* COLE, *supra* note 11, at 52.

[77] *Id*. at 65, 73. Simon Cole notes that Albany, New York detective John Malloy may have used prints even earlier in the United States. *Id*. at 120.

[78] *Id*. at 74.

[79] *See id*. at 137-38.

within each, was well received in America. While for many years anthropometry and dactyloscopy (as fingerprint analysis came to be called) shared popularity with police departments using them in tandem,[80] the latter soon emerged as the preferred identification method. In 1911, the IACP endorsed fingerprinting and encouraged its use[81] and by the 1930s fingerprinting was the nation's criminal-identification method of choice.[82]

Several reasons accounted for the speedy embrace of fingerprinting at the expense of anthropometry. First, anthropometry, like early photographic technology that preceded it, failed to accommodate physical human change. Because the human body continued its physical growth into adulthood, anthropometry could not, for instance, accurately record juvenile offenders. Fingerprints, available in immutable form from birth, were not so limited. Second, anthropometry continued to be plagued by accuracy concerns. Justifying its switch from anthropometry to fingerprinting in 1910, for instance, the Boston Police Department asserted that "as the digits *record themselves* there are no inaccuracies."[83] Third, anthropometry was difficult to master, and despite Bertillon's exhortations to the contrary, individual police departments took it upon themselves to add to, modify, and at times ignore bodily measures prescribed by the system.[84] Fingerprinting, on the other hand, could be readily mastered, and was cheaper and quicker for clerks to administer.[85] Finally, fingerprints themselves could be more easily stored and organized than the data in Bertillon's complex system.

State and local adoption of fingerprint analysis soon inspired interest from the federal government. While the U.S. government for many years rebuffed state requests to store fingerprints, deeming crime control a local, not federal, responsibility, in time it assumed the institutional role with zeal. Under the leadership of J. Edgar Hoover, the U.S. Department of Justice's Bureau of Investigation, predecessor of the FBI, had over three million criminal offender

[80] *Id*. at 152.

[81] Sankar, *supra* note 15, at 213-14.

[82] This is not to say exclusive choice. Bertillon measurements, combined with photos, continued to play a role in policing well into the 1900s. In 1936, for instance, concerned that an influx of anonymous criminals might prey on visitors for the Democratic Party Convention in the city, Philadelphia police amassed photographs of some 10,000 pickpockets, hotel thieves, swindlers, and ex-convicts, along with their Bertillon measurements, and shared information on the "undesirables" with hotel detectives and floor managers. *Philadelphia Dons Convention Dress*, N.Y. TIMES, June 19, 1936, at 8; *Photos of 10,000 Crooks Gathered for Convention*, N.Y. TIMES, June 17, 1936, at 2.

[83] COLE, *supra* note 11, at 165.

[84] *See supra* note 70 and accompanying text.

[85] COLE, *supra* note 11, at 159. According to Simon Cole, the anthropometric measurement of females posed particular challenges, inter alia, due to their bouffant hair styles that threw off height measures and distinctive marks possibly located in body areas that discouraged investigation by the typically male diagnosticians. *Id*. at 154.

fingerprints on file in 1932, with prints provided by 4,913 law enforcement agencies nationwide.[86]

In later years, the utility of fingerprints extended beyond identity verification.[87] Loops and whorls contained in prints could be compared to those found at crime scenes, resulting in the solution of unsolved crimes. This new forensic-investigative role was soon greatly enhanced by technological advances, especially the nationwide Automated Fingerprint Identification System in the 1980s, and the Integrated Automated Fingerprint Identification System (IAFIS) in the 1990s, permitting automated access to and analysis of digitally stored prints.[88] Even if a print failed to result in immediate solution of a crime, it could, when stored, be of potential future investigative value. Also, in the late 1990s, a revamped version of the National Criminal Information Center (NCIC), first instituted in the late 1960s, came on line. The more sophisticated system radically enlarged the capacity for the linking of stored information across disparate databases.[89]

B. *Modern Methods*

Until the 1980s, fingerprints remained the principal form of identity evidence. In the past few decades, however, remarkable scientific and technological advances have afforded police an array of new technologies, giving rise to what one writer aptly called the "digitally efficient investigative state."[90] This part provides a brief overview of three primary techniques, each concerning biometric measurements.[91]

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[86] *Federal Crime Registry Results in 236 Arrests*, L.A. TIMES, Sept. 12, 1932, at A12. By mid-1956, the FBI had well over 141 million fingerprints on file. DON WHITEHEAD, THE FBI STORY: A REPORT TO THE PEOPLE 139 (1956).

[87] *See generally* COLE, *supra* note 11, at 168-90.

[88] *See* Erin Murphy, *Databases, Doctrine and Constitutional Criminal Procedure*, 37 FORDHAM URB. L.J. 803, 806-08 (2010). At present, the IAFIS system constitutes the largest criminal identification database in the world. *Integrated Automated Fingerprint Identification System*, FED. BUREAU INVESTIGATION, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis (last visited Oct. 10, 2012).

[89] Murphy, *supra* note 88, at 808-09 (describing how the NCIC folds into the National Instant Criminal Background Check System, the Convicted Sexual Offender Registry, and the Convicted Persons on Supervised Release database).

[90] Stephen Rushin, *The Judicial Response to Mass Police Surveillance*, 2 U. ILL. J.L. TECH. & POL'Y 281, 284-85 (2011).

[91] "Biometrics" refers either to biological or physiological characteristics usable for automatic recognition of individuals on the basis of such characteristics. *See* NAT'L SCI. & TECH. COUNCIL, PRIVACY & BIOMETRICS: BUILDING A CONCEPTUAL FOUNDATION 4 (2006), *available at* http://www.biometrics.gov/Documents/privacy.pdf. For more in-depth treatment of the techniques described, as well as many other new biometric methods (e.g., voice, vein pattern, or hand), see BIOMETRIC SYSTEMS: TECHNOLOGY, DESIGN AND PERFORMANCE EVALUATION (James Wayman et al. eds., 2005); JOHN D. WOODWARD, JR. ET AL., BIOMETRICS: A LOOK AT FACIAL RECOGNITION 3 (2003). The FBI's "Next Generation

1. Iris and Retina Recognition

One identification method concerns the human eye, the iris and retina in particular. Iris recognition records the pigmented portion on the front of the eye surrounding the pupil, which contains features that serve as unique identifiers.[92] The technique requires use of a high-resolution near-infrared camera that captures an image of the iris that is stored in a database. The image can be quickly secured by police, in two to three seconds, and captured from up to three feet away (it is expected, however, that significantly greater distances will soon be possible).[93] While current scanning technology requires that the subject be stationary and look straight into the camera, this does not present a major obstacle when police have stopped or arrested a subject, as commonly occurs on street patrol.

Retina recognition is also based on a captured ocular image.[94] Here, the biometric identifier is located in the posterior of the eye, focusing on the biologically unique complex of capillaries supplying the retina with blood. A retinal image is taken by subjecting the eye to a beam of near infrared light, with the beam tracing the retina's pattern, which is then converted into code and stored in a database.[95] The retina affords a highly accurate basis for identification, so much so that even identical twins do not share a similar pattern.[96] Also, the retina typically remains unaltered until death, absent diabetes, glaucoma, or particular retinal degenerative disorders.[97] However, because at present the image must be taken very close to the eye (much like when peering into a microscope),[98] the retina enjoys less common identification use than the iris.

Identification" system is leading the federal government's advances in integrating the various biometric databases. *Next Generation Identification*, FED. BUREAU INVESTIGATION, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/ngi (last visited Aug. 20, 2011).

[92] S*ee generally* John Daugman, *Iris Recognition*, 89 AM. SCIENTIST 326 (2001). The concept of using the iris for recognition dates back to 1936, yet the technique did not enjoy significant use until the late 1980s and 1990s with the development of algorithms permitting automatic recognition. *See* NAT'L SCI. & TECH. COUNCIL, BIOMETRICS OVERVIEW 3 (2006), *available at* http://www.biometrics.gov/Documents/BioOverview.pdf.

[93] Kathy Harman-Stokes, *Ubiquitous Biometrics*, FUTURE OF PRIVACY FORUM (Feb. 10, 2010), http://www.futureofprivacy.org/2010/02/10/ubiquitous-biometrics.

[94] *See generally* JOHN D. WOODWARD, JR. ET AL., ARMY BIOMETRIC APPLICATIONS: IDENTIFYING AND ADDRESSING SOCIOCULTURAL CONCERNS 17 (2001).

[95] *See Retinography*, MED. DISCOVERIES, http://www.discoveriesinmedicine.com/Ra-Thy/Retinography.html (last visited Aug. 29, 2012).

[96] Ravi Das, *Retinal Recognition: Biometric Technology in Practice*, KEESING J. DOCUMENTS & IDENTITY, no. 22, 2007, at 11.

[97] *Id*. at 14.

[98] *Id*.

2. Facial Recognition

With facial recognition, a photograph of the subject's face is taken or distilled from a video surveillance image.[99] The image is then processed and converted into a digital template based on facial geometry, which is stored in a database, searchable by algorithm.[100] While gaining in significant popularity with governments,[101] the method currently suffers from two main shortcomings: first, it has a lower match accuracy rate compared to other new biometric methods; second, accuracy can be further reduced because of poor lighting conditions, glare, and other imaging challenges.[102]

3. DNA Sampling

Finally, and most important, police can secure and analyze DNA, which is contained in the bodily cells of all humans.[103] DNA is comprised of inherited genetic material containing sequences of nucleotides that are unique to each person (except for identical twins). Even small amounts of blood, saliva, hair, or other bodily elements suffice for samples, which can be obtained directly (by blood draw or buccal cheek swab) or by "shedding" (such as leaving saliva on a drink cup).[104] DNA sample information is stored in databases maintained by states, localities, and the federal government, and the respective databases have been merged into the FBI's Combined DNA Index System (CODIS). CODIS contains over ten million DNA profiles[105] and allows for a centralized

[99] *See* LUCAS D. INTRONA & HELEN NISSENBAUM, CTR. FOR CATASTROPHE PREPAREDNESS & RESPONSE, FACIAL RECOGNITION TECHNOLOGY: A SURVEY OF POLICY AND IMPLEMENTATION ISSUES 11 (2009), *available at* http://www.nyu.edu/ccpr/pubs/Niss_04.08.09.pdf.

[100] *Id*. at 16.

[101] *See* Ryan Gallagher, *FBI to Give Facial Recognition Software to Law-Enforcement Agencies*, SLATE (Aug. 23, 2012), http://www.slate.com/blogs/future_tense/2012/08/23/universal_face_workstation_fbi_to_give_facial_recognition_software_to_law_enforcement_.html.

[102] INTRONA & NISSENBAUM, *supra* note 99, at 21-38; *see also* P. Jonathan Phillips et al., An Introduction to the Good, the Bad, & the Ugly Face Recognition Challenge Problem (2010), *available at* http://www.nist.gov/itl/iad/ig/upload/05771424.pdf (explaining a mere fifteen percent accuracy for facial images that are "difficult to match").

[103] For a helpful primer on the nature and use of DNA, see generally DNA AND THE CRIMINAL JUSTICE SYSTEM: THE TECHNOLOGY OF JUSTICE (David Lazer ed., 2004).

[104] Even though DNA sampling requires extraction of a tangible physical sample, and not an impression or image, as is the case of biometric identifiers more generally, DNA sampling typically is regarded as a biometric identifier inasmuch as it is based on a physiological characteristic. *See* NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., BIOMETRIC RECOGNITION: CHALLENGE AND OPPORTUNITIES 94 (Joseph Pato & Lynette Millett eds., 2010), *available at* http://www.nap.edu/catalog.php?record_id=12720#toc.

[105] *See CODIS-NDIS Statistics*, FED. BUREAU INVESTIGATION, http://www.fbi.gov/about-us/lab/codis/ndis-statistics (last visited Sept. 5, 2011).

repository for uploaded samples and integrated searches for genetic matches.[106] Police can use the information in a variety of ways, including by establishing a link between a crime scene sample and a sample provider (known as a "cold hit"). Most recently, police have conducted investigative scans of DNA databases for "familial" or "kinship" matches, which look for partial matches in order to find possible relatives of the genetic source rather than seeking exact matches.[107]

* * *

As the foregoing highlights, over the years police have eagerly embraced newly available technologies to increase their criminal identification capabilities. With policing becoming more proactive in nature, identity evidence came to play an increasingly central role, first allowing for the identification of detained individuals, and later allowing for the forensic investigation of past and future criminality. The next section examines how identity evidence has been addressed by the courts during this evolution.

III. IDENTITY EVIDENCE IN THE COURTS

Despite its increasing importance over time, identity evidence has received inconsistent and sporadic attention from the courts. While early courts took a relatively keen interest in identification methods by imposing limits, over time this scrutiny abated, giving way to the blasé acceptance of today. This section first provides an overview of initial judicial treatment of identity evidence and then examines how modern courts are addressing two fundamentally important questions. First, whether and how the collection, retention, and use of identity evidence – DNA in particular – should be limited when secured as a result of lawful police detention; second, whether, when police unlawfully secure identity evidence and use it to facilitate prosecutions, the exclusionary rule should apply.

A. *Early Era*

While no evidence apparently exists of judicial reactions to spotting and similar memory-based identification techniques, courts did weigh in on police use of photographs, anthropometry, and fingerprints. Consistent with public concern and anxiety over unfettered police resort to the methods,[108] courts very

[106] *See* Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CAL. L. REV. 721, 739-40 (2007) (describing how the federal government and states use DNA matches to identify individuals on the basis of "cold hits").

