

MARYLAND v KING: TERRY v OHIO
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Forty years ago, the Supreme Court's search incident to arrest doctrine was settled and relatively clear: as a routine matter, police could, without any particularized suspicion, search an arrestee for weapons and any evidence in his possession that the arrestee might try to conceal or destroy. The twin rationales justifying a search incident to arrest—officer safety and evidence preservation—marked the outer boundaries of police authority. In *Schmerber v California*, the Court explained that these two justifications “have little applicability with respect to searches involving intrusions beyond the body’s surface.”¹ According to *Schmerber*, “the interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained.”² Thus, *Schmerber* required either a judicial warrant or some emergency that justified an exemption from the warrant requirement for the police to invade an arrestee’s body.³

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¹ *Schmerber v California*, 384 US 757, 769 (1966).

² *Id.* at 769–70.

³ As Professor Wayne LaFave has explained: “[I]t seems clear from the *Schmerber* case that a more demanding test must be met when the search incident to the arrest involves the taking of a blood sample or the making of some similar intrusion into the body.” Wayne R. LaFave, 3 *Search and Seizure: A Treatise on the Fourth Amendment* § 5.3(c) at 220–21 (West, 5th ed 2012) (footnote omitted).

Despite the apparent clarity of search incident to arrest doctrine, Justice Lewis Powell suggested in a concurring opinion in *United States v Robinson* that such searches should not be limited to the objectives of police safety and evidence preservation.⁴ In *Robinson*, a police officer looked inside a cigarette package found in the coat pocket of a person arrested for driving with a revoked license. The Court, in an opinion by then-Justice William Rehnquist, held that this was a valid search incident to arrest. Rehnquist explained that “in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.”⁵ Although stated in expansive terms, the holding in *Robinson* was consistent with the rationale of the search incident to arrest doctrine.⁶ Although the police officer did not find any evidence or fruits of the offense for which Robinson was arrested, the search of the cigarette package was “reasonable” because it ensured that Robinson did not possess a weapon that might be used to harm the arresting officer. The Court was unwilling to qualify an officer’s “general authority” to search incident to arrest on the “rather speculative judgment” that persons arrested for traffic offenses “are less likely to possess dangerous weapons than are those arrested for other crimes.”⁷

Although joining Rehnquist’s opinion, Justice Powell wrote separately that “an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person.”⁸ According to Powell, once a lawful arrest occurs, any privacy interest protected by the Fourth Amendment “is subordinated to a legitimate and overriding governmental concern.”⁹ Going beyond then-existing doctrine, Powell argued that “a valid arrest justifies a full search of the person, even if that search is not narrowly limited by the twin rationales of seizing evidence and disarming the

⁴ *United States v Robinson*, 414 US 218, 237 (1973) (Powell, J, concurring).

⁵ *Id.* at 235 (1973).

⁶ Existing precedents confined police authority to search the arrestee for weapons and for “any evidence on the arrestee’s person in order to prevent its concealment or destruction.” *Chimel v California*, 395 US 752, 763 (1969).

⁷ *Robinson*, 414 US at 234 (footnote omitted).

⁸ *Id.* at 237 (Powell, J, concurring).

⁹ *Id.*

arrestee.”¹⁰ Powell reasoned that search incident to arrest is “reasonable” because an arrestee’s privacy “is legitimately abated by the fact of arrest.”¹¹

Powell’s views on this issue were not embraced by the Court for forty years—until *Maryland v King*.¹² At issue in *King* was whether a Maryland law requiring forensic testing of DNA samples taken from persons arrested for violent crimes violated the Fourth Amendment. The purpose behind the statute, like other DNA collection laws, seemed obvious: collecting and analyzing DNA samples advances the capacity of law enforcement to solve both “cold cases” and future crimes when the government has evidence of the perpetrator’s DNA from the crime scene. Maryland did not contend that the DNA statute promoted either officer safety or evidence preservation. The Maryland Court of Appeals held the statute was unconstitutional because the government interests promoted by the law did not outweigh King’s right to privacy.¹³ In a 5–4 decision, the Court, in an opinion by Justice Anthony Kennedy, upheld the Maryland law—and presumably the similar laws of twenty-seven other states and the federal government.¹⁴

On the day *King* was decided, Orin Kerr, a respected criminal procedure scholar, described *King* as “hugely important as a practical matter, but it’s not very interesting from a theoretical or academic standpoint.”¹⁵ I disagree; *King* is a significant ruling in terms of our

¹⁰ Id (footnote omitted). In a footnote, Powell quotes a Ninth Circuit ruling, *Charles v United States*, 278 F2d 386, 388–89 (1960), which included the following statement: “Once the body of the accused is validly subjected to the physical dominion of the law, inspections of his person, regardless of purpose, cannot be deemed unlawful, unless they violate the dictates of reason either because of their number or their manner of perpetration.” *Robinson*, 414 US at 237 n 1 (Powell, J, concurring).

¹¹ *Robinson*, 414 US at 238 (footnote omitted) (Powell, J, concurring).

¹² *Maryland v King*, 133 S Ct 1958 (2013).

¹³ *King v State*, 42 A3d 549, 555–56 (Md 2012).

¹⁴ According to a study by the Urban Institute, published shortly before *King* was announced, “about half [of the twenty-eight states that have enacted laws authorizing DNA collection from arrestees] align their collection practices with convicted offender laws and authorize collection from persons arrested for any felony crime. The other half of states limits collection to a subset of felonies, typically involving violence, sexual assault, or serious property crimes. Seven arrestee DNA states also collect from individuals arrested or charged with select misdemeanor crimes. Broader than any of the state laws, federal law authorizes collection from all arrestees and non-US citizens detained by the US government.” Julie E. Samuels et al, *Collecting DNA at Arrest: Policies, Practices, and Implications, Final Technical Report* 25–26 (Urban Institute, May 2013).

¹⁵ Orin Kerr, *A Few Thoughts on Maryland v King (The Volokh Conspiracy June 3, 2013)*, online at <http://www.volokh.com/2013/06/03/a-few-thoughts-on-maryland-v-king-2/>.

understanding of Fourth Amendment law.¹⁶ Individuals and organizations who rarely agree on constitutional issues criticized the decision. Conservative Republican Senators Rand Paul and Ted Cruz, the *New York Times* editorial pages, the *American Prospect*, and the American Civil Liberties Union all condemned *King*.¹⁷ Moreover, Justice Samuel Alito, a former federal prosecutor, acknowledged during the oral argument that *King* “is perhaps the most important criminal procedure case that this Court has heard in decades.”¹⁸ The result in *King* was so important—and so controversial—that retired Justice John Paul Stevens publicly endorsed the Court’s ruling.¹⁹

Although Justice Kennedy’s opinion in *King* suggests otherwise, *King* has the potential to fundamentally alter Fourth Amendment law. Indeed, it is analogous to *Terry v. Ohio*.²⁰ Before *Terry* was decided in 1968, the Court had never authorized police to detain or search a suspicious person without probable cause to arrest. Although police officers frequently performed “investigative stops,” car searches, and weapons frisks on evidence short of probable cause, the Court had never approved such tactics.²¹ Indeed, as Justice Wil-

¹⁶ See also Erin Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 Harv L Rev 161, 161 (2013) (describing *King* as “no ordinary Fourth Amendment case,” and noting that it “represents a watershed moment in the evolution of Fourth Amendment doctrine and an important signal for the future of biotechnologies and policing.”).

¹⁷ See Rand Paul, *Big Brother Says “Open Your Mouth!”*, American Conservative (June 10, 2012), online at <http://www.theamericanconservative.com/articles/big-brother-says-open-your-mouth/>; Senator Ted Cruz, press release, *Statement on SCOTUS Decision in Maryland v. King* (June 3, 2012), online at <http://www.cruz.senate.gov/record.cfm?id=342973&&>; Editorial, *DNA and Suspicionless Searches*, NY Times (June 3, 2013), online at http://www.nytimes.com/2013/06/04/opinion/the-supreme-court-rules-on-dna-and-suspicionless-searches.html?_r=0; Scott Lemieux, *Scalia Gets It Right*, American Prospect (June 3, 2013), online at <http://prospect.org/article/scalia-gets-it-right>; ACLU, press release, *Comment on Supreme Court DNA Swab Ruling (Maryland v. King)* (June 3, 2013), online at <https://www.aclu.org/criminal-law-reform/aclu-comment-maryland-v-king-decision>.

¹⁸ Transcript of Oral Argument, *Maryland v. King*, No 12-207, 35 (Feb 27, 2013), online at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-207-1p23.pdf.

¹⁹ Justice John Paul Stevens (Ret), speech to American Constitution Society Convention, Capital Hilton Hotel, Washington, DC (June 14, 2013) (while admitting that he had not read the briefs in *King*, Justice Stevens stated, “I think I would have voted with the majority if I were still on the Court.”).

²⁰ *Terry v. Ohio*, 392 US 1 (1968).

²¹ In the classic article on the subject, Professor LaFave characterizes stop-and-frisk techniques as “a time-honored police procedure [where] officers . . . stop suspicious persons for questioning and, occasionally, . . . search these persons for dangerous weapons.” Wayne R. LaFave, “*Street Encounters*” and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67

liam Douglas emphasized in his dissenting opinion in *Terry*, the Court had ruled “precisely the opposite over and over again.”²² By departing from those precedents and embracing an open-ended balancing formula, *Terry* held that a frisk for weapons is permissible when an officer has reasonable grounds to believe that a suspect is currently armed and dangerous, even if the officer lacks probable cause to arrest that person. When it was announced, *Terry* could be narrowly read: a frisk for weapons is permissible only when an officer’s safety is threatened. The Court explained in *Terry* that the decision did not address “the constitutional propriety of an investigative ‘seizure’ for purposes of ‘detention’ and/or interrogation.”²³ As Justice Douglas predicted, however, the “hydraulic pressures” exerted on the Court “to water down constitutional guarantees and give the police the upper hand,”²⁴ combined with a balancing analysis, eventually persuaded the Court to enlarge police search-and-seizure powers in a wide swath of cases, many of which had nothing to do with police safety.

Like *Terry*, *King* alters the “rules of game” and significantly expands the government’s authority to search persons subject to custodial arrest. Just as a balancing analysis made it easy for the Court to extend *Terry*’s rationale to different scenarios between police and suspicious persons, *King*’s reasoning can be used to support collection and analysis of DNA samples from other persons subjected to governmental restraint (such as persons arrested for misdemeanors or traffic offenses or detained for investigative stops), or from those who possess diminished privacy interests vis-à-vis the government (such as public school students, driver’s license applicants, and lawyers). Indeed, because *King* approved suspicionless searches of persons under a free-form balancing analysis, it will be difficult to cabin the Court’s logic when government officials seek innovative search

Mich L Rev 39, 42 (1968). Stop-and-frisk procedures were a staple of police procedure long before *Terry* sanctioned the practice. See Lawrence P. Tiffany et al, *Detection of Crime* at 10–17 (Little, Brown, 1967) (distinguishing stop-and-frisk practices, like “field interrogation” and “aggressive patrol,” from traditional police procedures involving arrest or search incident to arrest); id at 15 (noting that “[m]inor traffic infractions are [] often used by the police to justify stopping for questioning or searching.”). According to one 1967 study of the practice, although police regularly “stop and question suspects on the street when there are insufficient grounds to make an arrest, . . . this important law enforcement practice has been either ignored or treated ambiguously by courts and legislatures.” Id at 6.

²² *Terry*, 392 US at 36 (Douglas, J, dissenting) (footnote omitted).

²³ Id at 19, n 16.

²⁴ Id at 39 (Douglas, J, dissenting).

powers in other contexts in which individuals arguably possess diminished privacy interests. As Professor Barry Friedman commented shortly after the decision, *King* “will have ramifications far beyond DNA testing, affecting much of policing in the 21st century.”²⁵

This article explains in more detail why *King* is so important. Part I summarizes Justice Kennedy’s opinion and Justice Antonin Scalia’s dissent, and offers some criticism of the Court’s opinion. Part II explains why the Court’s precedents do not support the decision. Part III addresses the implications of *King*’s reasoning, and explains why the holding will not be confined to persons arrested for violent felonies. Finally, Part IV explores the similarities (as well as one important difference) between the judicial styles exhibited by the Court in *King* and *Terry*.

I. THE COURT’S REASONING IN KING

DNA testing in the United States began in 1987. It has had a significant impact on the criminal justice system.²⁶ Initially, DNA databases included only “those classes of offenders with a high recidivism rate, such as sex offenders and violent felons.”²⁷ Today, every state and the federal government collects and analyzes DNA from all persons convicted of felonies. Lower federal and state courts have uniformly upheld DNA collection from convicts. In light of the investigative capabilities provided by DNA technology, “the collection of DNA samples from individuals arrested for criminal misconduct has been advocated by police officials and endorsed by

²⁵ Barry Friedman, *The Supreme Court Fails the Fourth Amendment Test*, *Slate Magazine* (June 5, 2013), online at http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/dna_collection_in_maryland_v_king_the_supreme_court_fails_on_the_fourth.html.

²⁶ Michelle Hibbert, *DNA Databanks: Law Enforcement’s Greatest Surveillance Tool?*, 34 *Wake Forest L Rev* 767, 768 (1999); compare Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* at 5–6 (Harvard, 2011) (explaining that “[s]ince DNA testing became available in the late 1980s, more than 250 innocent people have been exonerated by postconviction DNA testing,” and that “DNA exonerations have changed the face of criminal justice in the United States by revealing that wrongful convictions do occur and, in the process, altering how judges, lawyers, legislators, the public, and scholars perceive the system’s accuracy.”); Erin Murphy, *A Tale of Two Sciences*, 110 *Mich L Rev* 909, 926 (2012) (observing that “news sources are full of stories about some new mind-boggling scientific development” involving DNA typing. “Sadly, however, revelations of laboratory malfeasance, errors, or sloppy mistakes are as common as stories about the use of forensic science to convict a dangerous criminal or exonerate an innocent accused.”).

²⁷ Hibbert, 34 *Wake Forest L Rev* at 769 (cited in note 26).

politicians.”²⁸ Therefore, it was no surprise when states began to extend DNA collection procedures to arrestees. In 2002, Virginia became the first state to collect DNA from convicts and arrestees when it passed a law requiring that DNA samples be taken from those arrested for violent felonies. The Virginia Attorney General explained that “[i]t’s no secret that an enhanced database increases the chances of solving crimes,”²⁹ and that database expansion “will help us solve cases much quicker and ensure public safety by making sure somebody’s not released back into the general public who has committed a string of crimes.”³⁰ Three years later, Congress enacted a statute requiring that DNA samples be collected from *all* persons arrested by federal officers, regardless of the nature of the crime for which they are arrested.³¹ A year later, Congress made funding available to the states to collect and analyze DNA samples obtained from arrested individuals. In 2008, Maryland enacted the law at issue in *King*, requiring the collection and testing of DNA from persons arrested for serious felonies. Thus, when the Court agreed to review the constitutionality of the Maryland statute, the case attracted widespread attention. Twenty-four amicus briefs were filed with the Court.

A. JUSTICE KENNEDY’S MAJORITY OPINION

Alonzo King was arrested for assault on April 10, 2009, after menacing a group of people with a shotgun. As a routine part of the arrest procedure for a serious offense, Maryland law required that a DNA sample be taken by applying a cotton swab to the inside of King’s cheek.³² Under the law, a DNA sample may not

²⁸ D. H. Kaye, *Who Needs Special Needs? On the Constitutionality of Collecting DNA and Other Biometric Data from Arrestees*, 34 J L Med & Ethics 188 (2006); see generally D. H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 Cornell J L & Pub Policy 455 (2001).

²⁹ Ellen Sorokin, *Attorney General Hopefuls Favor More DNA Collection*, Washington Times C1 (Aug 7, 2001).

³⁰ Francis X. Clines, *Virginia May Collect DNA in Every Arrest for a Felony*, NY Times 22 (Feb 17, 2002).

³¹ 42 USC § 14135a (a)(1)(A).

³² As Justice Kennedy noted, the statute authorizes collecting DNA samples from “an individual who is charged with . . . a crime of violence or an attempt to commit a crime of violence; or . . . burglary or an attempt to commit burglary.” *King*, 133 S Ct at 1967, quoting Md Pub Saf Code Ann § 2-504(a)(3)(i). The charge of first-degree assault was eventually dismissed. King entered a plea pursuant to *North Carolina v Alford*, 400 US 25 (1970) (a defendant’s refusal to admit to guilt and professed belief in his innocence does not bar a trial judge from accepting a guilty plea, particularly when the record provides

be processed or placed in a database before the individual is arraigned. King's first court appearance was three days after his arrest. King's DNA sample was received by the Maryland State Police's Forensic Division two weeks after his arrest, on April 23, 2009. Several months later, on August 4, 2009, King's DNA profile was found to match the DNA discovered from an unsolved rape committed in another Maryland city in 2003. After being charged with that rape, King argued that the collection of his DNA after his arrest for assault was an unreasonable search, and that the evidence was therefore inadmissible in the rape trial. The trial court rejected King's suppression motion; he was convicted of rape and sentenced to life in prison without the possibility of parole. The Maryland Court of Appeals reversed, and the Supreme Court decided to weigh in.

Justice Kennedy began his analysis in *King* by observing that "the framework for deciding the issue is well established."³³ According to Kennedy, the procedure constituted a Fourth Amendment search, because the DNA sample taken from King entailed the use of a buccal swab on the inner tissues of his cheek. Kennedy explained that "[v]irtually any" intrusion into the body by state officials triggers constitutional scrutiny.³⁴ Kennedy then added, however, that a "buccal swab is a far more gentle process than a venipuncture to draw blood."³⁵ The "negligible" nature of the intrusion, according to Kennedy, "is of central relevance to determining the reasonableness" of the search.³⁶

Kennedy explained that reasonableness in Fourth Amendment cases depends on the circumstances of each case. For example, warrants are required in some situations, but not in others. Individualized suspicion of wrongdoing is generally "preferred" before police conduct a search, but there is no per se prohibition of suspicionless intrusions.³⁷ A search's constitutionality is determined by evaluating law enforcement goals, the nature and magnitude of the privacy interests at stake, the standardized nature of

a strong factual basis for the plea) and was convicted of second-degree assault, a misdemeanor offense.

³³ *King*, 133 S Ct at 1968.

³⁴ *Id.* at 1969.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

the search or seizure, and the extent of the intrusion on individual privacy and dignity.³⁸ Because the Maryland DNA collection law applies to “all arrestees charged with serious crimes,” and because police have no discretion when deciding whom to search, Kennedy concluded that the buccal swab used to collect King’s DNA fell within the “category of cases” calling for a balancing analysis—weighing “the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable.”³⁹

Turning first to the government’s side of the balance, Kennedy argued that the government interest in *King* was the time-honored need for police to “process and identify the persons and possessions they must take into custody.”⁴⁰ Kennedy argued that DNA identification serves several governmental interests. In order of importance, these interests include identifying the arrestee, protecting the safety and integrity of the detention facility that will house the arrestee, ensuring that the arrestee will be available for trial, enabling sound decisions about whether the arrestee should be released on bail, and “freeing a person wrongfully imprisoned for the same offense.”⁴¹ Although the Court listed five interests served by DNA testing, only the first interest—identifying the arrestee—is important for constitutional purposes. Indeed, the Court did not place significant weight on the other four interests, and for good reason. DNA testing takes at least several weeks to perform. The time lag between the DNA search and test and the receipt of matches prevents the arrestee’s sample from serving any of the other interests identified by Justice Kennedy. An arrestee’s DNA test is of no use to the state’s interests in protecting jailhouse security and making accurate bail determinations, because these matters arise long before an arrestee’s DNA results are available. As Justice Scalia noted in his dissent, “DNA testing does not even begin until after arraignment and bail decisions are already made. The samples sit in storage for months, and take weeks to test.”⁴²

³⁸ *Id.*

³⁹ *Id.* at 1970, quoting *Illinois v McArthur*, 531 US 326, 331 (2001).

⁴⁰ *King*, 133 S Ct at 1970.

⁴¹ *Id.* at 1970–74.

⁴² *Id.* at 1986 (Scalia, J, dissenting). In an exchange between counsel for King and Chief Justice Roberts during the oral argument, the Chief Justice seems to recognize the weakness of the argument that DNA searches advance the state’s interest in accurate bail determinations: “Now, your brief says, well, the only interest here is the law enforcement interest. And I found that persuasive because of the concern that it’s going to take months

Moreover, it is hardly self-evident that taking an arrestee's DNA deters flight before trial. Kennedy argued that if DNA is not taken upon arrest, a "defendant who had committed a prior sexual assault might be inclined to flee on a burglary charge, knowing that in every State a DNA sample would be taken from him after his conviction on the burglary charge that would tie him to the more serious charge of rape,"⁴³ but if a DNA sample is taken upon arrest, the arrestee has little to gain by flight, because the police already have his DNA. This logic is flawed, however, because an arrestee who has his DNA taken upon arrest might also conclude he has nothing to lose by flight, because he knows the government will link him to the sexual assault. If anything, taking the DNA at the time of arrest may actually *increase* the likelihood of flight.

Finally, the interest in exonerating those who have been wrongfully accused or convicted is mere window dressing for the majority's argument. This is so because collecting DNA from arrestees cannot help vindicate the innocent.⁴⁴ As Justice Scalia observed in dissent in *King*, mandating collection of DNA from arrestees for analysis against the FBI database cannot assist in freeing wrongfully convicted persons, because the FBI database includes DNA only from *unsolved* crimes. As Scalia sarcastically noted: "I know of no indication (and the Court cites none) that [the FBI database] also includes DNA from all—or even any—crimes whose perpetrators have already been convicted."⁴⁵

to get the DNA back anyway, so they are going to have to release him or not before they know it." Oral Argument in *King*, at 42–43 (cited in note 18).

⁴³ *King*, 133 S Ct at 1973.

⁴⁴ In fact, *Osborne v District Attorney's Office*, 557 US 52 (2009), "rejected a freestanding due process right for prisoners to obtain DNA tests that might prove their innocence." Brandon L. Garrett, *Criminal Justice and the Court's Past Term*, Harvard University Press Blog (Harvard University Press, Aug 2, 2013), online at http://harvardpress.typepad.com/hup_publicity/2013/08/criminal-justice-and-the-courts-past-term-brandon-garrett.html. To say the least, *Osborne* "is a striking contrast" to *King*'s "warm embrace of essentially unlimited law enforcement use of DNA from mere arrestees." *Id.* Professor Garrett also states that "[n]o DNA exonerations have ever resulted from DNA collected from unconvicted arrestees, while many whose convictions were overturned have benefited from DNA matches with serious convicts."

⁴⁵ *King*, 133 S Ct at 1984, n 2 (Scalia, J, dissenting). Compare Samuels et al, *Collecting DNA at Arrest* at 8, n 8 (cited in note 14), quoting *National DNA Database Submission to the Home Affairs Committee* at 2, Gene Watch UK (Jan 2010), online at http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/GWsub_Jan10.doc: "although DNA can undoubtedly be useful to exonerate the innocent, a database of individual DNA profiles (as opposed to crime scene profiles) is never necessary to exonerate an innocent person, since this can always be done by comparing the DNA of the innocent suspect directly with the crime scene DNA profile." After *King* was announced, Barry

With respect to the issue of identification, Justice Kennedy reasoned that law enforcement officials must know whom they have arrested. “An individual’s identity is more than just his name or Social Security number, and the government’s interest in identification goes beyond ensuring that the proper name is typed on the indictment.”⁴⁶ Kennedy observed that the identification process includes “searching the public and police records based on the identifying information provided by the arrestee to see what is already known about him.”⁴⁷ To this effect, an arrestee’s “criminal history is a critical part of his identification that officers should know when processing him for detention.”⁴⁸ Moreover, DNA is “an irrefutable identification”⁴⁹ of the arrestee, and is even more reliable as a type of identification than a photograph, social security number, or fingerprint. Kennedy therefore analogized taking a DNA sample to the practices and procedures police have traditionally used in processing arrestees. It is similar to matching an arrestee’s face to a photo of a previously unidentified suspect, or “comparing tattoos to known gang symbols to reveal a criminal affiliation; or matching the arrestee’s fingerprints to those recovered from a crime scene.”⁵⁰ Kennedy argued that “[j]ust as fingerprinting was constitutional for generations prior to the introduction of [the FBI’s automated fingerprint identification system], DNA identification of arrestees is a permissible tool of law enforcement today.”⁵¹ In Kennedy’s view, it makes no difference that DNA analysis takes weeks or months to complete: “The question of how long it takes to process identifying information obtained from a valid search goes only to the efficacy of the search for its purpose of prompt identification, not the constitutionality of the search.”⁵² Kennedy therefore concluded that taking the DNA sam-

Scheck, a cofounder of the Innocence Project, told the *New York Times* that Justice Scalia’s comment “goes too far.” Adam Liptak, *Cited by a Justice, but Feeling Less Than Honored*, *NY Times* (June 10, 2013), available at http://www.nytimes.com/2013/06/11/us/cited-by-a-justice-but-feeling-less-than-honored.html?_r=0. Scheck told the *Times* that “there had been times when prisoners had been exonerated through the testing of DNA in closed cases.” *Id.*

⁴⁶ *King*, 133 S Ct at 1971.