[107] *See generally* Natalie Ram, *Fortuity and Forensic Familial Identification*, 63 STAN. L. REV. 751 (2011).

[108] *See, e.g.*, COLE, *supra* note 11, at 157 (recounting public hostility in New York City in 1916 spawned by expanded fingerprinting of minor offense arrestees permanently

often imposed limits, especially vis-à-vis persons arrested for but not convicted of offenses.[109] As Berkeley Law Professor A.M. Kidd wrote in 1919, courts did not "sanction the common practice of 'mugging' every suspect whose picture and measurements the police would like to have. Nor d[id the courts] sustain the right to retain the prints and measurements after acquittal."[110] Professor Kidd, upon surveying the caselaw, including a handful of decisions adopting a more generous stance,[111] emphasized that even such cases went "no further than to permit the taking of photographs and measurements of persons suspected of serious offenses, for the purpose of identification."[112] Clearly a proponent of affording police greater authority, Professor Kidd added:

> In other words, that army of vagrants, hop-heads and degenerates in whose ranks are often to be found the most dangerous criminals, cannot [under current law] be fingerprinted in order to fasten on them crimes of which they may have been guilty in other places, nor can their records be retained to aid in future apprehension.[113]

The 1907 New York decision *Gow v. Bingham*[114] exemplified this judicial reluctance. There the defendant was charged with grand larceny and forgery, but never convicted, and sued to compel destruction of his photo, measurements, and fingerprints. The *Gow* court, interpreting a New York

"branded as criminals"); John Watkins, *"Mugging" Innocent Persons Under Arrest: Lights and Shadows of a System Whose Abuse Has Shaken New York's Police from Top to Bottom*, OREGONIAN (Portland), July 25, 1909, at 4. At the same time, the public and courts alike were decidedly impressed by the new "scientific" methods. *See, e.g.*, *Keeping Track of the Criminal by His Finger Prints: The Wonderful Art, Long Used in China, Rapidly Being Adopted by the Police of This Country, with the New York Force Leading*, N.Y. TIMES, July 30, 1911 (Magazine), at 12 ("[T]he finger-print system will remain the great science of identification long after all burglars have learned to go gloved in midsummer.").

[109] *See, e.g.*, People v. Hevern, 215 N.Y.S. 412, 418 (N.Y. Mag. Ct. 1926) (deeming "compulsory finger printing before conviction [] an unlawful encroachment upon person, in violation of the state and Federal Constitutions"); *see also* JOSEPH M. DEUEL, *What There Is in Finger-Prints*, *in* FINGER-PRINTS 3, 10 (1917) (relaying from author's experience as a New York City Magistrate that "[t]here must be an arrest . . . and a plea of guilty or a conviction on competent evidence before there can be finger-printing; there can be none on an acquittal"); *Finger-Printing*, EVENING WORLD DAILY MAG. (New York), Dec. 19, 1916, at 16 (lauding refusal of several magistrates to engage in "routine" fingerprinting of persons arrested for petty offenses, condemning such collection as "preposterous [and] barbarous").

[110] A.M. Kidd, *The Right to Take Fingerprints, Measurements and Photographs*, 8 CAL. L. REV. 25, 32 (1919).

[111] *Id.* at 30-32 (citing Shaffer v. United States, 24 App. D.C. 417 (1904); Mabry v. Kettering, 122 S.W. 115 (Ark. 1909); Downs v. Swann, 73 A. 653 (Md. 1909)).

[112] *Id.* at 32.

[113] *Id.*; *see also id.* at 35 ("[P]olice officials take a risk in the photographing, measuring and finger-printing regularly done in most departments.").

[114] 107 N.Y.S. 1011 (N.Y. 1907).

statute proscribing the taking of identification measurements before conviction, unequivocally condemned the departmental practice, stating:

> The officers of the police department are purely executive and administrative officers. The act of determining whether the liberty of a citizen shall be infringed . . . belongs solely to the Legislature. . . . To sustain a mere rule of the police department under such circumstances would be to confer upon the officials of that department not only executive, but legislative and judicial powers . . . . The acts of the police department here criticized were not only a gross outrage, not only perfectly lawless, but they were criminal in character.[115]

Early courts also made clear their concern over the long-term stigmatizing effect of identity evidence, especially evidence collected from persons featured in rogues galleries but not convicted of crimes.[116] In such situations, it was not uncommon for individuals to win injunctive relief allowing for the destruction or return of photographic plates in the possession of police.[117]

Starting in the 1930s, however, courts began evincing a less critical and more accepting view. Most notably, in *United States v. Kelly*[118] the Second Circuit rejected a challenge to the use of identity evidence, based on the absence of statutory authority to extract prints, brought by a defendant facing misdemeanor prosecution under the National Prohibition Act. The court downplayed the "indignity" experienced by Kelly and backed police efforts in "ascertaining whether a defendant has been previously convicted, so that the prior conviction can be pleaded as required in . . . the National Prohibition Act."[119] Identity verification, the court stressed, was "especially important in a time when increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no

[115] *Id.* at 1017-18; *see also, e.g.*, State v. Baldwin, 297 S.W. 10, 18-19 (Mo. 1927) (explaining that a 1919 state law required that "any person convicted of a felony, whose sentence has not been reversed, shall be subject to all the things (by way of identification) allowed by the Bertillon system").

[116] *See, e.g.*, Downs v. Swann, 73 A. 653, 655 (Md. 1909) (refusing to "countenance the placing in the rogues' gallery of the photograph of any person, not an habitual criminal, who has been arrested but not convicted, on a criminal charge, or the publication under those circumstances of his Bertillon record"); *Brokaw's Caretaker Held on Two Charges*, N.Y. TIMES, Mar. 13, 1905, at 8 (quoting a magistrate: "'I do not approve of photographing a man for the Rogue's Gallery until after he is convicted.' . . . 'I have always been opposed to the idea. Once a man's picture is in the Rogue's Gallery it is difficult for him get it out.'").

[117] *See, e.g.*, Itzkovitch v. Whitaker, 42 So. 228, 229 (La. 1906) (ordering return of photo plate and destruction of all fingerprints and measurements in police department's possession and stating that continued exhibition would be an unjust "permanent proof of dishonesty").

[118] 55 F.2d 67 (2d Cir. 1932).

[119] *Id.* at 70.

longer a ready means of identification."[120] In so holding, however, the court emphasized that the long-term effect of the policy was limited because identification data had to be destroyed or surrendered to the individual in the event the charge was dismissed or an acquittal occurred.[121]

Kelly marked an important shift, signaling the judiciary's greater willingness to endorse the collection and use of identity evidence, fingerprints in particular, at the pre-conviction stage. Consistent with earlier decisions and then-current practice, however, such use had administrative rather than investigative ends, seeking to discern individuals with criminal histories and thereby defeat criminal anonymity.[122] As discussed next, this circumscribed view would change in coming years, with *Kelly* itself playing a critical role.

B. *Modern Era*

As recounted earlier, the mid- to late twentieth century experienced a remarkable renaissance in identification technology, with new biometric measures such as DNA and integrated multimodal databases providing law enforcement unprecedented capacity to both verify individual identity and investigate criminal activity. Nevertheless, as this section makes clear, the courts have faltered in their response to these changes.

1. Collection, Storage, and Use of DNA

Like fingerprinting, DNA sampling has over the years targeted an increasingly broad scope of individuals. Initially, convicted sex offenders were targeted, and then all convicted felons,[123] expansions soon garnering approval from the courts.[124] More recently, attention has turned to state and

[120] *Id*. at 69.

[121] *Id*. at 71.

[122] *See* Annotation, *Right to Take Finger Prints and Photographs of Accused Before Trial, or to Retain Same in Police Record After Acquittal or Discharge of Accused*, 83 A.L.R. 127 (1933) ("This system in criminal law has two main purposes. The first is the identification of an accused as the person who committed the crime with which he is charged, and the second is the identification of an accused as the same person who has been charged with, or convicted of, other crimes."); Comment, *Excluding from Evidence Fingerprints Taken After an Unlawful Arrest*, 69 YALE L.J. 432, 438 n.30 (1960) ("In addition to establishing identity at the time of arrest, fingerprints are useful in aiding the apprehension of escaped prisoners, and in ascertaining whether the defendant has been previously convicted . . . ." (citing United States v. Kelly, 55 F.2d 67, 70 (2d Cir. 1932))); Note, *Methods of Scientific Crime Detection as Infringements of Personal Rights*, 44 HARV. L. REV. 842, 843 n.9 (1931) (noting judicial view of photos and prints as being "entirely proper" with respect to identity verification but acknowledging that "[t]he propriety of other uses remains open to conjecture").

[123] Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 33 J.L. MED. & ETHICS 102, 102 (2005).

[124] *See, e.g.*, United States v. Stewart, 532 F.3d 32, 36-37 (1st Cir. 2008); United States

federal laws that allow police to collect and analyze DNA evidence of persons not yet convicted of crimes, including mere arrestees.

The Third Circuit's en banc decision in *United States v. Mitchell*[125] marks the most significant treatment of the issue to date. In *Mitchell*, the government sought to compel collection of a DNA sample from a defendant indicted on a felony drug charge, based on federal law allowing samples to be taken from "individuals arrested, facing charges, or convicted."[126] The court rejected Mitchell's assertion that the collection and analysis of the sample, undertaken without a search warrant, constituted an unreasonable suspicionless search under the Fourth Amendment.[127]

Employing the totality of the circumstances test used by most courts to assess such claims, the Third Circuit acknowledged that the DNA sample collection constituted a search, but deemed it not an especially intrusive one given available collection methods such as buccal swabbing.[128] Moreover, the court downplayed the risk that sensitive personal and medical information contained in a DNA sample might be misused, given government safeguards in place.[129]

The *Mitchell* court next addressed a matter of core interest to the discussion here – the functional role of DNA evidence in establishing individual identity and "the degree to which an individual has an expectation of privacy in his or her own identity."[130] The court began by analogizing DNA sampling to fingerprinting, "part of a routine booking process."[131] Citing the Second Circuit's 1932 decision in *United States v. Kelly* as provenance for what it considered the historically routine fingerprinting of arrestees,[132] the *Mitchell* court stated that DNA analysis served "solely as an accurate, unique,

v. Kriesel, 508 F.3d 941, 950 (9th Cir. 2007); Banks v. United States, 490 F.3d 1178, 1193 (10th Cir. 2007); Bina Ghanaat, Comment, *Technology and Privacy: The Need for an Appropriate Mode of Analysis in the Debate over the Federal DNA Act*, 42 U.C. DAVIS L. REV. 1315, 1332-36 (2009) (surveying caselaw).

[125] 652 F.3d 387 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1741 (2012).

[126] 42 U.S.C. § 14135a(a)(1)(A) (2006); *see also* 28 C.F.R. § 28.12 (2012) ("[A]ny agency of the United States that arrests or detains individuals . . . shall collect DNA samples from individuals who are arrested, facing charges, or convicted . . . .").

[127] *See Mitchell*, 652 F.3d at 416 ("[G]iven arrestees' and pretrial detainees' diminished expectations of privacy in their identities and the Government's legitimate interests in the collection of DNA from these individuals, we conclude that such collection is reasonable and does not violate the Fourth Amendment.").

[128] *Id.* at 406-07.

[129] *Id.* at 407-09.

[130] *Id.* at 410.

[131] *Id.*

[132] *Id.* at 410-11 (citing United States v. Kelly, 55 F.2d 67, 68 (2d Cir. 1932)).

identifying marker – in other words, as fingerprints for the twenty-first century."[133]

Turning to the government's interest in collecting DNA, the court shifted emphasis in an important way. The court readily accepted a merged government interest in DNA, which can both verify identity and aid in investigation of past and future crimes.[134] The court drove the point home by asserting that there exist

> two components to a person's identity: "who that person is (the person's name, date of birth, etc.) and what that person has done (whether the individual has a criminal record, whether he is the same person who committed an as-yet unsolved crime across town, etc.)." . . . The second component – what a person has done – has important pretrial ramifications. Running an arrestee's DNA profile through CODIS could reveal matches to crime-scene samples from unsolved cases.[135]

The *Mitchell* court's analysis is troubling for several reasons. First, like other courts,[136] its invocation of the historical experience with pre-conviction collection, retention, and use of fingerprints, characterized as "routine," is well off the mark. As noted earlier, prints were, as a general rule, collected and stored only in the event of conviction, with the Second Circuit's decision in *Kelly* marking a shift in judicial attitude.[137]

Second, by blurring the verification and investigative functions of identity evidence, the *Mitchell* court again took undue liberty with the historical record. *Kelly*, as the court recognized, was predicated on the need to verify identity,[138] and was decided well before the forensic investigative heyday of prints, allowing for digitized matches to "latent" prints found at a crime scene or stored in databases.[139] If any historical inference were to be drawn, it would be

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[133] *Id*. at 410; *see also id*. at 413 ("DNA profiling is simply a more precise method of ascertaining identity and is thus akin to fingerprinting, which has long been accepted as part of routine booking procedures.").

[134] *See id*. at 414 ("To the extent that DNA profiling assists the Government in accurate criminal investigations and prosecutions (both of which are dependent on accurately identifying the suspect), it is in the Government's interest to have this information as soon as possible.").

[135] *Id*. (quoting Haskell v. Brown, 677 F. Supp. 2d 1187, 1199 (N.D. Cal. 2009)).