⁴⁷ *Id.* at 1972.

⁴⁸ *Id.* at 1971.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 1977.

⁵² *Id.* at 1976 (citation omitted).

ple served a legitimate and important law enforcement goal.

On the other side of the balance—King’s privacy interests—Kennedy emphasized that the intrusion is “minimal” and that an arrestee’s privacy expectations are curtailed by his lawful custody.⁵³ Kennedy reasoned that DNA testing “differs from the sort of programmatic searches of either the public at large or a particular class of regulated but otherwise law-abiding citizens that the Court has previously labeled as ‘special needs’ searches.”⁵⁴ Although the special needs cases “do not have a direct bearing on the issues presented in” *King* because the taking of DNA from an arrestee does not fall within that doctrine, Kennedy noted that searches authorized by the Court’s special needs doctrine “intrude upon substantial expectations of privacy.”⁵⁵ Kennedy then stated, rather curiously, that the Court’s special needs cases support his position in *King* “because unlike the search of a citizen who has not been suspected of a wrong, a detainee has a reduced expectation of privacy.”⁵⁶

Finally, Justice Kennedy argued that the manner of the search itself raised no constitutional problems. The DNA obtained and tested does not reveal the arrestee’s genetic traits, and even if the DNA could provide some private genetic information, the state analyzes the DNA sample for the sole purpose of generating a unique identifying number against which future samples may be matched. Kennedy left open whether law enforcement analysis of samples to determine an arrestee’s predisposition for a particular disease or other hereditary factor would be constitutional.⁵⁷

B. JUSTICE SCALIA’S DISSENTING OPINION

Justice Scalia’s acerbic dissent begins with a categorical rule: “The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence.”⁵⁸ This per se rule, according to Scalia, “lies at the very heart of the Fourth

⁵³ Id at 1977–78.

⁵⁴ Id at 1978.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id at 1979.

⁵⁸ Id at 1980.

Amendment.”⁵⁹ Suspicionless searches, in Scalia’s view, are permissible only when the government is motivated by a concern beyond the needs of ordinary law enforcement. Because the state of Maryland had no basis for intruding into King’s body, the buccal swab, no matter how brief and minimally intrusive, violated the Fourth Amendment.

Regarding the government interest in identifying arrestees, Scalia remarked that the Court’s “assertion that DNA is being taken, not to solve crimes, but to *identify* those in the State’s custody, taxes the credulity of the credulous.”⁶⁰ The Court’s definition of “identifying” is obviously wrong—“unless what one means by ‘identifying’ someone is ‘searching for evidence that he has committed crimes unrelated to the crime of his arrest.’”⁶¹ This form of identification, according to Scalia, “is indistinguishable from the ordinary law-enforcement aims that have never been thought to justify a suspicionless search.”⁶² He observed sardonically that searching cars of lawfully stopped drivers might reveal information about unsolved crimes committed by the driver, “but no one would say that such a search was aimed at ‘identifying’ him, and no court would hold such a search lawful.”⁶³

Moreover, Scalia explained why the collection and testing of King’s DNA was not intended to *identify* him. After King’s DNA was taken by the police, it was eventually shipped to the FBI’s DNA database. The FBI database contains two types of DNA collections: DNA samples taken from *known* convicts and arrestees, and DNA samples found at crime scenes belonging to *unknown* persons or perpetrators. At the FBI laboratory, King’s DNA profile was compared with the DNA profiles of the second group. The purpose of this comparison was not to determine King’s identity, but to determine whether King’s DNA profile matched any of the DNA profiles found at scenes of unsolved crimes, such as the 2003 rape. If Maryland had wanted to *identify* King, “the logical thing to do” would have been to compare his DNA against the first group—*known* convicts and arrestees.⁶⁴ As Scalia observed, Mary-

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Id at 1983.

⁶² Id.

⁶³ Id.

⁶⁴ Id at 1985.

land did not do this, because it already knew who King was and “because this search had nothing to with identification.”⁶⁵

Finally, Scalia pointed out that Maryland’s DNA law itself does not support the “identification” purpose attributed to it by the Court. According to Scalia, the relevant section of the statute specifies the purpose behind the DNA searches: samples are tested “as part of an official investigation into a crime.”⁶⁶ By contrast, another section of the statute permits testing for identification purposes: “to help identify *human* remains,” and “to help identify *missing* individuals.”⁶⁷ No section of the statute authorizes DNA testing for the purpose of identifying *arrestees*. Moreover, another section of the law expressly prohibits using DNA samples “for any purposes other than those specified” in the statute.⁶⁸

Justice Scalia was not persuaded by the Court’s claim that DNA testing is indistinguishable from traditional procedures used to process and identify arrestees. Scalia noted that photographing an arrestee does not trigger Fourth Amendment scrutiny because taking a photograph is not a physical intrusion, nor does it implicate a legitimate expectation of privacy. Additionally, Scalia observed that the Court’s precedents “provide no ready answer” as to whether fingerprinting constitutes a search.⁶⁹ But even assuming that fingerprinting is a search, “[f]ingerprints of arrestees are taken primarily to identify them (though that process sometimes solves crimes); the DNA of arrestees is taken to solve crimes (and nothing else).”⁷⁰ Regarding the constitutional status of fingerprinting, Scalia rightly noted that the Court’s claim that fingerprinting has been “constitutional for generations” is “bereft of citation to authority because there is none for it.”⁷¹ Scalia observed that the fact that many Americans have apparently accepted fingerprinting in various contexts is not the equivalent of the Court’s imprimatur. In his view, it is “wrong” to imply that fingerprinting has always been “uncontroversial,” or to suggest “that this Court blessed uni-

⁶⁵ *Id.*

⁶⁶ *Id.*, quoting Md Pub Saf Code Ann § 2-505(a)(2).

⁶⁷ *King*, 133 S Ct at 1986, quoting Md Pub Saf Code Ann § 2-505(a)(3) & (a)(4) (emphasis in original).

⁶⁸ *King*, 133 S Ct at 1986, quoting Md Pub Saf Code Ann § 2-505 (b)(2).

⁶⁹ *King*, 133 S Ct at 1987.

⁷⁰ *Id.*

⁷¹ *Id.* at 1988.

versal fingerprinting for ‘generations’ before it was possible to use it effectively for identification.”⁷²

Scalia might have added that fingerprinting arrestees has not always received the approval of the judiciary. As Professor Wayne Logan has explained, fingerprinting gained prominence in the early part of the twentieth century, “and by the 1930s fingerprinting was the nation’s criminal-identification method of choice.”⁷³ The judiciary, however, imposed limits on the use of fingerprints, especially when prints were obtained from persons not convicted of crimes.⁷⁴ A crucial change in the judiciary’s acceptance of the routine use of fingerprinting occurred in *United States v Kelly*, when the United States Court of Appeals for the Second Circuit rejected a challenge to the use of fingerprints to confirm a suspect’s identity.⁷⁵ *Kelly*’s holding, however, was “predicated on the need to verify identity, 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.”⁷⁶ Even with *Kelly* on the books, “the constitutional propriety of identity verification methods at the pre-conviction stage has always merely been ‘assume[d].’”⁷⁷

Comparing fingerprinting to DNA profiling is problematic for another reason. Fingerprints are “useful only as a form of identification.”⁷⁸ They cannot be analyzed, for example, “to determine whether two individuals are related.”⁷⁹ By contrast, “[e]ven non-coding regions of the DNA transmit more information than a standard fingerprint.”⁸⁰ Although the noncoding regions of DNA used to create DNA identification profiles “may never be found to have highly sensitive direct coding functions, they may very

⁷² Id.

⁷³ Wayne A. Logan, *Policing Identity*, 92 BU L Rev 1561, 1574 (2012) (footnote omitted).

⁷⁴ Id at 1583 (fingerprints were “as a general rule, collected and stored only in the event of conviction”).

⁷⁵ *United States v Kelly*, 55 F2d 67 (2d Cir 1932).

⁷⁶ Logan, 92 BU L Rev at 1583 (footnotes omitted) (cited in note 73).

⁷⁷ Id at 1584 (footnote omitted; bracket in original).

⁷⁸ Sheldon Krinsky and Tania Simoncelli, *Genetic Justice: DNA Data Banks, Criminal Investigations, and Civil Liberties* 235 (Columbia, 2011).

⁷⁹ Id.

⁸⁰ Id at 236.

well be found to *correlate* with things we may care about and deem private.”⁸¹

Scalia also criticized the Court’s willingness to accept the claim that the government is developing technology that will analyze DNA samples in “mere minutes.”⁸² Although conceding that there may come a day when it is possible to analyze DNA samples instantaneously, Scalia correctly observed that “[t]he issue before us is not whether DNA can *some day* be used for identification; nor even whether it can *today* be used for identification; but whether it *was used for identification here*.”⁸³

Finally, Scalia predicted that the search approved in *King* will not be confined to those arrested for violent felonies. “I cannot imagine what principle could possibly justify this limitation, and the Court does not attempt to suggest any.”⁸⁴ Thus, Scalia envisions a future where every person’s DNA will be taken and tested upon arrest, whether they are arrested for a traffic violation or an illegal political protest. “If one believes that DNA will ‘identify’ someone arrested for assault, he must believe that it will ‘identify’ someone arrested for a traffic offense. This Court does not base its judgments on senseless distinctions.”⁸⁵ Tellingly, Justice Kennedy offered no reply to Justice Scalia’s dissent.⁸⁶

⁸¹ *Id.*

⁸² *King*, 133 S Ct at 1988.

⁸³ *Id.* at 1988–89. There may soon come a day when technology allows the police to instantaneously analyze an arrestee’s DNA sample and determine whether it matches the DNA found at the crime scene of an unresolved murder or rape. Under Justice Kennedy’s analysis in *King*, however, the speed of obtaining test results “goes only to the efficacy of the search . . . , not the constitutionality of the search.” *Id.* at 1976. In any event, instantaneous analysis should not change the Fourth Amendment judgment. Even if police obtain immediate results from a DNA test, this test still occurs by means of a physical intrusion, conducted without suspicion of criminal wrongdoing, and motivated by law enforcement interests. The only difference between the situation in *King* and a case involving instantaneous analysis is the speed with which police have access to the fruit of their search. If future technology gives the police the ability to instantaneously discover the contents of a home, contraband and noncontraband items alike, the search remains unreasonable even when the results are instantaneous. See *Kyllo v United States*, 533 US 27, 34 (2001) (“We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area’ constitutes a search—at least where (as here) the technology in question is not in general public use.”). The same logic applies when the search involves a person.

⁸⁴ *King*, 133 S Ct at 1989.