[136] *See, e.g*., Anderson v. Commonwealth, 650 S.E.2d 702, 706 (Va. 2007) (terming collection and retention of fingerprints historically "routine").

[137] *See supra* notes 108-122 and accompanying text.

[138] *Mitchell*, 652 F.3d at 411 (stating that the Second Circuit "emphasized that fingerprinting arrestees is for the purpose of *identification*").

[139] *See* COLE, *supra* note 11, at 250-58 (surveying the revolutionary effect computerization and digitization had on the investigative power of fingerprints). This is not to say, however, that the forensic capability of fingerprints went unrecognized early on. As Professor Cole has observed, in 1902 Alphonse Bertillon searched his collection of anthropometric data, including fingerprints, and found a match with a bloody print left on a

that early courts would be wary of condoning anything more than identity verification, based on a database consisting of convicted individuals.[140]

Finally, and critically important, the court ignored critical developments occurring since *Kelly* by accepting as an article of faith the constitutionality of unfettered collection, storage, and use of arrestee identity data. Most obvious, *Kelly* predated the radical transformation and growth of Fourth Amendment jurisprudence commencing in the 1960s.[141] As the *Mitchell* majority itself was obliged to acknowledge, the constitutional propriety of identity verification methods at the pre-conviction stage has always merely been "assume[d]."[142] Use of *Kelly* as a fulcrum to justify application of identity methods as an open-ended *investigative* device without doctrinal foundation is thus especially problematic.[143]

Moreover, the *Mitchell* majority failed to give effect to several other broader developments of critical importance, affecting policing more generally. One development concerns a shift in police modus operandi. As noted, over time policing has become increasingly proactive, a tendency of late particularly manifest in the enforcement of laws concerning low-level offenses. In the past, officers would enforce such laws to serve immediate social control goals, often to quell anxiety felt by urban elites.[144] Starting in the 1990s, however, champions of "quality of life" and "zero tolerance" policing urged that detention of petty offenders could achieve broader crime control benefits

piece of glass collected at a murder scene. *Id*. at 169-71.

[140] *See supra* notes 108-122 and accompanying text.

[141] *See* United States v. Kincade, 379 F.3d 813, 874 (9th Cir. 2004) (en banc) (Kozinski, C.J., dissenting) ("Because the great expansion in fingerprinting came before the modern era of the Fourth Amendment[,] . . . it proceeded unchecked by any judicial balancing against the personal right to privacy."). Indeed, case law from the late 1960s was at pains to distinguish the identity verification role of fingerprinting from its investigative use. *See, e.g*., United States v. Laub Baking Co., 283 F. Supp. 217, 222-25 (N.D. Ohio 1968).

[142] *Mitchell*, 652 F.3d at 410 n.20 (citing as examples *Napolitano v. United States*, 340 F.2d 313 (1st Cir. 1965), *Smith v. United States*, 324 F.2d 879 (D.C. Cir. 1963), and *United States v. Iacullo*, 226 F.2d 788 (7th Cir. 1955)). Nevertheless, the *Mitchell* majority, quoting one of the very cases it identified in support of this conclusion, confidently concluded: "It is 'elementary' that blanket fingerprinting of individuals who have been lawfully arrested or charged with a crime does not run afoul of the Fourth Amendment." *Id*. at 411 (quoting *Smith*, 324 F.2d at 882).

[143] The precedential vacuum has been used by at least one court, oddly enough, as a basis to justify investigative use of identity. *See* Haskell v. Brown, 677 F. Supp. 2d 1187, 1199 (N.D. Cal. 2009) ("Plaintiffs could point the Court to no case holding that once an individual has been identified through his fingerprints, the government was barred from running those same fingerprints against crime scene samples for investigative purposes . . ."), *aff'd*, 669 F.3d 1049 (9th Cir. 2012), *reh'g and en banc granted*, 686 F.3d 1121 (9th Cir. 2012).

[144] *See, e.g*., MONKKONEN, *supra* note 24, at 103-08 (discussing nineteenth century New York City policing); SCHNEIDER, *supra* note 24, at 106-08 (discussing nineteenth century Detroit policing).

because such offenders could be involved in more serious criminal activity.[145] "Broken windows" policing, also popular during the era, targeted petty offenders for arrest on the premise that low-level offenses, such as loitering and graffiti vandalism, contributed to more general neighborhood disorder conducive to criminality.[146] Such arrests, aside from holding promise for immediate crime abatement, allow police to search individuals and their possessions, leading to possible discovery of evidence of more serious criminal activity, augmenting the menu of factors favoring police resort to arrests.[147]

Around this time, the Supreme Court weighed in with a series of decisions explicitly affording police expansive authority to undertake stops and arrests without warrants. First, the Court held that police can seize individuals for an offense that is actually a mere pretext to pursue suspicion of other, more serious criminal activity.[148] Then, in *Atwater v. City of Lago Vista*,[149] a five-member majority held that police, lacking a warrant, can arrest an individual for any public offense, no matter how minor, if probable cause exists that it occurred.[150] The end result of these decisions, and others in recent years,[151] has been a massive increase in the discretionary authority of police to seize individuals, affording attendant growth in the identity evidence that police can collect, store, and use.

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[145] *See* Wayne A. Logan, *Policing in an Intolerant Society*, 35 CRIM. L. BULL. 334, 334-36 (1999).

[146] *See* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 580 (1997).

[147] *See* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1694-95 (2010) (discussing, inter alia, purported existence of arrest quotas, monetary benefits associated with forfeiture and arrests, and training opportunities for new recruits). For the classic treatment of the manifold reasons motivating police to arrest, including without evidence of wrongdoing and with the intent to eventually release, see WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 437-66 (Frank J. Remington ed., 1965). For a more recent portrait of police resort to arrest for low-level offenses as a street control method, see PETER MOSKOS, COP IN THE HOOD: MY YEAR POLICING BALTIMORE'S EASTERN DISTRICT 114-20 (2008).

[148] *See* Arkansas v. Sullivan, 532 U.S. 769, 771 (2001) (deeming irrelevant police subjective motivation for an arrest supported by probable cause); Whren v. United States, 517 U.S. 806, 812 (1996) (concluding the same with respect to vehicle stops).

[149] 532 U.S. 318 (2001).

[150] *Id.* at 354 ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.").

[151] *See, e.g.*, Virginia v. Moore, 553 U.S. 164, 176-78 (2008) (holding that police can violate procedural limits imposed on their authority to arrest for minor offenses); Ohio v. Robinette, 519 U.S. 33, 39-40 (1996) (holding that police need not inform individuals that a lawful seizure has concluded, allowing for extended questioning and securing of consent).

Given the foregoing, the *Mitchell* court's blurring of the verification and investigative functions of identity evidence becomes especially problematic.[152] Even presuming that a unilateral police finding of probable cause diminishes an expectation of privacy in one's identity (*who* one is),[153] an entirely different question is presented by identifying information (revealing *what* one might have done or perhaps will do).[154] The latter question – the forensic/investigative one – has in modern times been governed by Fourth Amendment doctrine. With no limit on the pre-conviction collection of identity evidence, police will, as urged by advocates,[155] be free to exponentially populate DNA databases. While at present governments mainly target persons arrested for suspected commission of felonies,[156] there have been frequent calls to expand collection efforts to all arrestees[157] and a handful of states already require that DNA be extracted from suspected misdemeanants.[158] The continued expansion in the target population of DNA

[152] Similarly heedless, a Ninth Circuit panel, relying heavily on *Mitchell*, recently merged the two distinct functions in upholding a California law requiring DNA collection of felony arrestees. *See* Haskell v. Harris, 669 F.3d 1049, 1065 (9th Cir. 2012). It did so over a lengthy dissent by Judge William Fletcher highlighting the law's explicit purpose of facilitating identity verification, which the majority generously defined to encompass investigative functions. *Id*. at 1074 (Fletcher, J., dissenting).

[153] Probable cause is itself an ephemeral standard that is relatively easy to satisfy and subject to forgivable reasonable police mistakes of fact at the time of arrest. *See* Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 109 (2011) (explaining the standard and decisions allowing police to make reasonable mistakes of fact); *see also* Herring v. United States, 555 U.S. 135, 139 (2009) ("When a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation. The very phrase 'probable cause' confirms that the Fourth Amendment does not demand all possible precision.").

[154] United States v. Mitchell, 652 F.3d 387, 423 n.6 (3d Cir. 2011) (Rendell, J., dissenting) ("It is the identifying information about the defendant . . . that interests the Government in his DNA. Only through the use of that identifying information will additional crimes be solved."). Indeed, in *Mitchell*, no question existed as to the actual personal identity of the defendant.

[155] *See, e.g.*, 151 CONG. REC. 28,855 (2005) (statement of Sen. Jon Kyl) (stating that "the efficacy of the DNA identification system in solving serious crimes depends upon casting a broad DNA sample collection net to produce well-populated DNA databases").

[156] While the *Mitchell* court addressed the case of an indictee, and left unresolved the propriety of DNA sampling of arrestees, *Mitchell*, 652 F.3d at 412 n.22 (noting same and that "the finding of probable cause . . . was not left to the discretion of a polic[e] officer alone"), the Ninth Circuit recently condoned DNA sampling of felony arrestees, *Haskell*, 669 F.3d at 1065. Of note, none of the four named plaintiffs in the suit were convicted and two were not even charged. *Id*. at 1078 (Fletcher, J., dissenting).

[157] *See* D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORNELL J.L. & PUB. POL'Y 455, 458 nn.11-12 (2001) (noting bills proposed in New York and Connecticut and calls by police commissioners for expanded collection).

[158] *See, e.g.*, ARIZ. STAT. ANN. § 13-610(O)(3) (2011); KAN. STAT. ANN. § 21-2511(e)(1)-

specimens is a very good bet,[159] allowing for ever greater numbers of searches. And even if unsuccessful in securing a match, such specimens will be stored and allow for a potential future match, enabled by arrest or a DNA "shed."[160]

To some, such developments will doubtless be an unqualified positive. Those believing they have "nothing to hide" will aver that to avoid being subject to DNA investigation one merely needs to avoid being arrested in the first instance and thereafter remain free of legal suspicion.[161] Moreover, forensic use of DNA has clear benefits, including its capacity to exonerate the wrongly accused and convicted and assist in the apprehension of individuals

(2) (Supp. 2010); S.C. CODE ANN. § 23-3-620(A)(2) (2011). For information on the scope of state laws allowing for collection of DNA samples upon arrest more generally see STATE [sic] THAT HAVE PASSED ARRESTEE DNA DATABASE, DNARESOURCE.COM, (2011), *available at* http://www.dnaresource.com/documents/ArresteeDNALaws-2011.pdf.

In addition, news reports highlight the desire of police to expand the scope of collection in the absence of legislative authority. *See, e.g.*, Jennifer Dobner, *DNA Test Sought on All Booked at New Jail, Kennard Says It Could Cut Crime Rate in Half*, DESERET NEWS (Aug. 4, 1999), http://www.deseretnews.com/article/710914/DNA-test-sought-on-all-booked-at-new-jail.html?pg=all (announcing sheriff's intent to sample all arrestees and seek federal funding to facilitate storage and analysis). In Orange County, California prosecutors offer to drop misdemeanor charges in return for a DNA sample. *See* Tami Abdollah, *Arrested in O.C.? DNA Sample Could Buy Release*, L.A. TIMES, Sept. 17, 2009, at A1 ("Orange County, which already has one of the nation's most aggressive programs for taking DNA samples from convicts, has quietly begun offering a deal to some people who have only been arrested: give a DNA sample and have your charges dropped."). Similarly, when "Occupy Wall Street" protesters were arrested in New York City, the bail amount required was altered according to each protester's willingness to have his or her irises scanned, regardless of the individual's flight risk. Nick Pinto, *As Occupy Arrestees Arraigned, Iris Scans Affect Bail*, VILLAGE VOICE BLOGS (Mar. 19, 2012), http://blogs.villagevoice.com/runninscared/2012/03/as_occupy_arres.php. Meanwhile, police in the United Kingdom have pushed for DNA sampling of persons stopped for speeding or littering. *See* Richard Ford, *Police Want DNA from Speeding Drivers and Litter Louts on Database*, TIMES (London), Aug. 2, 2007, at 2.

[159] Impetus for state expansion will likely be boosted by the prospect of securing federal funds in return for broadened collection efforts. *See, e.g.*, Katie Sepich Enhanced DNA Collection Act of 2010, H.R. 4614, 111th Cong. (2010) (authorizing an increase in funds for states that implement or enhance their DNA collection processes).

[160] The latter referred to by one commentator as "covert involuntary DNA sampling." Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. U. L. REV. 857, 882 (2006).

[161] *See, e.g.*, 150 CONG. REC. 22,956 (2004) (statement of Sen. John Cornyn) ("If the person whose DNA it is does not commit other crimes, then the information simply remains in a secure database and there is no adverse effect on his life."). For an extended rebuttal of the "nothing to hide" position, relative to privacy more generally, see generally DANIEL J. SOLOVE, NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY (2011).

involved in unsolved crimes (allowing them to be held accountable and perhaps preventing other criminal activity).[162]

However, expansive police arrest authority[163] – and the desire to continually enlarge identity evidence databases[164] at very little cost in time and expense[165] – should give pause for several reasons. First, contrary to common public perception, DNA is not infallible. Rather, like other evidence, it is subject to human error, bias, and malfeasance,[166] and has figured in several wrongful accusations[167] and convictions.[168] As Professor David Kaye notes in his recent book:

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[162] For an overview of these and similar arguments favoring DNA sampling of arrestees see *Why Pass the DNA Law?*, DNA SAVES, http://www.dnasaves.org/dna_law.php (last visited Oct. 10, 2012).