⁸⁵ *Id.*

⁸⁶ See also Lyle Denniston, *Opinion Recap: Solving “Cold Cases” Made Easier*, SCOTUSblog (June 3, 2013), available at <http://www.scotusblog.com/2013/06/opinion-recap-solving-cold-cases-made-easier/> (“The Kennedy and Scalia opinions were almost totally at

II. A DECISION WITHOUT PRECEDENT

As one chronicler of the Court has observed, Justice Kennedy's opinion in *King* "sought to make it appear that the outcome was easily reached and involved no real alteration of existing constitutional norms."⁸⁷ In fact, the Court's most relevant precedents support the opposite conclusion.⁸⁸

A. DNA SAMPLING CANNOT BE JUSTIFIED AS A SEARCH INCIDENT TO ARREST

Certainly, the Court's search incident to arrest precedents do not support the decision in *King*. During the oral argument, Justice Kennedy compared taking a DNA sample to the search of an arrestee's coat pocket, the type of search upheld in *United States v Robinson*.⁸⁹ But the Court's search incident to arrest rulings do not come close to authorizing a search *into an arrestee's body*.⁹⁰ Although Kennedy quoted *Robinson*⁹¹ and *Florence v Board of Chosen Freeholders*⁹² for the proposition that "[a] search of the detainee's person when he is booked into custody may 'involve a relatively extensive exploration,' including 'requir[ing] at least some detainees to lift their genitals or cough in a squatting position,'"⁹³ Justice

odds with each other, in tone and in substance. . . . [Kennedy] also made no effort to respond to the dissenting opinion.").

⁸⁷ *Id.*

⁸⁸ Although Justice Kennedy would not concede the point in his opinion, Deputy Solicitor General Michael Dreeben acknowledged during oral argument that "there is no case on my side that decides the case" for the government, while quickly adding "there's no case that—on [King's] side that decides the case for him." Oral Argument in *King*, at 24–25 (cited in note 18). The Chief Deputy Attorney General for Maryland made a similar concession: ". . . [T]here's no—there's no case in this Court's jurisprudence that's exactly like this." *Id.* at 12.

⁸⁹ *Id.* at 26. Kennedy noted: "Just—just like taking the pockets out and—seeing what's in the person's overcoat and so forth is a search incident to arrest."

⁹⁰ Justice Rehnquist recognized in *Robinson* that "virtually all of the statements of this Court affirming the existence of an unqualified authority to search incident to a lawful arrest are dicta." *Robinson*, 414 US at 230. See also LaFave, 3 *Search and Seizure* § 5.2(b) at 136 (cited in note 3) (noting that "neither the prior decisions of the Supreme Court nor the 'original understanding' evidence [regarding the Fourth Amendment] conclusively establishes whether the 'general authority' to search the person incident to arrest is 'unqualified.'").

⁹¹ "The validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained virtually unchallenged." *King*, 133 S Ct at 1970–71, quoting *Robinson*, 414 US at 224.

⁹² *Florence v Board of Chosen Freeholders of County of Burlington*, 132 S Ct 1510 (2012).

⁹³ *King*, 133 S Ct at 1978, quoting *Robinson*, 414 US at 227, and *Florence*, 132 S Ct at 1520.

Scalia correctly responded that “[t]he objects of a search incident to arrest must be either (1) weapons or evidence that might easily be destroyed, or (2) evidence relevant to the crime of arrest. Neither is the object of the search at issue here.”⁹⁴ Indeed, none of the Court’s search incident to arrest rulings since *Chimel v California*⁹⁵ permit a suspicionless search for ordinary crime-solving or identification purposes.⁹⁶ *Robinson* certainly did not approve such a search, because a weapon such as a razor blade might have been inside the cigarette package. Moreover, none of the Court’s decisions, old or new, have ever authorized suspicionless searches *into* the bodies of arrestees. To the contrary, the Court in *Schmerber* expressly foreclosed such searches when it explained that the rationale of search incident to arrest has “little applicability with respect to searches involving intrusions beyond the body’s surface.”⁹⁷

Perhaps Kennedy cited *Robinson* and other search incident to arrest rulings merely to establish that arrestees possess a diminished expectation of privacy while in custody. Kennedy conceded that a warrant would be required to perform surgery on King or to search his home, notwithstanding his diminished privacy interests as an arrestee. As the Court noted in *Schmerber*, logic dictates that “absent an emergency, no less could be required where intrusions into the human body are concerned.”⁹⁸ Put simply, the Court’s search incident to arrest precedents do not authorize bodily intrusions. Because there was no emergency, judicial authori-

⁹⁴ *King*, 133 S Ct at 1982 (Scalia, J, dissenting) (citations omitted).

⁹⁵ *Chimel*, 395 US 752.

⁹⁶ Compare Brandon L. Garrett and Erin Murphy, *Supreme Court 2013: Collecting DNA from People Who Are Arrested Won't Solve More Crimes*, Slate Magazine (Feb 12, 2013), available at http://www.slate.com/articles/news_and_politics/jurisprudence/2013/02/dna_collection_at_the_supreme_court_maryland_v_king.html (“the Supreme Court has never held that if police have probable cause to arrest, they can also search a suspect for evidence of past or future crimes”); Sandra J. Carnahan, *The Supreme Court's Primary Purpose Test: A Roadblock to the National Law Enforcement DNA Database*, 83 Neb L Rev 1, 35 (2004) (“The Supreme Court has never approved a suspicionless search involving bodily intrusion for a law enforcement purpose, and to do so [for a national law enforcement DNA database for convicts] would be a substantial departure from traditional Fourth Amendment principles.”). But compare Kerr, *A Few Thoughts* (cited in note 15) (“in light of the broad language of *Robinson*’s holding, “it seems wrong, based on current law, to say that a suspicionless search is never allowed incident to arrest for purposes of ordinary crime-solving.”)

⁹⁷ *Schmerber*, 384 US at 769.

⁹⁸ *Id* at 770.

zation, or probable cause for the search, the buccal swab was an “unreasonable” search.

The Court’s precedents also suggest that a second search occurred when King’s DNA was subjected to forensic analysis. In *Ferguson v Charleston*, the Court found that “urine tests conducted by [state actors] were indisputably searches within the meaning of the Fourth Amendment.”⁹⁹ *Ferguson*’s conclusion rested on the legal principle established twelve years earlier in Justice Kennedy’s opinion for the Court in *Skinner v Railway Labor Executives’ Association*.¹⁰⁰ *Skinner* addressed whether obtaining and testing blood and breath samples from railroad personnel who were involved in train accidents, or who violated certain safety rules, constituted searches. After concluding that collecting the samples was a search, the Court added that chemical analysis of the samples “to obtain physiological data is a further invasion of the tested employee’s privacy interests.”¹⁰¹ *Skinner* explained that, although collecting and testing urine samples does not require a bodily intrusion, “chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether she is epileptic, pregnant, or diabetic.”¹⁰²

In *King*, Justice Kennedy rejected the claim that the processing of King’s DNA sample violated the Constitution, arguing that, because “the CODIS loci come from noncoding parts of the DNA that do not reveal the genetic traits of the arrestee,”¹⁰³ it was “open to dispute” whether “the testing . . . in this case reveals any private medical information.”¹⁰⁴ The implication is that analysis of DNA samples does not infringe any privacy interest. This conclusion also means that when police obtain a DNA sample without a per-

⁹⁹ *Ferguson v Charleston*, 532 US 67, 76 (2001). Justice Scalia’s dissent in *Ferguson* questioned whether obtaining and testing urine samples of hospital patients triggered Fourth Amendment scrutiny. “There is only one act that could conceivably be regarded as a search of petitioners in the present case: the *taking* of the urine sample. I suppose the *testing* of that urine for traces of unlawful drugs could be considered a search of sorts, but the Fourth Amendment protects only against searches of citizens’ ‘persons, houses, papers and effects’; and it is entirely unrealistic to regard urine as one of the ‘effects’ (i.e., part of the property) of the person who has passed and abandoned it.” *Id.* at 92 (Scalia, J, dissenting).

¹⁰⁰ *Skinner v Railway Labor Executives’ Assn*, 489 US 602 (1989).

¹⁰¹ *Id.* at 616.

¹⁰² *Id.* at 617. Thus, collecting and testing urine also “must be deemed searches under the Fourth Amendment.” *Id.*

¹⁰³ *King*, 133 S Ct at 1979.

¹⁰⁴ *Id.*

son's knowledge, say, from a discarded cigarette butt or water bottle, analysis of the sample does not trigger the Fourth Amendment at all.¹⁰⁵ This understanding is predicated on the assumption that the end product of analysis—the DNA profile—does not reveal genetic information about the individual. However, this assumption ignores the real threat to privacy posed by DNA data banking: "[T]he chance for government officials to surpass their [statutory] authority and use our DNA samples, containing our full genome and a 'treasure map' of our sensitive genetic information, for nefarious purposes."¹⁰⁶

In addition to emphasizing the arrestee's diminished expectation of privacy, Justice Kennedy also stressed the trifling nature of the cheek swab. This description of King's constitutional interest is "especially problematic; King complained about the information taken from him, not the Q-tip in his mouth."¹⁰⁷ More importantly, Kennedy ignored the Court's precedents. The minimal character of the intrusion should not matter. In *Arizona v Hicks*, police entered Hicks's home in response to a call that a gun had been fired through Hicks's apartment floor, injuring a man in the unit below.¹⁰⁸ While police were lawfully in the apartment searching for the shooter and any other victims, they noticed two sets of stereo equipment they suspected were stolen.¹⁰⁹ The police recorded the serial numbers, which required moving some of the equipment, and seized the equipment after learning that it had been stolen.¹¹⁰ The Court found that police action (i.e., slightly moving stereo equipment to see the serial number) unrelated to the objectives of the lawful search constituted a separate and distinct invasion of the suspect's privacy that was unjustified by the exigency of the lawful police entry. *Hicks* explained:

¹⁰⁵ For an excellent discussion of some of the legal issues surrounding the government's collection of "abandoned DNA," see Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 Nw U L Rev 857 (2006).

¹⁰⁶ Andrea Roth, *Maryland v. King and the Wonderful, Horrible DNA Revolution in Law Enforcement*, 11 Ohio St J Crim L 295, 303 (2013). See also Krimsky and Simoncelli, *Genetic Justice* at 235–36 (cited in note 78) ("DNA samples, which are stored indefinitely by forensic laboratories . . . have the potential to reveal almost unlimited information" about individuals.).

¹⁰⁷ Elizabeth E. Joh, *Maryland v. King: Policing and Genetic Privacy*, 11 Ohio St J Crim L 281, 287 (2013).

¹⁰⁸ *Arizona v Hicks*, 480 US 321 (1987).

¹⁰⁹ *Id.* at 323.

¹¹⁰ *Id.* at 323–24.

It matters not that the search uncovered nothing of any great personal value to [the suspect]—serial numbers rather than (what might conceivably have been hidden behind or under the equipment) letters or photographs. A search is a search, even if it happens to disclose nothing but the bottom of a turntable.¹¹¹

If moving a turntable a few inches requires probable cause under the Court's precedents, so should a compelled police entry into a person's mouth.

Moreover, the Court in *Schmerber* described extraction of blood samples as a "common-place" procedure that "involves virtually no risk, trauma, or pain."¹¹² Since then, many courts have described a compelled blood extraction as a painless, routine procedure.¹¹³ In fact, Justice Kennedy cited *Schmerber* and other precedents in a 1989 ruling to confirm "society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's privacy and bodily integrity."¹¹⁴ Nonetheless, the Court has never disavowed *Schmerber's* judgment regarding the need for a warrant when the police want to draw blood from an arrestee. Indeed, in *Missouri v McNeely*, decided only six weeks before *King*, the Court reaffirmed *Schmerber* and rejected the state's call for a per se rule allowing warrantless blood testing in drunk-driving cases.¹¹⁵ Put simply, bodily intrusions by the police, no matter how painless or commonplace, have always required a showing of probable cause and a warrant.

B. DNA SAMPLING CANNOT BE JUSTIFIED UNDER THE SPECIAL NEEDS EXCEPTION

Justice Kennedy's opinion in *King* appears to draw on the Court's special needs cases. For example, Kennedy invoked *Vernonia School District 47J v Acton* to support the balancing analysis he employs,¹¹⁶ *Treasury Employees v Von Raab* to bolster his conclusion

¹¹¹ *Id.* at 325.

¹¹² *Schmerber*, 384 US at 771.

¹¹³ See, for example, *United States v Amerson*, 483 F3d 73, 84 (2d Cir 2007) (noting that the Court "has long maintained that the intrusion effected by taking a blood sample . . . is minimal."), quoting *Nicholas v Goord*, 432 F3d 652, 659 (2d Cir 2005).

¹¹⁴ *Skinner v Ry. Labor Executives' Assn*, 489 US 602, 625 (1989), quoting *Winston v Lee*, 470 US 753, 762 (1985).

¹¹⁵ *Missouri v McNeely*, 133 S Ct 1552, 1554 (2013).

¹¹⁶ *King*, 133 S Ct at 1969, quoting *Vernonia School Dist. 47J v Acton*, 515 US 646, 652 (1995) ("As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness'").

that warrants are not required “when the search involves no discretion that could be properly limited by the ‘interpo[l]ation of] a neutral magistrate between the citizen and the law enforcement officer,’”¹¹⁷ and several other special needs cases to support the proposition that an arrestee’s privacy interests must be assessed in light of his “legal relationship with the State.”¹¹⁸ In these cases, the Court has permitted suspicionless searches of individuals

¹¹⁷ *King*, 133 S Ct at 1969–70, quoting *Treasury Employees v Von Raab*, 489 US 656, 667 (1989). Of course, the assertion that collecting DNA from arrestees involves “no [police] discretion” is ridiculous. Professor Erin Murphy rightly notes that the “notion that arrestee testing invites no law enforcement discretion makes sense only if one believes that the police lack discretion in making decisions about arrest.” Murphy, 127 Harv L Rev at 189 (cited in note 16) (footnote omitted). Even the Court knows this isn’t true. See *Town of Castle Rock, Colorado v Gonzales*, 545 US 748, 760 (2005) (“A well-established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.”). Many scholars have shown that the decision to arrest can be highly discretionary. See, for example, Wayne R. LaFare, *Arrest: The Decision to Take a Suspect into Custody* 60 (Brown, 1965) (“It is not common to arrest a person unless he is at least suspected of having engaged in criminal conduct. It is common for some persons not to be arrested even though it can easily be proved that they have engaged in criminal conduct.”); id at 155 (“A decision not to arrest in a specific case does not ordinarily come to the attention of members of the community. . . . In most situations, the decision is known only to those who know of the crime and to the police officer who decides not to arrest.”); Michael K. Brown, *Working the Street: Police Discretion and the Dilemmas of Reform* at 152 (Rose Sage Foundation, 1988) (stating that “felonies are the least interesting of discretionary incidents, for these violations are usually enforced. Refusal to arrest a person who has committed a felony not only counters the police code, but many policemen believe they have no discretion where a felony is concerned. This does not mean that every person who commits a felony will be arrested, since the determination of whether or not a felony has been committed is often a matter of interpretation.”). Police exercise even greater discretion regarding misdemeanor arrests. See Alexandra Natapoff, *Misdemeanors*, 85 S Cal L Rev 1313, 1331–37 (2012) (“police arrest people for a variety of reasons that may or may not involve probable cause”); id at 1337 (“while we do not know how many people are arrested for petty offenses without evidence, we know the practice is ingrained in phenomena like urban loitering and trespass policies, zero tolerance policing, and routine urban street control. . . . Because misdemeanor arrests are low profile, unlikely to be litigated, and staples of police control tactics, they can easily be driven not by evidence, but by other police aims and goals.”); see also Logan, 92 BU L Rev 1561 at 1589–90 (cited in note 73) (discussing the discretion police have when making arrests). Thus, even Professor David Kaye, an advocate for universal DNA testing, recognizes that “making arrest the threshold for inclusion in law enforcement DNA databases reflects a naïve view of what it means to be arrested. . . . Indeed, probable cause to arrest is spread thick and wide through the populace, attaching to the innocent-in-fact as well as to those guilty of the crime for which probable cause exists. Probable cause is thus an extremely low threshold, and a poor shield against the government taking and profiling our DNA—and against abuse of that power.” D. H. Kaye and Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 Wis L Rev 413, 458 n 153 (2003). See also Joh, 11 Ohio St J Crim L at 285 (cited in note 107) (“What *King* fails to acknowledge is that the very existence of a DNA database gives the police incentives to turn every encounter into an arrest. . . . While it is true that database laws give the police few choices at the literal moment of sample collection, little reins in the police in their decision about whom to target, when, and why” (footnotes omitted)).

¹¹⁸ *King*, 133 S Ct at 1978, quoting *Vernonia*, 515 US at 654.

“when ‘special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.’”¹¹⁹ A synthesis of the cases shows that three factors are important to the Court when it decides whether a challenged search falls within the special needs doctrine: the purpose of the search, whether law enforcement officials will have access to the fruits of the search, and the extent of police involvement in conducting the search.¹²⁰

Several lower courts have upheld DNA testing of arrestees on the theory that the testing is reasonable both for immediate identification purposes *and* for “maintaining a permanent record to solve other past and future crimes.”¹²¹ This reasoning, however, cannot be squared with legal principles announced in the Court’s most recent special needs case, *Ferguson v City of Charleston*.¹²² In *Ferguson*, the Court invalidated a public hospital’s policy of conducting urine tests of pregnant women suspected of drug use and disclosing the results to law enforcement officials. Writing for the Court, Justice Stevens explained that the urine tests were designed to obtain incriminating information that would be revealed to police and prosecutors. Because the urine tests’ central purpose “was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy,”¹²³ the Court found that “this case simply does not fit within the closely guarded category of ‘special needs.’”¹²⁴ Stevens explained that the “fact that positive test results were turned over to the police does not merely provide a basis for distinguishing” the special needs cases, it “also provides an affirmative reason for enforcing the strictures of the Fourth Amendment.”¹²⁵ Stevens added that, “[w]hile the ultimate goal of the policy may well have been to get [women] into sub-

¹¹⁹ *Griffin v Wisconsin*, 483 US 868, 873 (1987), quoting *New Jersey v T.L.O.*, 469 US 325, 351 (1985) (Blackmun, J, concurring).

¹²⁰ See 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, 108–15 (2005).

¹²¹ *Anderson v Commonwealth*, 634 SE2d 372, 375 (Va App 2006), quoting *Jones v Murray*, 962 F2d 302, 306 (4th Cir 1992).

¹²² *Ferguson v City of Charleston*, 532 US 67 (2001).

¹²³ *Id* at 84.

¹²⁴ *Id* (footnote omitted).

¹²⁵ *Id*.

stance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal.”¹²⁶ For that reason, the special needs doctrine was inapplicable.

In light of *Ferguson*, it is difficult to conclude that DNA testing of an arrestee is a valid special needs search. Although the government has legitimate interests in knowing the identity of arrestees and in accurately identifying arrestees in a manner superior to fingerprinting or photography, it does not follow that DNA testing falls within the special needs doctrine because the government’s interests in this context are directly related to law enforcement.¹²⁷ Further, police are thoroughly involved in conducting and using the results of DNA searches. As Justice Kennedy observed in his concurring opinion in *Ferguson*, “[n]one of our special needs precedents has sanctioned the routine inclusion of law enforcement . . . to implement the system designed for the special needs objectives.”¹²⁸

It might be argued that because the police are permitted to fingerprint arrestees for administrative purposes related to “identification” and to use those fingerprints for investigative purposes, the same should be true for DNA searches. This is a false analogy, however. As David Kaye, a well-known proponent of universal DNA testing, noted in the aftermath of *Ferguson*, it is “extremely implausible” that taking DNA samples from arrestees can be justified on the theory that the search’s primary purpose is to ascertain an arrestee’s true identity.¹²⁹ Rather, “[t]he legislative interest in DNA databases has not been primarily to supplement or supplant fingerprints as markers of true identity; it has always been to generate investigative leads.”¹³⁰ For all these reasons, DNA

¹²⁶ *Id.* at 82–83 (footnotes omitted).

¹²⁷ Compare Kaye and Smith, 2003 *Wis L Rev* at 434 (cited in note 117) (“‘Normal law enforcement’ would appear to be the primary purpose of a program requiring arrestees to provide DNA samples, typing those samples at standard forensic loci, and including the profiles in an identification database that can be searched for a profile matching DNA recovered in connection with unsolved past or future crime.”).

¹²⁸ *Ferguson*, 532 US at 88 (Kennedy, J., concurring).

¹²⁹ D. H. Kaye, *Two Fallacies About DNA Data Banks for Law Enforcement*, 67 *Brooklyn L Rev* 176, 203 (2001).

¹³⁰ *Id.*; compare Kaye, 34 *J L Med & Ethics* at 192 (cited in note 28) (stating that the reasoning of *Ferguson* “has pulled the rug out from under special-needs balancing for DNA databanks. The convicted-offender databases exist primarily to facilitate the identification of the perpetrators of sexual assaults, murders, and many other crimes, . . . criminal investigation is their *raison d’être*.”).

testing of arrestees does not fit within the category of special needs cases.

C. DNA SAMPLING CANNOT BE JUSTIFIED UNDER THE SAMSON/
KNIGHTS PRINCIPLE

If DNA testing is justified neither as a search incident to arrest nor as a special needs search, how can it be squared with the Fourth Amendment? As one federal appellate court has observed, the “Supreme Court has never applied a general balancing test”¹³¹ in the context of searches designed to investigate ordinary criminal conduct. Indeed, as Justice Scalia emphasized in his dissenting opinion in *King*, the Court has generally embraced a “categorical” rule that the Fourth Amendment bars “searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence.”¹³²

The “categorical” rule was jostled a bit, however, in *United States v Knights*¹³³ and *Samson v California*.¹³⁴ Both cases cast doubt on this “rule.” In 2001, the Court in *Knights* upheld a warrantless police search of a probationer’s home based on reasonable suspicion that criminal evidence would be discovered. *Knights* did not rely upon the special needs doctrine, because the search was directly related to law enforcement purposes and conducted by police. Additionally, there was no exigency justifying the warrantless search of Knights’s home. The Court held that the search was “reasonable under our general Fourth Amendment approach of ‘examining the totality of the circumstances.’”¹³⁵ The Court emphasized that Knights had signed a probation order that permitted suspicionless searches of his person, property, and effects “at any-time.”¹³⁶ This agreement, although not determinative of Knights’s Fourth Amendment rights, “significantly diminished” his “reasonable expectation of privacy.”¹³⁷ The Court concluded that the

¹³¹ *Nicholas v Goord*, 430 F3d at 666.

¹³² *King*, 133 S Ct at 1980.

¹³³ *United States v Knights*, 534 US 112 (2001). Professor LaFare is quite critical of *Knights*. See LaFare, 5 *Search and Seizure* § 10.10(c) at 542–46 (cited in note 3).

¹³⁴ *Samson v California*, 547 US 843 (2006).

¹³⁵ *Knights*, 534 US at 118.

¹³⁶ *Id* at 114.

¹³⁷ *Id* at 120 (footnote omitted). Although *Knights*’s holding incorporates the reasonable suspicion the police had for searching Knights, the statute governing the search permitted

warrantless search of Knights's home advanced the government's "justified" concern in protecting the community from criminal acts committed by a probationer, who "will be more likely to engage in criminal conduct than an ordinary member of the community."¹³⁸

Samson went a step further and upheld a suspicionless police search of a known parolee seen walking down the street with a woman and a child. The officer testified that he searched Samson's person for the "sole reason . . . that defendant was 'on parole,'" and noted that he "does not search all parolees 'all the time,' but does conduct parole searches 'on a regular basis' unless he has 'other work to do' or already 'dealt with' the parolee."¹³⁹ Like Knights, Samson had signed a release condition which permitted suspicionless searches at any time of the day or night. According to the Court, the issue in *Samson* was whether the condition of parole can so diminish a parolee's reasonable expectation of privacy that a suspicionless search by police does not violate the Fourth Amendment. In a 6-3 ruling (with Justice Scalia in the majority), the Court held that the search was "reasonable," once again suggesting the propriety of an open-ended type of balancing. The Court emphasized that Samson had signed a search condition that diminished any reasonable expectation of privacy he might otherwise harbor. For good measure, the Court added that probationers and parolees are on a "'continuum' of state-imposed punishments" and that "[o]n this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment."¹⁴⁰ The Court found that the suspicionless search served several state interests, including reducing recidivism of parolees, supervising parolees, and protecting the public from criminal acts by reoffenders. In practical effect, *Samson* eliminated Fourth Amendment protec-

suspicionless searches of probationers, a fact not lost on the *Knights* majority. *Id.* at 120, n 6. Indeed, the Court seemed to plant the seeds for the result in *Samson* in *Knights* when it explicitly left open "whether [a] probation condition so diminished, or *completely eliminated*, Knights' reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment." *Id.* (emphasis added).