[163] By an overwhelming margin, such arrests involve misdemeanors. *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. (forthcoming 2012) (manuscript at 3) (on file with author) (citing studies estimating that eighty percent of state court dockets concern misdemeanors). While precise data are hard to come by, large proportions of such arrests concern petty violations such as driving with a suspended license, marijuana possession, vagrancy, disorderly conduct, and loitering. *Id*. (manuscript at 9-10).

More generally, in terms of the general population, today almost one-third of all Americans have been arrested for a crime by the time they reach twenty-three years of age. Erica Goode, *Many in U.S. Are Arrested by Age 23, Study Finds*, N.Y. TIMES, Dec. 19, 2011, at A16. The figure in 1965 was twenty-two percent. *Id*.

[164] Telling evidence of this motivational dynamic was seen in New York City, where police, before being enjoined, embarked upon a pilot project with portable DNA laboratories, swabbing the inside cheeks of persons stopped (not arrested) for traffic and other minor offenses. Kevin Flynn, *Fighting Crime with Ingenuity, 007 Style: Gee-Whiz Police Gadgets Get a Trial Run in New York*, N.Y. TIMES, Mar. 7, 2000, at B1; *see also, e.g.*, Brendan McCarthy, *As NOPD Files Away Mountain of Data from Traffic Stops, Critics Warn Overuse May Break Law*, NOLA.COM (July 10, 2012), http://www.nola.com/crime/index.ssf/2012/07/as_nopd_files_away_mountain_of.html (discussing New Orleans police policy of entering into computer databases names and identifying information on individuals detained during pedestrian and traffic stops, based on "field interview cards").

[165] *See* David Lazer & Michelle N. Mayer, *DNA and the Criminal Justice System: Consensus and Debate*, *in* DNA AND THE CRIMINAL JUSTICE SYSTEM, *supra* note 103, at 359, 370.

[166] *See* NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 104, at 4-5, 96-97; NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 132 (2009), *available at* http://books.nap.edu/catalog.php?record_id=12589.

[167] *See, e.g.*, William Thompson, *Tarnish on the "Gold Standard": Understanding Recent Problems in Forensic DNA Testing*, CHAMPION, Jan./Feb. 2006, at 10 (discussing contamination errors and sample swaps in various states); William K. Rashbaum & Joseph Goldstein, *DNA Match Tying Protest to 2004 Killing Is Doubted*, N.Y. TIMES, July 11, 2012, at A19 (noting recent laboratory error resulting in false match, based on "touch DNA" recovered from the scene of the Occupy Wall Street protest); Peter Jamison, *SFPD Crime Lab's DNA Evidence Could Be Tainted by Concealed Mistakes*, S.F. WKLY. (Dec. 15,

> How probable is it that two, correctly identified DNA genotypes would be the same if they originated from two unrelated individuals? By definition, [such matches] do not consider any uncertainty about the origins of the samples (the chain-of-custody issue), about the relatedness of the individuals who left or contributed the samples (the identical-alleles-by-descent issue), or about the determination of the genotypes themselves (the laboratory-error issue).[169]

Second, use of arrest as the triggering event is problematic based on what we know about arrests. Today, large percentages of the many millions of arrests occurring annually nationwide for felonies and misdemeanors alike do not result in prosecution, much less conviction.[170] This statistical reality assumes particular importance given that the majority of jurisdictions allowing for DNA collection before conviction do so at the time of arrest, without first requiring an arraignment or a judicial finding of probable cause.[171] As a result, unvarnished street-level determinations of probable cause by police determine whether a sample is added to the system.[172]

2010), http://www.sfweekly.com/2010-12-15/news/sfpd-s-troubled-crime-lab-more-evidence-of-screwups-and-coverups/ (discussing sample switches in several cases).

[168] *See* Greg Hampikian et al., *The Genetics of Innocence: Analysis of 194 DNA Exonerations*, 12 ANN. REV. GENOMICS & HUM. GENETICS 97, 107 (2011) (mentioning existence of at least fifteen exonerations in which DNA resulted in conviction).

[169] DAVID H. KAYE, THE DOUBLE HELIX AND THE LAW OF EVIDENCE 163 (2010).

[170] In California, for instance, in 2010 almost one-third of the roughly 300,000 adult felony arrests did not result in a conviction. *See* CAL. DEP'T OF JUSTICE, CRIME IN CALIFORNIA 49 (2010), *available at* http://ag.ca.gov/cjsc/publications/candd/cd10/preface.pdf. National data for misdemeanor arrests suggest similar rates. *See* Surrell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 40-41 (2000). Other studies, however, suggest far higher non-conviction rates for misdemeanor arrests. *See, e.g.*, Andrew Golub et al., *Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIMINOLOGY & PUB. POL'Y 131, 147 (2007) (reporting a non-conviction rate for low-level offense arrests of eighty percent in New York City from 1992-2003); Robert Sykora, *Our New Permanent Punishment Machine*, COUNCIL ON CRIME AND JUST., http://www.crimeandjustice.org/councilinfo.cfm?pID=65 (last visited Aug. 6, 2012) (citing statistics from Minnesota's two largest counties indicating that in 2004 nearly sixty percent of misdemeanors resulted in dismissals or not guilty verdicts). Moreover, conviction data themselves are of questionable weight, given that innocent individuals, especially those swept into high-volume justice systems struggling to process low-level offenses, often plead guilty merely to avoid costs associated with challenging wrongful arrests (e.g., remaining in jail and missing work). *See* Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 318 (2005).

[171] *See* Julie Samuels et al., *Collecting DNA from Arrestees: Implementation Lessons*, NAT'L INST. JUST. J., June 2012, at 18, 21, *available at* https://www.ncjrs.gov/pdffiles1/nij/238484.pdf (explaining that two-thirds of states allowing for DNA collection upon arrest do not first require an arraignment or judicial determination of probable cause).

[172] Such an expansive approach, it should be noted, is also problematic from a practical perspective because it adds volume to a system already struggling to handle samples secured

Trolling and trawling for DNA become even more problematic when one takes into account the demographic and geographic effects of arrests.[173] As Simon Cole has recognized:

> Criminal histories are not merely objective representations of individuals' antisocial behavior or of their potential dangerousness to society. . . . Once inscribed into the [DNA] database, these inequities take on a seemingly neutral authority of their own: They appear to be pure, objective information, when in fact they may reflect the prejudices of police or judicial practitioners.[174]

Such effects are especially evident in the context of police enforcement of minor offenses, where police discretion to arrest is at its greatest.[175]

Finally, the fusing of identity verification and investigation has implications for other biometric identification techniques. DNA collection, as the *Mitchell* court itself held, is unquestionably a search.[176] It remains to be seen whether

in a conviction-based regime. *See* JEREMIAH GOULKA ET AL., RAND CORP., CTR. ON QUALITY POLICING, TOWARD A COMPARISON OF DNA PROFILING AND DATABASES IN THE UNITED STATES AND ENGLAND 17-20 (2010), *available at* http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR918.pdf (finding that "[d]atabase matches are more strongly related to the number of crime-scene samples than the number of offender profiles in the database" and urging that collection focus on the former); *id*. at 20 ("[A] more effective means of increasing hit rates is to increase the number of crime-scene profiles uploaded into the database rather than continue to add more suspects and arrestees . . . to the database net."); SHELDON KRIMSKY & TANIA SIMONCELLI, GENETIC JUSTICE: DNA DATABANKS, CRIMINAL INVESTIGATIONS, AND CIVIL LIBERTIES 318-19 (2011) (noting, inter alia, that increased volume creates processing backlogs that can undercut investigations and lead to errors).

[173] *See* Troy Duster, *Selective Arrests, an Ever-Expanding DNA Forensic Database, and the Specter of an Early Twenty-First Century Equivalent of Phrenology*, *in* DNA AND THE CRIMINAL JUSTICE SYSTEM, *supra* note 103, at 315, 319-22, 329 (surveying various ways such matters are reflected in DNA collection efforts); *see also, e.g.*, JUSTICE POLICY INST., THE VORTEX: THE CONCENTRATED RACIAL IMPACT OF DRUG IMPRISONMENT AND THE CHARACTERISTICS OF PUNITIVE COUNTIES 6-9 (2007), *available at* http://www.justicepolicy.org/images/upload/07-12_REP_Vortex_AC-DP.pdf (discussing effects of police patrol focus on low-income and ethnic minority neighborhoods).

[174] Simon Cole, *Fingerprint Identification and the Criminal Justice System: Historical Lessons for the DNA Debate*, *in* DNA AND THE CRIMINAL JUSTICE SYSTEM, *supra* note 103, at 63, 82.

[175] *See, e.g.*, Golub et al., *supra* note 170, at 146 (stating that seventy-four to ninety-one percent of persons arrested in New York City from 1992 to 2003 for low-level marijuana offenses were African American or Latino); Aleksandar Tomic & Jahn K. Hakes, *Case Dismissed: Police Discretion and Racial Differences in Dismissals of Felony Charges*, 10 AM. L. & ECON. REV. 110, 138-39 (2008) (discussing study results showing disproportionate targeting of African Americans, compared to Whites, in street-level discretionary enforcement of less serious offenses); Jim Dwyer, *Whites Smoke Pot but Blacks Are Arrested*, N.Y. TIMES, Dec. 22, 2009, at A24.

[176] United States v. Mitchell, 652 F.3d 387, 406 (3d Cir. 2011).

facial and eye-related (retina and iris) identification methods, which entail no bodily intrusion whatsoever, will be deemed searches.[177] If not, and, as Bill Stuntz perceptively noted years ago, privacy continues to be myopically defined as secrecy,[178] nothing will prevent police, armed with hand-held devices now increasingly available, from collecting such data and conducting analyses when on patrol.[179] Criminal history "hits" will thus provide grist to justify on-the-spot reasonable suspicion and probable cause determinations,[180] fueling a self-perpetuating cycle of criminal justice system contacts.[181] The prospect becomes especially menacing if, as feared by some, DNA samples are

[177] Language in *United States v. Dionisio*, 410 U.S. 1, 14 (1973) to the effect that no reasonable expectation of privacy exists in one's "facial characteristics" that are "constantly exposed to the public" will doubtless come into play. Both the face and the eyes upon it are of course publicly exposed. Emerging biometric technologies, however, change this logic, allowing for the computerized storage, rapid retrieval, and analysis of personal identity data, a process independently qualifying as a search. *Cf.* Cupp v. Murphy, 412 U.S. 291, 295 (1973) (deeming taking of dried blood scraping a search because it enabled much closer laboratory examination than mere "public view" allows).

Also, *Dionisio* lacks precedential force here, for two reasons. First, the case addressed whether an individual could be compelled to appear before a lawful grand jury, and did not involve Fourth Amendment misconduct by the police, with implications for the exclusionary rule. *See Dionisio*, 410 U.S. at 10 (discussing ways in which the grand jury context differs from police patrol, inter alia, distinguishing the context from that presented by the unlawful arrest and fingerprinting condemned in *Davis v. Mississippi*, 394 U.S. 721 (1969)). Second, *Dionisio* concerned a voice exemplar and reference to facial characteristics therefore constituted dictum.

[178] *See* William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1016-17 (1995).

[179] *See supra* notes 1, 164 and accompanying text; *see also* JENNIFER LYNCH, IMMIGRATION POLICY CTR., FROM FINGERPRINTS TO DNA: BIOMETRIC DATA COLLECTION IN U.S. IMMIGRANT COMMUNITIES AND BEYOND 3-5 (2012), *available at* http://www.immigrationpolicy.org//sites/default/files/docs/Lynch%20%20Biometrics%2005 2112.pdf (describing a variety of mobile biometric scanners now in use, and their capacity to connect to broader databases). Even more cutting-edge advances in technology and cognitive neuroscience might soon permit police to "scan" individuals' brains to collect and retain identity data. *See* Nita A. Farahany, *Searching Secrets*, 160 U. PA. L. REV. 1239, 1281-82 (2012).

[180] *See, e.g.*, United States v. Wagers, 452 F.3d 534, 541 (6th Cir. 2006) (holding that knowledge of criminal history can help give rise to probable cause of current criminal activity); United States v. Sandoval, 29 F.3d 537, 542 (10th Cir. 1994) (holding that knowledge of prior criminal record can help create reasonable suspicion of current safety risk justifying a frisk).

[181] *Cf.* Cole, *supra* note 174, at 83 ("After passing through a DNA database, . . . the biased information contained in criminal records will have essentially been 'laundered,' and it will be treated as objective information imbued with the considerable authority of science.").

put to "predictive" use regarding genetically encoded behavioral tendencies, like addiction, aggression, or criminal propensity.[182]

Left unchecked, such developments threaten negative ramifications for society as a whole. Those not yet subject to government data collection will seek to avoid exposure for fear of being wrongly ensnared by the system.[183] And those having had their DNA collected and stored will not only be worried about subjecting innocent family members to investigation as a result of "familial searching,"[184] but also will be justly wary of venturing outside, especially in areas already thought worthy of criminal suspicion (e.g., a "high crime" or "drug blighted" area).[185] Such chilling effects not only undermine the Fourth Amendment's core animating purpose;[186] they also implicate the constellation of other civil rights that depend on the liberty and privacy that it ensures.[187]

There is no mistaking that broadened collection, storage, and use of DNA affords crime control benefit. However, as with other features of the ongoing effort to achieve a perfected law enforcement regime, it also carries significant cost. This past Term, in *United States v. Jones*,[188] five members of the Supreme Court made plain their unease over this evolution, relative to unconstrained government use of global positioning technology to track

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[182] *See, e.g.*, TANIA SIMONCELLI & SHELDON KRIMSKY, AM. CONSTITUTION SOC'Y, A NEW ERA OF DNA COLLECTIONS: AT WHAT COST TO CIVIL LIBERTIES? 12-13 (2007), *available at* http://www.acslaw.org/sites/default/files/Simoncelli__Krimsky_-_DNA_Collection__Civil_Liberties.pdf.