¹³⁸ *Knights*, 534 US at 121.

¹³⁹ *Samson*, 547 US at 843.

¹⁴⁰ *Id.*

tion for parolees, though the Court denied this result.¹⁴¹

According to Professor Wayne LaFave, *Samson* is the most relevant precedent in assessing the constitutionality of arrestee DNA testing.¹⁴² It is, indeed, the only modern precedent in which the Court has upheld a suspicionless search for investigative purposes under a standardless balancing analysis.¹⁴³ Interestingly, though Justice Kennedy could have cited *Knights* and *Samson* as direct support for the result in *King*, he did not.¹⁴⁴ Perhaps Kennedy avoided relying upon either *Knights* or *Samson* because *Knights* and *Samson* apply only to searches of persons who have already been convicted of crime. During the oral argument, Kennedy seemed

¹⁴¹ Justice Thomas's majority ruling in *Samson* denied the charge in Justice Stevens's dissent that the result in *Samson* permitted arbitrary, capricious, or harassing searches of parolees. According to Thomas, a statutory prohibition against these types of searches prevented that result. *Samson*, 547 US at 856. Justice Thomas's statement is unconvincing. If the statutory prohibition had any teeth, why wasn't the search of Samson deemed "arbitrary"? Is there much difference "between a search made without suspicion (and without adherence to any neutral criteria) and one made in an arbitrary or capricious manner?" Yale Kamisar et al, *Modern Criminal Procedure* 451 (West, 13th ed 2012). The officer's testimony—he searched Samson for the "sole reason . . . that defendant was 'on parole'"—suggested that the search was arbitrary. In any event, when the result in *Samson* is paired with the holding in *Pa Bd of Probation and Parole v Scott*, 524 US 357 (1998) (Fourth Amendment's exclusionary rule does not apply in a state parole hearing to suppress the fruit of an unconstitutional search conducted against a parolee), Fourth Amendment protection for parolees seems nonexistent.

¹⁴² According to LaFave, none of the Justices in *King* measured DNA testing of arrestees by the "one and only suspicionless-search/no-special-needs/balancing-of-interests precedent, *Samson v. California*." Wayne R. LaFave, 3 *Search and Seizure: A Treatise on the Fourth Amendment* § 5.4(c) (forthcoming, West, 5th ed supp 2013–14).

¹⁴³ Compare Charles J. Nerko, Note, *Assessing Fourth Amendment Challenges to DNA Extraction Statutes After Samson v California*, 77 *Fordham L Rev* 917, 945 (2008) (noting that although the *Samson* Court "described its decision as 'far from remarkable,' never before had the Court approbated a search devoid of a warrant or individualized suspicion by invoking the totality of the circumstances test."); id at 945 (stating that "*Samson* provides courts with a new Fourth Amendment approach to justify the monumental governmental interests" that DNA testing of convicts furthers) (emphasis added); see also LaFave, 3 *Search and Seizure* § 5.4(c) (supp 2013–14) (cited in note 142) ("What makes *King* so disappointing is neither opinion comes to grips with the real issue in the case"—namely, "whether on a balancing-of-interests analysis a standardized procedure—consisting of a suspicionless minimal search by way of a cheek swab to obtain DNA for the primary purpose of identifying the perpetrators of otherwise unsolved past and future crimes—may constitutionally be applied to all persons lawfully arrested and then held pursuant to a valid charge of a serious offense, in light of the reduced expectation of privacy of those detainees.").

¹⁴⁴ See LaFave, 3 *Search and Seizure* § 5.4(c) (supp 2013–14) (cited in note 142) (noting that the result in *King*, as intimated by the Court majority, comes from a "process of balancing privacy and law enforcement interests in cases where there exists a lesser-expectation-of-privacy than is normally the case, which the majority could have specified (but didn't) as having been accepted by a majority of the Court" in *Knights* and *Samson*).

to accept that position.¹⁴⁵ Because parolees and probationers could be in prison and thus subject to frequent and suspicionless searches,¹⁴⁶ it might seem reasonable for the government to release them on the condition that they remain subject to similar searches.¹⁴⁷ On this view, arrestees are distinguishable, because they have not been placed on a “‘continuum’ of state-imposed punishments.”¹⁴⁸

In sum, then, Justice Kennedy’s opinion in *King* cannot persuasively be explained in terms of the *Knights/Samson* principle, the search incident to arrest doctrine, or the special needs concept. What, then, explains *King*’s holding? In the end, *King* appears to rest on the Fourth Amendment jurisprudence of open-ended interest balancing, and this will likely portend how *King* will be read in the future. As *Terry v Ohio* and its progeny have shown, such an approach is an open invitation to expansive police powers.

III. IMPLICATIONS OF KING

King’s application in future cases depends on how one reads Justice Kennedy’s opinion. *King* can be read narrowly to apply only to persons arrested on felony or other serious charges. Kennedy himself framed the issue in that way, asking only whether the Fourth Amendment bars DNA testing from “persons arrested . . . on felony charges.”¹⁴⁹ As Justice Scalia noted in dissent, at

¹⁴⁵ When counsel for *King* noted his strong disagreement with Maryland and the federal government’s argument to use the “rationale of *Samson v. California* and essentially extend that rationale to the point of arrest,” Justice Kennedy responded: “I think—I think there is some merit to your argument in that regard. In *Samson*, he was a parolee, and he actually, as I recall, signed a—a consent form as part of the probation.” Oral Argument in *King* at 30 (cited in note 18).

¹⁴⁶ *Hudson v Palmer*, 468 US 517 (1984) (ruling that the Fourth Amendment does not provide protection for claims that a convicted prisoner has a privacy interest in his cell or possessory interest in his effects therein).

¹⁴⁷ Compare Oral Argument in *King* at 11 (cited in note 18) (Justice Sotomayor: “As I read *Samson*, it was the special relationship between the parolee or the probationary person, that line of cases, and the assumption being that they’re out in the world, I think, by the largesse of the State. So the State has a right to search their home, just as it would their cell, essentially.”); id at 24 (Chief Justice Roberts: “According to *Samson* and *Knights*, you’re dealing with people who are still subject to the—criminal sentence.”). See also Murphy, 127 Harv L Rev at 185 (cited in note 16) (stating that “*Samson* is not an iconic case describing the core of the Fourth Amendment,” rather, “[i]t was, until *King*, an outlier” permitting suspicionless searches for law enforcement purposes. *Samson* was “explicable only as a reflection of the all but extinguished privacy expectations of those [under] conditional liberty.”) (footnote omitted).

¹⁴⁸ *Samson*, 547 US at 843.

¹⁴⁹ *King*, 133 S Ct at 1966.

several places Kennedy's opinion appeared to confine the analysis to those arrested for serious offenses. Indeed, Kennedy stated in the last sentence of his opinion: "When officers make an arrest supported by probable cause to hold for a *serious offense* and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment."¹⁵⁰

On the other hand, a few passages in the opinion indicate that the Court's analysis might apply to *all* arrestees. For example, Kennedy noted that Maryland's law is similar to laws enacted by other states and the federal government that authorize "the collection of DNA from . . . *all* arrestees."¹⁵¹ Moreover, the logic of *King* would seem to extend to all arrestees. Indeed, in his dissenting opinion, Justice Scalia directly challenged the proposition that *King* will apply only to persons arrested for serious crimes:

I cannot imagine what principle could possibly justify [limiting *King*'s holding to serious offenses], and the Court does not attempt to suggest any. If one believes that DNA will 'identify' someone arrested for assault, he must believe that it will 'identify' someone arrested for a traffic offense. This Court does not base its judgments on senseless distinctions. At the end of the day, *logic will out*. . . . Make no mistake about it: As an entirely predictable consequence of today's decision, your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason.¹⁵²

Tellingly, Justice Kennedy did not respond to Scalia's challenge. Although the only issue before the Court in *King* concerned DNA testing of persons arrested for violent offenses, the federal government takes DNA samples from *all* arrestees, and seven states collect DNA samples from a subset of misdemeanor arrestees.¹⁵³ Moreover "a growing number of local law enforcement agencies across the country" now take DNA samples from anyone arrested

¹⁵⁰ Id at 1980 (emphasis added).

¹⁵¹ Id at 1968 (emphasis added).

¹⁵² Id at 1989 (Scalia, J, dissenting).

¹⁵³ 42 USC A § 14135(a). Alabama, Ala Code Ann § 36-18-25 (2013); Arizona, Ariz Rev Stat Ann § 13-610(L) (2013); Kansas, Kan Stat Ann § 21-2511 (2013); Louisiana, La Rev Stat Ann § 609 (2013); Minnesota, Minn Stat Ann § 299C105 (2013); South Carolina, SC Code Ann § 23-3-620 (2009); and South Dakota, SD Cod Laws § 23-5A-16.

for minor offenses.¹⁵⁴ This phenomenon will no doubt “accelerate” after *King*.¹⁵⁵ This trend is not surprising, for many law enforcement officials insist that “the crime-solving benefits of local databases are dramatic.”¹⁵⁶

When lower courts are confronted with constitutional challenges to DNA testing of persons arrested for minor offenses, they will naturally look to the Court for guidance. Because Justice Kennedy offered no reply to Scalia, lower court judges will have to decide how to interpret *King*, and in light of that exchange, most judges are likely to uphold DNA testing for all arrestees. It is, after all, a familiar adage that silence can be seen as assent.

Another issue is whether the police can use DNA testing on persons stopped for investigative detention.¹⁵⁷ One week after *King* was decided, the *New York Times* reported that some local police departments were “taking DNA from people on the mere suspicion of a crime, long before any arrest, and holding on to it regardless of the outcome.”¹⁵⁸ Indeed, the police have been taking

¹⁵⁴ Joseph Goldstein, *Police Agencies Are Assembling Records of DNA*, NY Times (June 12, 2013), online at <http://www.nytimes.com/2013/06/13/us/police-agencies-are-assembling-records-of-dna.html?pagewanted=all>; see also Tami Abdollah, *Arrested in O.C.? A DNA Sample Could Buy Freedom*, LA Times (Sept 17, 2009), online at <http://articles.latimes.com/2009/sep/17/local/me-oc-dna17> (describing a policy instituted by the Orange County, California District Attorney “offering a deal to some people who have only been arrested: give a DNA sample and have your charges dropped. . . . The [policy] applies to people arrested for nonviolent misdemeanors, including petty theft, trespassing and low-level drug-possession felonies.”).

¹⁵⁵ Goldstein, *Police Agencies* (cited in note 154). The public safety director of Bensalem Township, Pennsylvania, read *King* in just this manner: “In light of the Supreme Court decision, more and more organizations are going to be [expanding DNA collection].” *Id.* See also *King*, 133 S Ct at 1989 (Scalia, J, dissenting). Professor Erin Murphy agrees. According to Murphy, “*King* is a green light” to conduct more DNA testing. “It’s a ringing endorsement of DNA testing, and many law enforcement agencies would see this as a dramatic opportunity to expand DNA collection.” Goldstein, *Police Agencies* (cited in note 154).

¹⁵⁶ Goldstein, *id.*

¹⁵⁷ The federal government already obtains DNA samples from noncitizens detained by federal officers. See 42 USC § 14135(a). This section permits, as prescribed by the Attorney General’s regulations, collecting “DNA samples from . . . non-United States persons who are *detained* under the authority of the United States” (emphasis added). To be sure, the word “detained” is ambiguous in this context. Neither the statute nor the Attorney General’s regulations define the term. The sponsor of the DNA Fingerprint Act stated, “the word ‘detained’ covers a wide spectrum of circumstances. The dictionary definition of ‘detained’ is to keep from proceeding or to keep in custody or temporary confinement.” Statement of Senator Kyle, 151 Cong Rec S13757 (daily ed, Dec 16, 2005). Perhaps, “detained” means persons held in custody, but does not apply to persons temporarily seized for investigation as occurs during a *Terry* stop.