[183] For instance, an individual is arrested and, despite having a compelling alibi and reason for the existence of his genetic material having been found at a crime scene, is nonetheless convicted based on single-minded police focus on the match and the system's confidence in DNA. *See* William Thompson et al., *How the Probability of a False Positive Affects the Value of DNA Evidence*, 48 J. FORENSIC SCI. 1, 2 (2003) (recounting a case with similar facts).

[184] *See* Ram, *supra* note 107, at 789-94 (surveying current capabilities and adverse effects on, inter alia, family relations).

[185] *See generally* Andrew G. Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing "High-Crime Areas,"* 63 HASTINGS L.J. 179 (2011) (discussing caselaw attaching importance to geographic location in reasonable suspicion assessments by police).

[186] *See generally* Arnold H. Loewy, *The Fourth Amendment As a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983). For a more recent discussion, examining the many ways in which the lives of the factually innocent are affected by accepted police measures, see L. Rush Atkinson, *The Bilateral Fourth Amendment and the Duties of Law-Abiding Persons*, 99 GEO. L.J. 1517, 1521-26 (2011).

[187] *See, e.g.*, Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by Police*, *in* POLICE POWER AND INDIVIDUAL FREEDOM 87, 97 (Claude R. Sowle ed., 1962) (stating that "[a]ll the other freedoms, freedom of speech, of assembly, of religion, of political action" turn on the preexistence of security and privacy).

[188] 132 S. Ct. 945 (2012).

suspects without warrants.[189] Justice Sotomayor emphasized that the low-cost, comprehensive, and readily storable and accessible nature of the technology, which can be used surreptitiously and without likely resource limit, risked "chill[ing] associational and expressive freedoms."[190] A similar sensitivity is now warranted in the collection, storage, and use of DNA, which if left unconstrained, will have an array of kindred troubling consequences.

2. The Exclusionary Rule and Identity Evidence

Judicial difficulty with identity evidence has not been limited to instances in which police act lawfully and secure the evidence. Indeed, for some time courts have wrestled with whether police misconduct, resulting in the acquisition of identity evidence, and affording an independent basis for prosecution, should trigger application of the exclusionary rule.

In significant part the confusion can be traced to the Supreme Court's 1984 decision in *INS v. Lopez-Mendoza*,[191] involving the illegal arrest of two Mexican nationals. One defendant, Lopez-Mendoza, objected to being summoned to a deportation hearing based on information provided to agents as a result of his illegal arrest. The other, Sandoval-Sanchez, rather than challenging the court's jurisdiction over him at his deportation hearing, sought to have identity-related evidence linking him to his immigration record suppressed. The Court, by a five-four vote, rejected both claims.

At the outset of its opinion, seemingly directing itself to Lopez-Mendoza's jurisdictional claim, the majority wrote that "[t]he 'body' or identity of a defendant or a respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred."[192] Turning to Sandoval-Sanchez's "more substantial claim," challenging not his physical presence but rather identity evidence offered at the hearing, the majority cast the issue in terms of whether the exclusionary rule applied to deportation proceedings.

Even though such proceedings have long been regarded as civil in nature and hence exempt from application of the exclusionary rule, the majority nonetheless analyzed whether the rule should apply, weighing the benefits of exclusion – especially deterrence of police misconduct – against the costs of

[189] *Id.* at 954 (Sotomayor, J., concurring); *id.* at 957 (Alito, J., concurring).

[190] *Id.* at 956 (Sotomayor, J., concurring); *see also id.* at 955-56 ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations . . . . The Government can store such records and efficiently mine them for information years into the future."); *id.* at 964 (Alito, J., concurring) ("[S]ociety's expectation has been that law enforcement agents and others would not – and indeed, in the main, simply could not – secretly monitor and catalogue every single movement of an individuals' car for a very long period.").

[191] 468 U.S. 1032 (1984).

[192] *Id.* at 1039.

excluding valuable probative evidence. According to the majority, any possible deterrent effect was reduced by several factors, including that proof of alienage could "sometimes be [proven] using evidence gathered independently of, or sufficiently attenuated from, the original arrest,"[193] that internal immigration agency rules contained a comprehensive scheme for deterring Fourth Amendment violations by agents,[194] and that declaratory relief was available for any agency-wide abuse.[195]

The social costs of exclusion, on the other hand, were "both unusual and significant."[196] Not only are exclusionary rule proceedings inconsistent with the "deliberately . . . streamlined" immigration system,[197] but immigration violations themselves present special concern.[198] "Applying the exclusionary rule in proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal would require the courts to close their eyes to ongoing violations of the law."[199] Suppression of evidence resulting in Sandoval-Sanchez's release

> would clearly frustrate the express public policy against an alien's unregistered presence in this country. . . . The constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime. When the crime in question involves unlawful presence in this country, the criminal may go free, but he should not go free within our borders.[200]

Before ending, the majority cautioned that its assessment might change if evidence existed of "widespread" Fourth Amendment violations by immigration agents or an instance of an "egregious violation" of the Fourth Amendment, not evident in the present case.[201]

While courts today most often read *Lopez-Mendoza*'s bar on suppression of identity evidence narrowly, consistent with its apparent limited application to jurisdiction over a defendant,[202] confusion lingers over whether identity evidence is categorically exempt from possible suppression.

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[193] *Id*. at 1043.

[194] *Id*. at 1044-45.

[195] *Id*. at 1045.

[196] *Id*. at 1046.

[197] *Id*. at 1048-49.

[198] *Id*. at 1046-47.

[199] *Id*. at 1047.

[200] *Id*.

[201] *Id*. at 1050-51.

[202] *See, e.g*., United States v. Olivares-Rangel, 458 F.3d 1104, 1111 (10th Cir. 2006) ("[T]he Supreme Court's statement [in *Lopez-Mendoza*] that the 'body' or identity of a defendant are 'never suppressible' applies only to cases in which the defendant challenges the jurisdiction of the court over him or her based upon the unconstitutional arrest, not to cases in which the defendant only challenges the admissibility of the identity-related evidence."); United States v. Guevara-Martinez, 262 F.3d 751, 753 (8th Cir. 2001) ("[T]he

One judicial camp holds that application of the exclusionary rule turns on the motivation of officers in securing the evidence: whether police are seeking to verify identity or investigate criminal activity. If identity evidence is secured for an "administrative" purpose, "simply ascertaining or confirming the identity of the person arrested and routinely determining the criminal history and outstanding warrants of the person arrested," it is admissible.[203] If, however, an illegal seizure is motivated in whole or part by an investigative purpose to secure information for use in an unrelated case, the information is subject to suppression.

Such a result, the courts reason, is consistent with the Supreme Court's decisions in *Hayes v. Florida* and *Davis v. Mississippi*, where the Court barred admission of fingerprint evidence secured as a result of illegal arrests executed to obtain prints to aid ongoing criminal investigations.[204] These courts also suppress derivative or secondary evidence obtained from government databases by the use of such identification (like the immigration records in *Lopez-Mendoza*).[205]

A majority of other courts, however, exempt identity evidence from possible exclusion. The Eleventh Circuit's decision in *United States v. Farias-Gonzalez*[206] exemplifies one approach to this outcome. There, agents allegedly unlawfully seized the defendant and secured his fingerprints and a photo, resulting in his criminal prosecution for illegal reentry after deportation. While ostensibly eschewing *Lopez-Mendoza*'s categorical bar, the *Farias-Gonzalez* court achieved the same result, invoking the deterrence-based rationale of the exclusionary rule and deeming "identity-related evidence . . . never suppressible."[207]

Applying the rationale of the Supreme Court's decision in *Hudson v. Michigan*,[208] the Eleventh Circuit first concluded that any deterrent benefit of excluding identity evidence was outweighed by its social costs.[209] Next, citing the Supreme Court's decisions in *Hiibel v. Sixth Judicial District Court of Nevada*, holding that police can demand the name of a suspect lawfully

Court's reference to the suppression of identity [in *Lopez-Mendoza*] appears to be tied only to a jurisdictional issue, not to an evidentiary issue.").

[203] *Olivares-Rangel*, 458 F.3d at 1112-13.

[204] Hayes v. Florida, 470 U.S. 811, 815 (1985); Davis v. Mississippi, 394 U.S. 721, 727 (1969).

[205] *See, e.g.*, *Olivares-Rangel*, 458 F.3d at 1119 (concluding that illegally obtained fingerprints and immigration records, leading to criminal prosecution, were "inextricably linked" and suppression of former dictated suppression of latter).

[206] 556 F.3d 1181 (11th Cir. 2009).

[207] *Id.* at 1189.

[208] 547 U.S. 586, 591 (2006) (holding that the exclusionary rule is "applicable only 'where its remedial objectives are thought most efficaciously served' – that is, where its deterrence benefits outweigh its substantial social costs" (quoting United States v. Calandra, 414 U.S. 338, 348 (1974))).

[209] *Farias-Gonzalez*, 556 F.3d at 1189.

stopped for suspected criminal activity,[210] and *United States v. Dionisio*, holding that individuals have no right to withhold a voice exemplar in a lawful grand jury proceeding,[211] the Eleventh Circuit held that police could "freely obtain[]" and use the identity evidence (fingerprints and photo) of the illegally seized Farias-Gonzalez.[212]

Furthermore, the court reasoned, even if all identity evidence were suppressed, the government could simply collect new, admissible identity evidence and initiate a new prosecution. This was "because identity-related evidence is not unique evidence that, once suppressed, cannot be obtained by other means. The application of the exclusionary rule to identity-related evidence will have a minimal deterrence benefit, as its true effect will often be merely to postpone a criminal prosecution."[213]

The court discounted the likelihood of "rampant violations" of the Fourth Amendment ensuing as a result of its decision to immunize identity evidence from possible suppression. This was because, as the Supreme Court held in *Hudson*, civil suits afford sufficient deterrence of such practices.[214] Moreover, because identity evidence was not subject to suppression police would lack motivation to engage in Fourth Amendment violations.[215]

Finally, having concluded that defendant's photograph and fingerprints were not suppressible, the court addressed whether his immigration file (A-File), which formed the basis for his reentry prosecution, was subject to possible suppression. Again, the Eleventh Circuit rebuffed the claim. Because the defendant's identity was known by police as a result of the non-suppressible identity evidence secured, and the A-File itself in the government's possession was independently lawfully created and retained, the latter was not subject to suppression.[216]

In *People v. Tolentino*,[217] the New York Court of Appeals relied upon both *Farias-Gonzalez* and *Lopez-Mendoza* to deem identity evidence non-suppressible, this time in a non-immigration context.[218] In *Tolentino*, police stopped defendant, allegedly without a lawful basis, for violating a noise ordinance while driving, learned his name, and conducted a computer check of Department of Motor Vehicles (DMV) files to obtain his driving record. When

[210] Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 185-86 (2004).

[211] United States v. Dionisio, 410 U.S. 1, 15 (1973).

[212] *Farias-Gonzalez*, 556 F.3d at 1188.

[213] *Id.* at 1189.

[214] *Id.*

[215] *See id.* at 1188 (observing that police had "no incentive to violate the Fourth Amendment, as the evidence was freely obtainable without implicating the Fourth Amendment").

[216] *Id.* at 1189.

[217] 926 N.E.2d 1212 (N.Y.), *cert. granted*, 131 S. Ct. 595 (2010), *and cert. dismissed*, 131 S. Ct. 1387 (2011).

[218] *Id.* at 1215.

the check revealed that Tolentino's license was suspended and had been suspended in the past, he was arrested and charged with aggravated unlicensed operation of a motor vehicle.[219] The *Tolentino* court first invoked *Lopez-Mendoza*'s blanket bar on suppression and proclaimed, as several other courts have,[220] that name and identity can never be subject to suppression.[221] The court then addressed what it saw as the sole remaining issue: whether defendant could successfully seek suppression of his DMV files, which were accessed as a result of the allegedly unlawful stop and triggered his arrest.[222] Again invoking *Farias-Gonzalez*, the *Tolentino* court held that the DMV records were not suppressible.[223] Even though they were accessed only as a result of identity information secured by the allegedly illegal stop, the records themselves "were obtained by the police from a source independent of the claimed illegal stop."[224]

The court then reiterated the Eleventh Circuit's various policy-based arguments against use of the exclusionary rule,[225] and downplayed worry that police would be given an incentive to illegally detain persons in order to secure identity evidence and a link to government records.[226] According to the court, "[p]olice are already deterred from conducting illegal car stops because evidence recovered in the course of an illegal stop remains subject to the exclusionary rule."[227]

The court closed by distinguishing *Davis* and *Hayes*, where the Supreme Court barred admission of identity evidence – fingerprints.[228] Police in those cases, the court reasoned, illegally seized individuals to obtain fingerprints to link them to crimes actively being investigated, based on latent prints left at crime scenes.[229] With defendant Tolentino, only a name was secured, and the exclusionary rule was inapplicable when "the only link between improper

[219] *Id*. at 1213-14.

[220] S*ee, e.g*., United States v. Bowley, 435 F.3d 426, 430-31 (3d Cir. 2006) ("[W]e doubt that the Court lightly used such a sweeping word as 'never' in deciding when identity may be suppressed as the fruit of an illegal search or arrest."); United States v. Del Toro Gudino, 376 F.3d 997, 1001 (9th Cir. 2004) (holding that identity may not be suppressed even in cases of egregious constitutional violations, noting that when the Court said "'never' suppressible, it meant 'never'").

[221] *Tolentino*, 926 N.E.2d at 1214. The court quoted *Farias-Gonzalez* for the proposition that "[a] contrary holding would 'permit[] a defendant to hide who he is [and] would undermine the administration of the criminal justice system.'" *Id*. (quoting *Farias-Gonzalez*, 556 F.3d at 1187).

[222] *Id*.

[223] *Id*. at 1214-16.

[224] *Id*. at 1216.

[225] *Id*.

[226] *Id*.

[227] *Id*.

[228] *See supra* note 204 and accompanying text.

[229] *Tolentino*, 926 N.E.2d at 1216.

police activity and the disputed evidence is that the police learned the defendant's name."[230]

As the foregoing makes clear, courts are in considerable disarray on whether identity evidence can be suppressed. A minority of courts are amenable to suppression and look to the particular facts of each seizure to determine if it was motivated by a desire to secure identity evidence to tie a defendant to an unsolved crime. If instead police were motivated to simply verify a detainee's identity, then the identity evidence – and its role in linking defendant to other criminal activity – is not subject to suppression. These courts voice concern that a per se bar of the exclusionary rule will, as the Tenth Circuit put it, "give the police carte blanche powers to engage in any manner of unconstitutional conduct" and use identity evidence to achieve broader enforcement goals.[231]

An increasing majority of courts, however, deem identity evidence immune to possible exclusion. To these courts, identity evidence is unique in nature, warranting a special carve-out from the exclusionary rule,[232] which otherwise usually results in the suppression of secondary or derivative evidence accessed as a result of police misconduct, such as government records.

The disarray is regrettable for several reasons. First, accepting as one should that *Lopez-Mendoza* does not rule out use of the exclusionary rule with identity evidence in criminal cases, the caselaw manifests a remarkable naiveté about the role of identity evidence in modern law enforcement. As both the majority and dissent in *Hiibel v. Sixth Judicial District Court* acknowledged, identity information – even a name – can afford immediate access to an ever-growing universe of government information providing major investigative benefit.[233]

Police, mindful of this benefit, have significant incentive to neutralize individual anonymity. To offer but two examples among many beyond the

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[230] *Id.*

[231] United States v. Olivares-Rangel, 458 F.3d 1104, 1111 (10th Cir. 2006); *see also* United States v. Juan-Torres, 441 F. Supp. 2d 1108, 1122 (D.N.M. 2006) ("If police are free to detain and question anyone they want in order to obtain the person's identity, without fear of the exclusionary rule, they may be tempted, even in the absence of reasonable suspicion, to single out people of certain ethnic backgrounds for questioning."); *Tolentino*, 926 N.E.2d at 1218 (Ciparick, J., dissenting) (asserting that the majority provided "law enforcement an incentive to illegally stop, detain, and search anyone for the sole purpose of discovering the person's identity and determining if it matches any government records accessible by the police").

[232] *See, e.g.*, United States v. Del Toro Gudino, 376 F.3d 997, 1001 (9th Cir. 2004) (deeming identity evidence "inherently different from other kinds of evidence").

[233] *See* Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 191 (2004) (explaining that "furnishing identity" can "give[] police a link in the chain of evidence needed to convict the individual of a separate offense"); *id.* at 196 (Stevens, J., dissenting) ("[A] name can provide the key to a broad array of information about the person, particularly in the hands of a police officer with access to a range of law enforcement databases. And that information, in turn, can be tremendously useful in a criminal prosecution.").

immigration context, knowledge of identity secured as a result of an illegal arrest can lead to prosecution pursuant to sex offender registration laws[234] or protective orders.[235] In addition, short of serving as an independent basis for prosecution, knowledge of identity allows police rapid access to criminal history or "status" databases (for example, those listing alleged gang affiliations).[236]

Acquisition and storage of identity information can also serve to justify future searches and seizures. In New York City, for instance, police for a time retained in an electronic database identity information on all persons stopped and frisked and used it to bolster criminal suspicion in subsequent encounters.[237] After the state legislature banned the computer storage of identity information on persons stopped but not arrested, police continued to retain and use such information in paper form.[238]

"[T]he simple fact of who a defendant is,"[239] in short, is actually not so simple when it comes to law enforcement. In an era when police enjoy unprecedented lawful discretionary authority to seize individuals without warrants, including on a pretextual basis,[240] categorical judicial refusal to apply the exclusionary rule allows police to engage in fishing expeditions or targeted seizures to secure identity evidence.[241] Officers otherwise prohibited from seizing an individual solely to "ascertain . . . identity,"[242] can achieve the

[234] For instance, learned identity could indicate to police that a convicted sex offender is residing in a residence other than that provided to authorities. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 9795.2 (West 2007) (specifying reporting requirement and allowing for felony conviction if that requirement is violated). Alternatively, the individual could run afoul of laws prohibiting registrants from visiting certain public areas. *See, e.g.*, FLA. STAT. ANN. § 856.022 (West Supp. 2012) (establishing offense of "loitering or prowling by certain offenders in close proximity to children"); 720 ILL. COMP. STAT. ANN. 5 / 11-9.4 (West Supp. 2011) (making it a felony to approach, contact, reside, or communicate with a "child within certain places").

[235] *See, e.g.*, MASS. GEN. LAWS ch. 209A, §§ 3, 7 (2010).

[236] *See generally* K. Babe Howell, *Gang Databases: Labeled for Life*, CHAMPION, July/Aug. 2011, at 28.

[237] Ray Rivera & Al Baker, *Police Cite Help from Stop-and-Frisk Data in 170 Cases*, N.Y. TIMES, July 17, 2010, at A15.

[238] Rocco Parascandola, *Write On, Say Cops: Brass Says Stop & Frisk Records Aren't Dead, Just Use Paper, Not Computers*, N.Y. DAILY NEWS, July 22, 2010, at 2.

[239] United States v. Del Toro Gudino, 376 F.3d 997, 1001 (9th Cir. 2004).

[240] *See supra* notes 148-151 and accompanying text.

[241] *See* Hudson v. Michigan, 547 U.S. 586, 596 (2006) ("[T]he value of deterrence depends upon the strength of the incentive to commit the forbidden act."); Elkins v. United States, 364 U.S. 206, 217 (1960) ("The [exclusionary] rule is calculated to prevent, not repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effective available way – by removing the incentive to disregard it.").

[242] Brown v. Texas, 443 U.S. 47, 52 (1979) (banning the practice and expressing concern over the risk of "arbitrary and abusive police practices").

identical result when they illegally seize the same individual and use discovered identity to scan government databases in the interest of pursuing an entirely unrelated prosecution. Importantly, moreover, police motivation operates largely free of any countervailing deterrent effect resulting from personal monetary liability for alleged civil rights violations pursuant to §1983 or *Bivens*.[243]

Yet even the approach adopted by the minority of courts evincing a more skeptical view – allowing exclusion only if an illegal police seizure is motivated by investigative (not administrative) purposes – is problematic. This is so for several reasons. First, it is not uncommon for such courts to narrow the band of possible exclusion even further: to be concerned about only fingerprint evidence,[244] deeming other forms of identity evidence to be exempt from exclusion.[245] To these courts, this is all that the Supreme Court's *Davis* and *Hayes* decisions, which concerned fingerprints, can be presumed to warrant. Singling out fingerprint evidence alone, however, is decidedly under-inclusive. While fingerprints perhaps to date qualified as the "paradigmatic identity evidence,"[246] names and certainly biometric identifiers can afford as much if not more utility to police as links to government databases.[247]

Second, tying exclusion to police purpose creates an array of difficulties of its own. The Court has repeatedly refused to attach Fourth Amendment significance to the subjective intent of individual officers acting without warrants.[248] The pragmatic reason for doing so is highlighted by caselaw

[243] *See* David J.R. Frakt, *Fruitless Poisonous Trees in a Parallel Universe:* Hudson v. Michigan*, Knock-and-Announce, and the Exclusionary Rule*, 34 FLA. ST. U. L. REV. 659, 691-96 (2007) (discussing limited bases for recovery for wrongful police searches and seizures and disincentives for suits more generally, absent egregious police misconduct).

[244] *See, e.g.*, United States v. Oscar-Torres, 597 F.3d 224, 229-30 (4th Cir. 2007); United States v. Perez-Perez, 337 F.3d 990, 994 (8th Cir. 2003).

[245] In *United States v. Arias*, 678 F.2d 1202 (4th Cir. 1982), for instance, defendants filed a motion to suppress asserting that "the identity of the van's occupants would never have been discovered had the van not been stopped." *Id.* at 1206. The Fourth Circuit, noting that "this may be true," held that the name of a defendant "is not suppressible under the exclusionary rule." *Id.*; *see also, e.g.*, United States v. Navarro-Diaz, 420 F.3d 581, 588 (6th Cir. 2005) (refusing to exclude name and date of birth information secured as a result of illegal arrest); United States v. Del Toro Gudino, 376 F.3d 997, 1001 (9th Cir. 2004) ("We continue to hold today that the simple fact of who a defendant is cannot be excluded, regardless of the nature of the violation leading to his identity.").

[246] People v. Tolentino, 926 N.E.2d 1212, 1218 (N.Y. 2011) (Ciparick, J., dissenting).

[247] Names and other identity evidence, no less than fingerprints, are "something of evidentiary value which the public authorities have caused an arrested person to yield to them during illegal detention." Davis v. Mississippi, 394 U.S. 721, 724 (1969) (quoting Bynum v. United States, 262 F.2d 465, 467 (D.C. Cir. 1958)). Here, the evidentiary value lies in linking the detainee to a government database.

[248] *See, e.g.*, Brendlin v. California, 551 U.S. 249, 260 (2007); Brigham City v. Stuart, 547 U.S. 398, 404 (2006); Whren v. United States, 517 U.S. 806, 813-14 (1996).

concerning automobile checkpoints, one of the acknowledged exceptions to the search warrant requirement.[249] Courts have struggled to discern whether the purpose of a given checkpoint is something other than crime control or detection, which constitutionally redeems police behavior.[250] The challenge, difficult enough in the context of programs and policies,[251] becomes radically more so in the context of individual officer initiative.

Allowing for suppression of identity evidence if an illegal seizure is "in part" motivated by an investigative purpose is no more tenable.[252] While perhaps less difficult to apply than a "primary purpose" test,[253] the standard presents obvious proof concerns, if for no other reason than that officers, faced with possible exclusion of identity evidence, will feel pressure to cast their purpose as purely administrative in nature.[254] For instance, an officer with a mere hunch of unlawful activity taking place could execute an illegal stop, secure identity evidence (name, prints, or biometric data), run it in a government database, and develop an entirely unrelated criminal case, perhaps of a more serious (and career-enhancing) nature. All the officer need do to ensure admissibility of the evidence is articulate an administrative need – such as ascertaining or confirming "who the detainee is."[255]

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[249] *See* 1 JOSHUA DRESSLER & ALAN MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE §§ 15.01, 18.04-.05 (5th ed. 2010) (discussing, inter alia, administrative searches, vehicle checkpoints, and automobile inventories).

[250] *See generally* Brooks Holland, *The Road 'Round* Edmond*: Steering Through Primary Purposes and Crime Control Agendas*, 111 PENN ST. L. REV. 293, 299-327 (2006) (surveying difficulties encountered by courts in assessing programmatic purpose).

[251] *Id*.; *cf*. Ram, *supra* note 107, at 783-86 (criticizing current state efforts to allow "fortuitous" yet not "deliberate" partial familial DNA matches, asserting that doing so, inter alia, encourages strategic behavior among laboratory personnel and defeats governmental transparency).

[252] *See* United States v. Olivares-Rangel, 458 F.3d 1104, 1116 (10th Cir. 2006).

[253] With checkpoints, it remains unclear whether a secondary crime control purpose will defeat a non-crime control primary one, a possibility signaled by the Court in *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 n.2 (2000). *See* Holland, *supra* note 250, at 301-02.

[254] *Cf*. United States v. Gross, 662 F.3d 393, 405 (6th Cir. 2011) (holding that the exclusionary rule must potentially apply when an illegal stop reveals an outstanding arrest warrant because doing otherwise "would create perverse incentives. We do not wish to create a system of post-hoc rationalization through which the Fourth Amendment's prohibition against illegal searches and seizures can be nullified."). On testimonial pressures felt by police more generally in the suppression context see, for example, Morgan Cloud, *Judges, "Testilying," and the Constitution*, 69 S. CAL. L. REV. 1341 (1996); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996).

[255] *Olivares-Rangel*, 458 F.3d at 1112-13 (condoning police taking of prints "for the purpose of simply ascertaining or confirming the identity of the person arrested and routinely determining the criminal history and outstanding warrants of the person arrested"). Whether an officer's administrative motive can trump legislative intent evincing an express

IV. RECONCEIVING IDENTITY EVIDENCE

It is difficult to say how the complexities noted above can be best addressed. However, any corrective path must first resolve a basic uncertainty: the definitional contours of identity evidence itself.