¹⁵⁸ Goldstein, *Police Agencies* (cited in note 154). According to the *New York Times*, “New York City has amassed a database with the profiles of 11,000 crime suspects. In Orange

forensic evidence from persons suspected, but not yet arrested, for many years. Not only is the Court aware of the practice, but it has signaled its approval.

The Court first confronted the practice of taking forensic evidence prior to arrest a year after *Terry*. In *Davis v Mississippi*,¹⁵⁹ the police brought Davis to a police station for fingerprinting and questioning in the course of a rape investigation. Davis's fingerprints matched those found at the crime scene and he was therefore convicted of rape. The Court held the detention unconstitutional because it had not been authorized by a judicial warrant, and it therefore suppressed the fingerprint evidence. The Court suggested, however, that it might approve a different type of fingerprinting detention. Speaking for the Court, Justice William Brennan wrote that, "because of the unique nature of the fingerprinting process, such detentions might be valid, under narrowly defined circumstances, even though there is no probable cause in the traditional sense."¹⁶⁰ Brennan explained that fingerprinting is less intrusive than other types of searches; it does not require the type of probing into a suspect's private life or thoughts that is associated with interrogation; it is inherently more reliable than eyewitness identifications or confessions; it is not subject to police manipulation; and because fingerprints cannot be destroyed, the detention can be planned by the police and authorized by a judicial warrant.¹⁶¹

County, California, the district attorney's office has 90,000 profiles, many obtained from low-level defendants who give DNA as part of a plea bargain or in return for having the charges against them dropped. . . . Others want to compile DNA profiles from suspects or low-level offenders long before their DNA might be captured by the state or national databases, which typically require conviction or arrest."

¹⁵⁹ *Davis v Mississippi* 394 US 721 (1969).

¹⁶⁰ *Id.* at 727.

¹⁶¹ *Id.* In a concurring opinion, Justice John Harlan made clear his view that, under a different set of facts than those presented in *Davis*, a "compelled submission to fingerprinting would not amount to a Fourth Amendment violation even in the absence of a warrant." Harlan felt that question should be left open. *Id.* at 728–29 (Harlan, J, concurring). "The *Davis* dictum has had considerable impact." LaFave, 4 *Search and Seizure* § 9.8(b) at 975–76 (cited in note 3) (noting that laws have been enacted authorizing detention at a police station on less than probable cause for certain identification procedures, and that courts have "consistently" upheld such laws and such procedures even in the absence of an authorizing statute or court rule). Professor Kaye believes that the dicta from *Davis* "suggest[s] that the Supreme Court would uphold compulsory acquisition of biometric data from a person when the process is not physically or mentally invasive, when the data are useful primarily to link individuals to crime scenes or to establish the true identity of a given individual, and when the data are valid, reliable, and effective for this purpose." Kaye, 34 *J L Med & Ethics* at 193 (cited in note 28) (footnote omitted).

The door *Davis* opened for possible forensic detentions was opened still wider in *Hayes v Florida*.¹⁶² The issue in *Hayes* was whether the Fourth Amendment permits the police to transport a suspect to a police station for fingerprinting without his consent and absent probable cause or a warrant. Relying on *Davis*, the Court held that the police cannot constitutionally seize an individual and transport him to a police station for investigative detention. The Court implied, however, that *street detentions* for fingerprinting might be consistent with the Fourth Amendment. Speaking for the Court, Justice White suggested “that a brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause,” might be constitutional.¹⁶³ Noting that *Terry* and similar decisions had held that a brief detention of a suspicious person is permissible “in order to determine his identity,”¹⁶⁴ “to pose questions to the person, or to detain the person briefly while attempting to obtain further information,”¹⁶⁵ White concluded that the Fourth Amendment might

permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect’s connection with that crime, and if the procedure is carried out with dispatch.¹⁶⁶

If, as *Hayes* suggests, the police can fingerprint a suspect during a *Terry* stop, can they also obtain a DNA sample during the stop, as long as they have reasonable grounds to believe that the suspect has committed a crime and that DNA analysis might either establish or negate the suspect’s guilt? Is taking a DNA sample different from taking a fingerprint? Perhaps. *King* established that obtaining a DNA sample via a cheek swab is a “search.” The Court has never decided, however, whether fingerprinting is a search. Indeed, on at least one occasion, it has suggested that fingerprinting might not constitute a search because it involves “mere ‘phys-

¹⁶² *Hayes v Florida*, 470 US 811 (1985).

¹⁶³ *Id.* at 816.

¹⁶⁴ *Adams v Williams*, 407 US 143, 146 (1972).

¹⁶⁵ *United States v Hensley*, 469 US 221, 232 (1985).

¹⁶⁶ *Hayes*, 470 US at 817.

ical characteristics . . . constantly exposed to the public.”¹⁶⁷ Because the Court has never held that there is a “search-for-evidence counterpart to the *Terry* weapons search,”¹⁶⁸ it might permit fingerprinting during an investigatory stop, if fingerprinting is not a search, but not DNA testing, which *is* a search. On the other hand, it is possible to read *King* as authorizing compelled DNA samples during investigative stops by employing the same type of balancing analysis utilized in *King* and concluding that the government’s interest in identifying a suspected criminal outweighs the minimal intrusion involved in obtaining a DNA sample, even if it is a search.¹⁶⁹

Moreover, although the Court has never extended *Terry* to allow “investigative identification search[es]” incident to a stop, the Wisconsin Supreme Court has upheld such searches during lawful investigative detentions,¹⁷⁰ and federal prosecutors have urged lower courts to recognize such an exception.¹⁷¹ In light of these developments, courts might increasingly be persuaded after *King* to uphold “investigative identification search[es]” by combining the logic of *King* with the reasoning of *Hübel v Sixth Judicial District Court*,¹⁷² which was also authored by Justice Kennedy.

In *King*, Justice Kennedy emphasized that accurate identification of an arrestee includes knowing more than the arrestee’s name: police also need to know “what is already known about him.”¹⁷³ According to Kennedy, a “suspect’s criminal history is a critical

¹⁶⁷ *Cupp v Murphy*, 412 US 291, 295 (1973), quoting *United States v Dionisio*, 410 US 1, 14 (1973).

¹⁶⁸ LaFave, 4 *Search and Seizure* § 9.6(g) at 941 (cited in note 3) (footnote omitted).

¹⁶⁹ In a pre-*King* ruling, four judges of the District of Columbia Court of Appeals endorsed this reasoning. *Askew*, 529 F3d at 1156–63 (Kavanaugh dissenting) (concluding that police may conduct a search—unzipping a suspect’s jacket—during a *Terry* stop to facilitate a victim’s identification of the suspect).

¹⁷⁰ *State v Flynn*, 285 NW2d 710 (Wis 1979). *Flynn* explained that to accept the notion that a suspect properly detained for investigation can refuse an officer’s request for identification “would reduce the authority of the officer granted by [the state stop and identify statute] and recognized by the United States Supreme Court in *Adams v Williams*, 407 US 143 (1972) to identify a person lawfully stopped by him to a mere fiction.” Id at 717–18. While *Flynn* applied a balancing analysis, according to Professor LaFave, no other court has embraced this result and recognized an identification search. See LaFave, 4 *Search and Seizure* § 9.6(g) at 943 (cited in note 3).

¹⁷¹ In *Askew*, 529 F3d at 1134, the government urged the court to approve an “identification” search during a *Terry* investigation.

¹⁷² *Hübel v Sixth Judicial District*, 542 US 177 (2004).

¹⁷³ *King*, 133 S Ct at 172.

part of his identity.”¹⁷⁴ Kennedy observed that persons stopped for traffic offenses are often dangerous criminals, noting that Timothy McVeigh was stopped for driving without a license plate only hours after the Oklahoma City bombing, and that one of the terrorists involved in the September 11 attacks was ticketed for speeding two days before the attacks.¹⁷⁵ Kennedy explained that DNA is a “metric of identification used to connect the arrestee with his or her public persona, as reflected in records of his or her actions that are available to the police.”¹⁷⁶ Accordingly, police may link an arrestee to “a variety of relevant forms of identification” possessed by the government, which “are checked as a routine matter to produce a more comprehensive record of the suspect’s complete identity.”¹⁷⁷

If these government interests are sufficient to justify DNA searches of arrestees, it arguably follows that similar interests justify DNA searches during *Terry* stops. *Hiibel* might be viewed as a first step in that direction. *Hiibel* was detained and questioned about a reported domestic dispute. After he refused to identify himself, he was arrested and later convicted of violating Nevada’s “stop and identify” law, which requires a person subject to a lawful investigative detention to provide police with his identity. Relying on prior rulings, *Hiibel* argued that he had a right not to identify himself during a *Terry* stop. The Court, in an opinion by Justice Kennedy, disagreed. Kennedy explained that the Court had made “clear that questions concerning a suspect’s identity are a routine and accepted part of many *Terry* stops.”¹⁷⁸ He noted that the Court had recognized that the authority to detain, ask questions, and check identification, even without probable cause to arrest, “promotes the strong government interest in solving crimes and bringing offenders to justice.”¹⁷⁹ Applying a balancing analysis, Kennedy found that learning a suspect’s identity “may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder.”¹⁸⁰ Moreover, he added, identity is

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Hiibel*, 542 US at 186.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

particularly important in domestic violence cases, because police “need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.”¹⁸¹ Kennedy added that the “request for identity has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop.”¹⁸² Finally, and importantly, Nevada’s identification requirement does not change the duration or location of the stop. Taking all this into account, Kennedy upheld the law.

Although Wayne LaFave believes that *Hiibel* “does not lend much support” for an investigative identification search,¹⁸³ that proposition is not so clear after *King*. Relying on the government interests identified in *King* and *Hiibel*, and *Hayes*’s procedural framework for obtaining fingerprints from a suspect during an investigative stop, a court could easily find that the government’s interest in accurately identifying persons subject to *Terry* stops outweighs the minor intrusion of taking a DNA sample.¹⁸⁴ Courts have already approved warrant and criminal background checks for persons detained for traffic offenses, even though such procedures can take thirty minutes to complete.¹⁸⁵ In *Illinois v Caballes*, the Court impliedly conferred approval on these investigative procedures, provided that they do not unduly prolong the length of the stop.¹⁸⁶ If there is reasonable suspicion that a suspect has committed a crime, the state has a strong interest in obtaining an accurate identification of the suspect, similar to its interest in obtaining fingerprints. A court might therefore conclude that “the only difference between DNA analysis and the accepted use of

¹⁸¹ *Id.*

¹⁸² *Id.* at 188.

¹⁸³ See LaFave, 4 *Search and Seizure* § 9.6(g) at 947 (cited in note 3).

¹⁸⁴ See *Askew*, 529 F3d at 1161 (Kavanaugh dissenting) (four judges, relying upon *Hiibel* and other cases, stating: “Identification procedures constituting searches are permitted during *Terry* stops so long as procedures are reasonable under the circumstances.”).

¹⁸⁵ See, for example, Wayne R. LaFave, *The Routine Traffic Stop from Start to Finish: Too Much “Routine” and Not Enough Fourth Amendment*, 102 Mich L Rev 1843, 1876–78 (2004); Tracey Maclin, *Police Interrogation During Traffic Stops: More Questions Than Answers*, 31 *Champion* 34, 37 n 64 (Nov 2007).