The confusion was in ample evidence at the *Tolentino* Supreme Court oral argument in March 2011. In a remarkably disjointed and meandering session, the Justices confidently suggested that visual observations by police are subject to suppression,[256] even though disagreement remains on the question.[257] Members of the Court also expressed obvious frustration over the ongoing judicial failure to view identity evidence (including one's name) as anything more than abstract information, independent of its attendant utility vis-à-vis government databases.[258]

Even more telling of the uncertainty was an exchange between Justice Kagan and counsel for the U.S. Department of Justice, as amicus curiae,

investigative purpose, as in Louisiana's law directing police to collect DNA samples from arrestees, presents an intriguing question. *See* LA. REV. STAT. ANN. § 15:602 (West 2005) ("The Louisiana Legislature finds and declares that DNA data banks are important tools in criminal investigations . . . .").

[256] *See, e.g.*, Transcript of Oral Argument at 20, Tolentino v. New York, 131 S. Ct. 595 (2010) (No. 09-11556) ("[N]obody's contending that [the policeman's visual identification of the individual driving the car] can't be suppressed. . . . What should have been suppressed was the policeman's identification of the person who was driving the car.") (statement of Scalia, J.).

[257] *See, e.g.*, Sossamon v. State, 816 S.W.2d 340, 348 (Tex. Crim. App. 1991). Courts denying the claim invariably cite to *United States v. Crews*, where a majority of justices rejected the view that a defendant's face can be a suppressible fruit of an illegal arrest. *See* United States v. Crews, 445 U.S. 463, 477 (1980) (Powell, J., concurring in part); *id.* at 477-78 (White, J., concurring in the result). However, *Crews* concerned only the due process implications of an in-court identification, not Fourth Amendment exclusionary rule analysis. *See id.* at 473 n.19 (majority opinion) (noting that "a satisfactory resolution of the [due process] reliability issue does not provide a complete answer to the consideration underlying [the Fourth Amendment exclusionary rule]"). Furthermore, the five justices concurring in the outcome, yet wishing the Court's opinion to be clearer on whether one's face can be suppressible fruit, were animated by concern that physical jurisdiction over the defendant not be defeated (as in *Lopez-Mendoza*). *See id.* at 477 (Powell, J., concurring in part) (citing Frisbie v. Collins, 342 U.S. 519 (1952)); *id.* at 477-78 (White, J., concurring in the result). Similarly, for reasons earlier discussed, the Court's statement in *United States v. Dionisio*, 410 U.S. 1, 14 (1973) – that "a man's facial characteristics" are "constantly exposed to the public" and are therefore not protected by the Fourth Amendment – lacks precedential force. *See supra* note 177.

[258] *See, e.g.*, Transcript of Oral Argument at 33, *Tolentino*, 131 S. Ct. 595 (No. 09-11556) ("[Y]ou keep saying . . . you're just talking about the names, but names are meaningless in the abstract. It's not just that the officer wants to know what to call him. It's what he wants to find out from the name.") (statement of Roberts, C.J.); *id.* at 34 ("[O]nce you get the guy's name you're interested in a lot of things.") (statement of Kagan, J.).

regarding whether police could, in Justice Kagan's words, secure a DNA sample and use that sample to show that "this is a guy who . . . did these various terrible things, and start building [a] case[]."[259] Counsel demurred but offered that some question might exist over whether biometric information such as DNA – unlike names and fingerprints, "traditionally used to identify a defendant" and not, according to counsel, subject to Fourth Amendment limit[260] – could be secured by police. In addition to raising increased medical and personal privacy concerns, counsel reasoned that DNA acquisition entails "pricking someone with a needle."[261]

While perhaps tactically sound, counsel's response underscores the critical need for a more realistic understanding of identity evidence. Just as courts have been prone to regard only fingerprints as warranting exclusionary rule attention,[262] DNA is coming to be seen as the end-all of identity evidence. While DNA can implicate privacy issues that differ from other forms of identity evidence,[263] it also serves as a personal identifier – much like facial recognition, iris/retina recognition, names, and fingerprints – and plays an increasingly important role in modern-day police work. Moreover, contrary to the view of counsel, DNA of course can be secured without piercing the skin surface.[264]

Going forward, courts should focus less on the form and more on the function of identity evidence and heed its actual – not presumed – history. Just as courts have resorted to enfeebled historical analogies in their assessment of what constitutes a modern-day search for Fourth Amendment purposes,[265] they have taken undue liberty with the history of identification techniques. As previously discussed, early techniques, such as fingerprinting and "mugging," enjoyed comparatively limited use. Generally, only in instances of conviction, usually for more serious offenses, was information allowed to be collected, stored, and later used – and only to verify personal identity.[266]

So understood, the warrantless collection, retention, and use of DNA samples of arrestees can be more properly addressed. While the Supreme Court has never directly addressed the constitutional propriety of collecting

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[259] *Id*. at 51.

[260] *See id*. at 51-52.

[261] *Id*.

[262] *See supra* note 244 and accompanying text.

[263] On whether "junk DNA" used to compile profiles unavoidably contains private medical information and the propriety of the current government practice of retaining such biological samples, see generally Simon A. Cole, *Is the "Junk" DNA Designation Bunk?*, 102 NW. U. L. REV. COLLOQUY 54 (2007), http://www.law.northwestern.edu/lawreview/Colloquy/2007/23/LRColl2007n23Cole.pdf.

[264] *See supra* note 104 and accompanying text.

[265] *See* Luke M. Milligan, *Analogy Breakers: A Reality Check on Emerging Technologies*, 80 MISS. L.J. 1319, 1322-23 (2011).

[266] *See supra* notes 108-122 and accompanying text.

identity evidence from lawfully arrested individuals, policy and modern caselaw support allowing the use of such evidence for identity verification. For instance, the justice system has a legitimate need to secure identity information on *who* has been taken into lawful custody, as the Supreme Court in *Hiibel* made clear.[267] Likewise, police, incident to a lawful arrest, can search the area within an arrestee's immediate physical control and secure identity information.[268]

Importantly, however, collection differs from retention of identity evidence. As explained earlier, jurisdictions are eager to not only collect DNA samples (under federal law, by force if necessary[269]) but also retain them, which, if left unrestricted, will enable fishing expeditions.[270] To limit this threat, identity evidence should be retained only on individuals lawfully convicted of crimes. Doing so aligns modern with historical practice[271] and is consistent with Fourth Amendment doctrine ascribing a lessened expectation of privacy among persons lawfully convicted of crimes.[272] Any DNA sample taken by non-consensual means and stored, in the absence of conviction, should be destroyed.[273] In keeping with the policy of seven states[274] (but not the federal

[267] *See* Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 188-89 (2003). Prior to *Hiibel*, the right of police to demand identity information was less than certain. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 439 (1984) (stating in dictum that a suspect detained during a lawful *Terry* stop "is not obliged to respond" to questions); Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring) (stating that a lawfully detained suspect can be questioned but "is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for arrest").

[268] *See* Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 391-97 (2001) (discussing caselaw affording police authority to search individuals incident to arrest).

[269] *See* 42 U.S.C. § 14135a(a)(4)(A) (2006) ("The Attorney General . . . may use or authorize the use of such means as are reasonably necessary to . . . collect a DNA sample from an individual who refuses to cooperate in the collection of the sample."). *See also* U.S. MARSHALLS SERV., PRISONER OPERATIONS 2 (2009), *available at* http://www.usmarshals.gov/foia/Directives-Policy/prisoner_ops/dna.pdf (explaining that personnel "are authorized . . . to use such means are reasonably necessary to . . . collect a DNA sample from an individual who is unwilling to submit to DNA collection"). Failure to cooperate by an individual is classified as a class A misdemeanor. *See* 42 U.S.C. § 14135a(a)(5)(A).

[270] *See supra* note 231 and accompanying text.

[271] *See supra* notes 108-122 and accompanying text.

[272] *See, e.g.*, Sampson v. California, 547 U.S. 843, 848-49 (2006) (finding lessened expectation of privacy on part of parolee); United States v. Knights, 534 U.S. 112, 117-18 (2001) (finding same with respect to probationer); United States v. Kincade, 379 F.3d 813, 837 n.32 (9th Cir. 2004) (en banc) ("Those who have suffered a lawful conviction lose an interest in their identity to a degree well-recognized as sufficient to entitle the government permanently to maintain a verifiable record of their identity.").

[273] DNA acquired by means of "shedding," akin to abandonment, while not free of controversy, would not be subject to the requirement.

[274] *See* STATE [sic] THAT HAVE PASSED ARRESTEE DNA DATABASE LAWS, *supra* note

government[275]), this should occur automatically, without requiring legally innocent individuals to undertake a cumbersome, expensive, and uncertain expungement process.[276] Ultimately, these changes will hopefully help restore a suppressed sensitivity to the importance of identity information itself. As Judge Alex Kozinski recently observed:

> [W]e have become accustomed to having our fingerprints on file in some government database. The suggestion that law enforcement agencies . . . must destroy the fingerprints of those who were wrongly arrested and booked, and were later released, would today be greeted by reactions ranging from apathy to disdainful snigger. Why? Because we have come to accept that people – even totally innocent people – have no legitimate expectation of privacy in their fingerprints, and that's that.[277]

And just as collection and retention of identity evidence require varied analysis, so too does its use. While courts, such as the Third Circuit in *Mitchell*, have been prone to carelessly merge the verification and investigative functions of identity evidence,[278] government should be barred from using identity evidence secured from a lawful arrestee for any purpose other than identity verification. When government uses identity evidence forensically – to investigative an arrestee's possible role in other criminal activity – a distinct government purpose (and hence search) is pursued.[279] Focusing on the actual

158. In this regard, it is worthwhile to note that the European Court of Human Rights recently condemned the U.K.'s practice of retaining arrestees' biometric identity information. *See* S. & Marper v. United Kingdom, 48 Eur. H.R. Rep. 50, 1195-1202 (2009) (holding that retaining such information violates Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms). For discussion of other nations' positions on the collection and retention of DNA, including Canada, which imposes the most controls, see generally Liz Campbell, *"Non-Conviction" DNA Databases and Criminal Justice: A Comparative Analysis*, 2011 J. COMMONWEALTH CRIM. L. 55.

[275] *See* 42 U.S.C. § 14132(d) (2006) (requiring that DNA records be expunged but only if the proper government official receives verification that a conviction was overturned, charges were dismissed, or the arrestee was acquitted). This was done because Congress wished to relieve the government of the "unwieldy requirement" of having to "track the progress of individual criminal cases." 151 CONG. REC. 28,855 (2005) (statement of Sen. Jon Kyl).

[276] A similar policy should be adopted with respect to fingerprint evidence, as to which arrestees currently do not even have a lawful right to seek expungement. *See* 151 CONG. REC. 28,857 (2005) (statement of Sen. Jon Kyl) (explaining that under the DNA Fingerprint Act of 2005 there "is no expungement of fingerprints from the national database, even if the arrestee is acquitted or charges are dismissed").

[277] *Kincade*, 379 F.3d at 874 (Kozinski, J., dissenting).

[278] *See supra* notes 134-135 and accompanying text.

[279] *See, e.g.*, Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 618 (1989) (stating that "the collection and subsequent analysis of . . . biological samples must be deemed Fourth Amendment searches"). As the Arizona Supreme Court recently observed, extracting cell samples from a suspect and processing them to create a DNA sample for investigative use

use of the identity information secured will reduce the risk of identity evidence dragnets by police who, already enjoying expansive discretionary arrest authority, will otherwise be tempted to make investigative use of identity databases.[280] If distinct focus on governmental use of data collected by generalized public surveillance methods is warranted,[281] it is most assuredly also warranted relative to identity information secured as a result of seizures of individuals.

A similar sensitivity to the crucial role of identity evidence must also come to characterize the judicial response to instances when such evidence results from unlawful stops and arrests by police. Here, however, there comes what has been called a "practical problem"[282] of considerable difficulty: having discovered a detainee's criminal conduct, can it reasonably be expected that the government will simply not take action?[283]

One response, affording maximum likely deterrent effect, would be to simply adopt a blanket rule categorically denying police use of identity

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are distinct Fourth Amendment events:

> We recognize that DNA profiles are an important law enforcement tool for investigating crimes other than those charged . . . . But one accused of a crime . . . does not forfeit Fourth Amendment protections with respect to other offenses not charged absent either probable cause or reasonable suspicion. An arrest for vehicular homicide, for example, cannot alone justify a warrantless search of an arrestee's financial records to see if he is also an embezzler.

Mario W. v. Kaipio, 281 P.3d 476, 483 (Ariz. 2012) (citation omitted); *cf.* State *ex rel.* Reed v. Harris, 153 S.W.2d 834, 837 (Mo. 1941) (stating that, in the absence of affirmative statutory authority for police to disseminate records, "there is a marked difference between making an adequate record of the identity of a person lawfully in custody . . . and the dissemination of the photographs and fingerprints of an innocent person about whose identity there can be no question").

[280] *See supra* note 233 and accompanying text; *cf.* City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) (acknowledging concern over "stops justified only by a generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime").

[281] *See, e.g.*, Russell D. Covey, *Pervasive Surveillance and the Future of the Fourth Amendment*, 80 MISS. L.J. 1289, 1316-18 (2011); Orin S. Kerr, *Use Restrictions and the Future of Surveillance Law*, *in* CONSTITUTION 3.0: FREEDOM AND TECHNOLOGICAL CHANGE 37, 39 (Jeffrey Rosen & Benjamin Wittes eds., 2011) ("Instead of focusing solely on the initial collection of information, we need to distribute regulation along the entire spectrum of the surveillance process. The future of surveillance is a future of use restrictions – rules that strictly regulate what the government can do with information it has collected and processed."); *cf.* Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 TEX. L. REV. 49, 60 (1995) ("Particularly in light of new technology, privacy is threatened as much by what law enforcement authorities do with information as by the original acquisition itself.").

[282] United States v. Navarro-Diaz, 420 F.3d 581, 587 (6th Cir. 2005).

[283] This issue was a major focus of attention in the *Tolentino* oral argument. *See* Transcript of Oral Argument at 16, Tolentino v. New York, 131 S. Ct. 595 (2010) (No. 09-11556).

information secured. Professor Ric Simmons, for instance, recently advanced such a view in the context of suspicionless searches undertaken to combat terrorism, advocating that police be able to intercede to prevent possible calamities, but not be allowed to use any evidentiary fruits thereby secured in a criminal prosecution.[284] Doing so, which Professor Simmons concedes is "radical" and "politically unpalatable,"[285] would obviate the ongoing strained efforts of courts to find a preventive, non-crime control purpose behind antiterrorism searches.[286]

Less extreme and preferable is the option of applying the traditional tools used in exclusionary rule analysis: attenuation, independent source, and inevitable discovery.[287] Resort to these tools, rather than making identity evidence "sacred and inaccessible,"[288] can help resolve the practical problems noted above when police unlawfully learn a detainee's identity and then make investigative use of this information in a government database to prosecute.

If, for instance, police learn that a detainee is the subject of a lawful outstanding arrest warrant, the detainee can be arrested and, consistent with precedent, be subject to the formal jurisdiction of the court.[289] In such a situation, barring prosecution would afford the detainee what is seen as an unjustified windfall.[290] It is thus unlike scenarios such as in *Tolentino*, where

[284] Ric Simmons, *Searching for Terrorists: Why Public Safety Is Not a Special Need*, 59 DUKE L.J. 843, 915-19 (2010).

[285] *Id*. at 915.

[286] *Id*. at 891 (asserting that the conclusion that such searches have a "public safety purpose rather than a law-enforcement or crime-control purpose is simply disingenuous"); *see also* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 382-85 (8th ed. 2007) (citing cases in support and noting the difficulty of distinguishing between search purposes).

[287] For an overview of the doctrines see JAMES J. TOMKOVICZ, CONSTITUTIONAL EXCLUSION: THE RULES, RIGHTS, AND REMEDIES THAT STRIKE THE BALANCE BETWEEN FREEDOM AND ORDER 42-51 (2011). Of course, merely because identity evidence can be secured by other lawful means does not redeem its use or admission. *See* Davis v. Mississippi, 394 U.S. 721, 725 n.4 (1969) (stating that "the fact that equivalent evidence can conveniently be obtained in a wholly proper way" does not suffice as a reason for not excluding the fruits of police misconduct given that the threatened exclusion seeks to make "those administering the criminal law understand that they must" obtain evidence legally).

[288] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

[289] *See* Gerstein v. Pugh, 420 U.S. 103, 119 (1975) (explaining "the established rule that illegal arrest or detention does not void a subsequent conviction"); Frisbie v. Collins, 342 U.S. 519, 522 (1952) (explaining that the "power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reasons of a 'forcible abduction'" (quoting Ker v. Illinois, 119 U.S. 436, 444 (1886))).

[290] This is not to say, however, that evidence secured as a result of a search conducted incident to arrest, based on a discovered lawful arrest warrant, should be immune to possible exclusion. The issue remains the subject of ongoing disagreement, turning on whether the discovered warrant dissipates the taint of the initial illegal seizure. *Compare* United States v. Gross, 662 F.3d 393, 404-05 (6th Cir. 2011) (applying exclusionary rule and barring

identity serves as the crucial evidentiary nexus for as-yet uninvestigated matters, independent of jurisdiction, relative to which the exclusionary rule should be allowed to exercise its deterrent influence.[291]

The "continuing offense" scenario, at issue in "status" crimes such as criminal immigration violations or when sex offenders are not in compliance with registration requirements, poses a more vexing difficulty.[292] With immigration, the answer actually lies in language found in *Lopez-Mendoza* itself – deportation:

> The constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime. When the crime in question involves unlawful presence in this country, the criminal may go free, but he should not go free within our borders.[293]

With a sex offender registration violation, the effect of discovered identity is not so readily reconcilable. Courts, however, applying attenuation and independent source analysis, have found ways to preserve admissible use of identity evidence.[294]

What might be called a single-act offense, such as that engaged in by the motorist in *Tolentino* prosecuted for driving with a suspended license,[295] can

evidence of unrelated crime secured as a result of search incident to arrest), *with* United States v. Johnson, 383 F.3d 538, 546 (7th Cir. 2004) (rejecting application of exclusionary rule and allowing evidence to be used). For analysis of the split, favoring exclusion, see State v. Moralez, 242 P.3d 223, 241-53 (Kan. Ct. App. 2011) (Atcheson, J., dissenting).

[291] This is especially so given judicial failure to regulate the use of identity evidence secured by a past illegal arrest, and later used to identify a detainee lawfully seized on a subsequent occasion. *See* LAFAVE, *supra* note 3, § 11.4(g), at 358-60 nn.404-08 (citing cases reaching varying results on whether photos secured as a result of illegal seizures are admissible). As Professor LaFave urges, courts should be "vigilant" in guarding against police efforts to increase the reservoir of identity data at their disposal, which can later be drawn upon. *Id*. at 360. In earlier times, as discussed above, identity evidence was typically destroyed when a conviction was not secured. *See supra* notes 108-122 and accompanying text.

[292] *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1046 (1984) (identifying the "unique" social cost of applying the exclusionary rule to "continuing violations of the law," and stating that doing so "would require the courts to close their eyes to ongoing violations of the law").

[293] *Id*. at 1047. It is also likely the case that the deportation proceeding would itself allow for collection of untainted identity evidence, including fingerprints, with the latter being admitted pursuant to the inevitable discovery doctrine.

[294] *See, e.g*., United States v. Carter, 573 F.3d 418, 423 (7th Cir. 2009) (finding that a photo of an unregistered sex offender discovered during an unlawful search was admissible in a robbery trial under attenuation analysis).

[295] As for the facts in *Tolentino*, police, acting pursuant to their public safety authority, could have lawfully impounded the vehicle upon discovery of the violation, thereby abating the safety threat Tolentino's unlicensed driving presented. *See* People v. Tolentino, 926

also be addressed by traditional exclusionary rule doctrine. Police could, for instance, secure identity evidence on an independent basis (e.g., as a result of a consensual encounter[296]) or as a result of a lawful seizure based upon a myriad of state, local, and federal provisions.[297] The latter authority is especially expansive in the enforcement of motor vehicle-related laws, a context long acknowledged by officers themselves as being rife with ready opportunities for lawful stops and arrests.[298] Alternatively, consistent with attenuation doctrine,[299] police could monitor the individual to see if he or she again engaged in the same misconduct after a passage of time and execute a lawful seizure.[300]

If, however, the individual remains law-abiding and no exception applies, the full effect of the exclusionary rule sanction would come into play: the identity evidence and its connection to an incriminating government database could not be used.[301] The result, as has so often been highlighted in exclusionary rule debates more generally,[302] stems from the rule itself, which while perennially under assault, remains central to enforcement of constitutional criminal procedure protections. Police, as the Supreme Court has insisted, would not be put "'in a worse position than they would have been in absent [the] error or violation.'"[303] They simply would not be advantaged by their unlawful conduct.

N.E.2d 1212, 1213-14 (N.Y. 2010).

[296] *See* Florida v. Royer, 460 U.S. 491, 497 (1983) (holding that officers can ask individuals questions, including those related to identity, without triggering Fourth Amendment concerns).

[297] *See* Logan, *supra* note 153, at 91-94 (discussing the extensive seizure authority afforded to police by the array of low-level, *malum prohibitum* offenses contained in various state codes).

[298] *See, e.g.*, David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 310-11 (1999); David E. Steinberg, *The Drive Toward Warrantless Auto Searches: Suggestions from a Back Seat Driver*, 80 B.U. L. REV. 545, 564-67 (2000) (discussing the many legal bases to stop motorists).

[299] *See* Brown v. Illinois, 422 U.S. 590, 603-04 (1975) (identifying attenuation factors as: the amount of time elapsing between illegality and receipt of evidence; "the presence of intervening circumstances"; and "the purpose and flagrancy" of police misconduct).

[300] *See* LAFAVE, *supra* note 3, § 11.4(a), at 258-65 (surveying cases in which courts found sufficient attenuation).

[301] Even more unpalatable to some, this is so relative both to the relatively minor traffic violation alleged in *Tolentino* and more serious offenses. To date, application of the exclusionary rule typically has not turned on crime seriousness. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 390 (1978) (rejecting a Fourth Amendment "murder scene" exception).

[302] For an example of the competing views see, for example, the concurrences of Judges Lay and Bowman in *United States v. Jefferson*, 906 F.2d 346, 351-53 (8th Cir. 1990).

[303] Murray v. United States, 487 U.S. 533, 537 (1988) (quoting Nix v. Williams, 467 U.S. 431, 443 (1984)).

In this connection, it is important to emphasize the crucial evidentiary role played by identity vis-à-vis government databases. Contrary to the view of the New York Court of Appeals in *Tolentino*, it is not determinative that "public records [are] already in the possession of authorities."[304] Rather, the records accessed by police in *Tolentino* qualify as quintessential secondary, derivative evidence, the legal materiality of which only came about as a result of their misconduct.[305]

Nor does language in *United States v. Crews*,[306] to the effect that the exclusionary rule "does not reach backward to taint information that was in official hands prior to any illegality,"[307] dictate to the contrary. In *Crews*, the evidence at issue – an in-court identification by a witness – had an independent, preexistent factual basis, which "neither resulted from nor was biased by the unlawful police conduct."[308] In *Tolentino*, police were wholly unaware that the defendant was driving with a suspended license and would not have learned of the suspension had they not exploited an illegal seizure to learn Tolentino's identity and access information contained in a government database. The police misconduct, unlike in *Crews*, provided something "of evidentiary value that the police did not already have in their grasp"[309]: it "link[ed] together two extant ingredients in [the] identification"[310] – Tolentino and his unlawful motorist status.

CONCLUSION

The goal of this Article has been part archival and part normative. The archival goal has been to highlight the centrality of identity evidence to policing over time. "Spotting," "rogues galleries," and anthropometric measurements, all used long ago by police to overcome criminal anonymity,

[304] People v. Tolentino, 926 N.E.2d 1212, 1215 (N.Y. 2010).

[305] Standing – in particular whether the illegally seized detainee can contest use of the records accessed as a result of the identity evidence – should be resolved on the basis of traditional doctrine. *See* United States v. Olivares-Rangel, 458 F.3d 1104, 1117 (10th Cir. 2006) (concluding that it is not the case that standing exists "only when the defendant has standing regarding both the *violation* which constitutes the poisonous tree *and* separate standing regarding the *evidence* which constitutes the fruit of the poisonous tree"). Not all courts have so held, however. *See* LAFAVE, *supra* note 3, § 11.4, at 258 n.18 (citing decisions taking the "erroneous approach" of requiring independent standing as to the government records accessed).

[306] 445 U.S. 463 (1980).

[307] *Id*. at 475.

[308] *Id*. at 473.

[309] *Id*. at 475.

[310] *Id*.; *see also Olivares-Rangel*, 458 F.3d at 1120 (suppressing "previously compiled Government records" when obtained through "exploitation of an illegal search and seizure [that] produced the critical link between a defendant's identity and his . . . criminal history record").

are but the technological forebears of the sophisticated biometric identification strategies used today.[311]

Yet, as this Article also makes clear, as identification and policing methods have evolved over time, the American justice system has not kept pace. While early identification efforts met with constraint, a second major wave of innovation has been met with a troubling blasé acceptance based on a superficial historicism and an under-appreciation of changes in American policing and the power and breadth of modern databases.[312]

The current state of affairs, while regrettable for all the reasons mentioned, should serve as a warning to be heeded. Much as we have recently awakened to the forensic fallibility of identity evidence methods, such as fingerprints, after decades of judicial acceptance,[313] we must resist any technological determinism that blinds us to the consequences of the methods being used to create indices of identity in the name of social control. The discussion here, and the analytic framework offered to address two particularly problematic aspects of the broader challenge presented by identity evidence, will hopefully serve as a starting point in this effort.

[311] *See, e.g.*, KELLY A. GATES, OUR BIOMETRIC FUTURE: FACIAL RECOGNITION TECHNOLOGY AND THE CULTURE OF SURVEILLANCE 89-90 (2011) (describing efforts by Tampa police to justify use of facial recognition technology by likening the technique to "age-old" police practices of carrying photos or "hot sheets" of wanted individuals).

[312] Indeed, the term "database" itself did not emerge until the 1960s when computers first facilitated military access to data accumulated in information repositories. *See* Thomas Haigh, *"A Veritable Bucket of Facts": Origins of the Data Base Management System*, SIGMOD REC., June 2006, at 33, 35.

[313] *See* NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 104, at 4-5, 97-98.