¹⁸⁶ *Illinois v Caballes* 543 US 405, 408 (2005). In *Caballes*, police conducted a warrant check and a criminal background check before having a drug-detection dog sniff *Caballes*’s car. *People v Caballes*, 802 NE2d 202, 203 (Ill 2003). Although these facts were not mentioned in Justice Stevens’s majority opinion in *Caballes*, he did state that the “duration of the stop in this case was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop.” *Caballes*, 543 US at 408.

fingerprint databases is the unparalleled accuracy DNA provides.”¹⁸⁷

Furthermore, a court might believe that a *Terry* “suspect’s criminal history is a critical part of his identity that officers should know when” conducting an investigative detention.¹⁸⁸ The same government interests in accurate identification that are served by obtaining a suspect’s fingerprints are also promoted by obtaining a DNA sample. If the police may obtain a suspect’s fingerprints during a *Terry* stop, as *Hayes* seems to suggest, then it would seem to follow that they may take a DNA swab for the same purpose.¹⁸⁹ Although obtaining a DNA sample constitutes a separate and additional search, a court could decide that taking the sample “does not alter the nature of the stop itself: it does not change its duration, or its location.”¹⁹⁰ Borrowing from the analysis of *King*, a court could find that “the additional intrusion upon the [suspect’s] privacy beyond that associated with fingerprinting is not significant,” and thus justifies this minor intrusion.¹⁹¹

To be sure, the Court has not yet endorsed an investigative search for identification under *Terry*. However, the Court had not approved a suspicionless search of the body for identification be-

¹⁸⁷ *King*, 133 S Ct at 1972.

¹⁸⁸ *Id.* See also Joh, 11 Ohio St J Crim L at 291–92 (cited in note 107). (“If ‘knowledge of identity’ has long been an acceptable objective in the *Terry* context, and a DNA profile is a part of the individual’s identity for Fourth Amendment purposes, its collection would seem appropriate even in circumstances short of arrest.”) (footnotes omitted).

¹⁸⁹ In *Askew*, four judges of the District of Columbia Court of Appeals argued that prohibiting identification procedures that amount to searches during *Terry* stops would “lead to absurd and dangerous results.” *Askew*, 529 F3d at 1162 (Kavanaugh dissenting) (observing that such a rule would mean police could not “remove a suspect’s gloves to perform the fingerprinting that *Hayes* expressly allows,” “lift a rape suspect’s sleeve to view a tattoo on the suspect’s forearm, even though the rape victim said the perpetrator had a distinctive tattoo on his forearm,” “take fingernail scrapings or a saliva swab from a murder suspect in a case where the victim was killed in a violent struggle.”). According to these judges, barring identification searches during investigative detentions “would mean that a large number of state statutes, rules, and decisions permitting identification procedures on less than probable cause—which have been on the books for decades—are all unconstitutional and wrongly decided.” *Id.*

¹⁹⁰ *Hiiibel*, 542 US at 178 (internal citations omitted). During the oral argument in *King*, Chief Justice Roberts asked counsel for Maryland about taking DNA samples during traffic stops: “But there’s no reason you couldn’t, right? I gather it’s not hard. Police officers who give Breathalyzer tests, they can also take a Q-tip or whatever and get a DNA sample, right?” After counsel noted that the Court’s cases presume that traffic stops be brief, the Chief Justice suggested that taking a DNA sample would not take much time: “Well, how long does it take to—to undergo the procedure? You know, you say, ah, and then—you know.” Oral Argument in *King* at 7 (cited in note 18).

¹⁹¹ *King*, 133 S Ct at 1976.

fore *King*. Prior to *King*, the Court had permitted *Terry* searches only for weapons. Nonetheless, after *King*, lower courts might find that a DNA search during a *Terry* stop is constitutional. One might argue, for example, that taking DNA during a stop is designed not to discover *evidence*, but rather, as *King* found, to produce an *accurate identification*. Moreover, the intrusion on privacy is no greater than the intrusion authorized in *King*, and is not significantly more intrusive than fingerprinting,¹⁹² which the Court has already said is permissible in these circumstances. Put differently, just as *King* invoked a balancing process similar to that used in *Terry* to assess “the reasonableness of the government adding a very little search (this kind of cheek swabbing) to the booking process,”¹⁹³ a judge in a future case could take the next step and approve the same type of search in the context of an investigative detention.¹⁹⁴

¹⁹² Compare *id.* at 1976 (describing the intrusion on privacy of taking a DNA sample: “The additional intrusion upon the arrestee’s privacy beyond that associated with fingerprinting is not significant . . .”).

¹⁹³ E-mail from John Q. Barrett to crimprof@chicagokent.kentlaw.edu (June 6, 2013 at 6:48 pm) (explaining that *King* “is a *Terry*/balancing decision about the Fourth Amendment reasonableness of the government adding a very little search (this kind of cheek swabbing) to the booking process for . . . these kinds of ‘serious’ crime arrestees.”).

¹⁹⁴ Although this is not the place for a detailed analysis of the issue, the reasoning of *King* can also be extended to persons not suspected of criminal conduct. For a long time, mandatory fingerprinting has been associated with criminal investigations. “With technological advances, however, the criminal stigma has somewhat lessened as fingerprinting has become a more common form of identification utilized outside of the criminal justice system.” Christina Buschmann, *Mandatory Fingerprinting of Public School Teachers: Facilitating Background Checks or Infringing on Individuals’ Constitutional Rights?*, 11 Wm & Mary Bill Rts J 1273, 1279–80 (2003). Many states require applicants to certain professions to provide fingerprints for identification purposes and criminal background checks, including individuals applying to be lawyers, doctors, nurses, public school teachers, bankers, and pawnbrokers. Some states require welfare recipients to provide fingerprints as a condition for receiving benefits. See Recent Legislation, *Welfare Policy—Fraud Prevention—New York Requires Finger Imaging for Welfare Recipients*, 109 Harv L Rev 1168 (1996). Six states require fingerprints to obtain a driver’s license. Although the statutes vary in form, the purpose behind most mandatory fingerprinting requirements is to verify the identification of the applicant and to facilitate criminal background checks. For example, California’s fingerprint requirement for the bar exam serves two purposes: “to establish the identity of the applicant and in order to determine whether the applicant . . . has a record of criminal conviction in this state or in other states.” Cal Bus & Prof Code § 6054 (West 2013). Similarly, the California Supreme Court, in upholding California’s fingerprint requirement for driver’s licenses, explained that the state legislature had found that “the driver’s license and identification card issued by the Department of Motor Vehicles are the basic identification documents in this state and that the state has a compelling interest in insuring the accuracy and integrity of this identification system.” *Perkey v Dept of Motor Vehicles*, 721 P2d 50, 51 (Cal 1986) (citation omitted).

If states can require potential school teachers and applicants for a driver’s license to provide fingerprints, can states also require applicants to provide a DNA sample for iden-

IV. IS KING ANOTHER TERRY?

Near the conclusion of oral argument in *King*, Justice Kennedy asked King's counsel a series of questions that, for Kennedy, encapsulated the heart of the case:

[A] person has been arrested for a felony and is in custody, do the police—does the justice system have an interest in knowing whether that person committed other crimes?¹⁹⁵

My question is whether or not the police, who have John Doe in custody for a felony, have an interest in knowing, at the outset or within a few weeks' time, whether or not that person has committed other crimes?¹⁹⁶

And my—my question is, do they have an interest—a legitimate interest in knowing if that person has committed other crimes?¹⁹⁷

Counsel did not provide the answers Kennedy sought; therefore, Kennedy answered his own questions: Yes, Justice Kennedy concluded in *King*, the state does have a legitimate interest in knowing

tification purposes? After all, “[i]f the Constitution allows the police to keep a fingerprint or a photograph as a biometric identifier, as many courts have held, then it is hard to see why they cannot keep a DNA profile if it is properly limited to ‘vacuous’ loci.” Kaye and Smith, 2003 Wis L Rev at 432 (cited in note 117). And as *King* observed in the context of identifying arrestees, “the only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides.” *King*, 133 S Ct at 1972. Indeed, “if DNA collection is also okay because DNA is just a 21st century fingerprint, and all that it tells us is just a part of ‘identity,’ then it is hard to read [*King*] as rejecting collection of DNA in any case where collection of fingerprints is already allowed.” Murphy, 127 Harv L Rev at 178 (cited in note 16).

As noted above, the Court has not found that fingerprinting is a search for constitutional purposes, while *King* establishes compelling a DNA sample via a buccal swab is a search. Nevertheless, a lower court might decide, using a balancing analysis and the reasoning of *King*, that although obtaining a DNA sample constitutes a search, the state's compelling interest in accurately identifying applicants for particular professions outweighs the minimal nature of the intrusion in obtaining the sample. *King* described a DNA search as a “negligible” intrusion, “a far more gentle process” than a blood draw and a “minimally invasive search.” *King*, 133 S Ct at 1969 & 1977. Moreover, while it is a debatable proposition, an argument can be made that because of extensive regulation by the state, members of certain professions, for example, doctors and lawyers, possess a diminished or no-privacy interest concerning their identity. In a similar vein, the Court has ruled that suspicionless and random urinalysis drug testing of public school students does not violate the Fourth Amendment. In two separate cases, the Court concluded that the collection of urine, which is considered a search, was reasonable because students have diminished privacy interests due to the state's “custodial and tutelary responsibility for children” and the collection of a urine sample was relatively unobtrusive, and thus the privacy interests compromised were “negligible.” *Bd of Ed of Pottawatomie City v Earls*, 536 US 822, 830 (2002) (citation omitted); *Vernonia Sch Dist*, 515 US 646, 658 (1995).

¹⁹⁵ Oral Argument in *King* at 41 (cited in note 18).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 42.

whether an arrestee has committed other crimes. A DNA search obviously advances that interest. Moreover, a DNA search also promotes the state's interest in being able to identify the arrestee if he commits a future crime and his DNA is found at the scene. As Scalia put the point in *King*, “[w]hat DNA adds—what makes it a valuable weapon in the law enforcement arsenal—is the ability to solve unsolved crimes, by matching old crime-scene evidence against the profiles of people whose identities are already known.”¹⁹⁸ Indeed, the Justices in the majority envisioned arrestee DNA searches as “an indispensable tool in the fight against crime.”¹⁹⁹ This understanding no doubt prompted Justice Alito's comment that *King* “is perhaps the most important criminal procedure case that this Court has heard in decades.”²⁰⁰

To act on this understanding, Justice Kennedy had to deal with the Court's existing doctrine. Because the Court's precedents offered no support for Kennedy's position, he had to create an expansive and novel definition of “identity” in order to uphold DNA searches of arrestees.²⁰¹ The felt necessity to uphold DNA searches explains Kennedy's unconvincing assertion that the purpose of the DNA search was to “identify” King. As they say, necessity is the mother of invention.²⁰²

Both *King* and *Terry v Ohio* upheld unprecedented police searches, using reasoning motivated by a sense of necessity. In *Terry*, the Court confronted a controversial and pressing issue: the authority of police officers to stop and frisk a suspicious person absent probable cause to believe that he has committed a crime. While patrolling in plain clothes on the afternoon of October 31, 1963, Cleveland police detective Martin McFadden observed two men peer into a store window roughly twenty-four times. The two men then left the scene and joined a third man. The officer

¹⁹⁸ *King*, 133 S Ct at 1989 (Scalia, J, dissenting).

¹⁹⁹ Murphy, 127 Harv L Rev at 181 (cited in note 16) (footnote omitted).

²⁰⁰ Oral Argument in *King* at 35 (cited in note 18).

²⁰¹ See also Murphy, 127 Harv L Rev at 177 (cited in note 16) (“The most radical aspect of *King* is its reimagination of the idea of ‘identity’ to include criminal history and other information beyond ‘name and social security number.’”).

²⁰² See *The New Oxford American Dictionary* 1135 (2d ed, 2005) (“*proverb*, when the need for something becomes imperative, you are forced to find ways of getting or achieving it.”). *Cambridge Dictionaries Online* (Cambridge University Press, 2007), online at <http://dictionary.cambridge.org> (select “American English”; search “necessity is the mother of invention”) (“if someone really needs to do something, (s)he will think of a way of doing it.”).

suspected the men of “casing a job, a stick-up” and worried that “they may have a gun.”²⁰³ After approaching the men and not receiving a satisfactory explanation of their behavior, the officer grabbed one of the men, John Terry, spun him around and patted down the outside of his clothing. The officer felt a gun in Terry’s overcoat pocket. The officer removed another gun from the second man’s overcoat.

The Court’s precedents required probable cause to believe that criminal conduct was afoot before the police could seize or search a person. The trial court in *Terry* stated that it “‘would be stretching the facts beyond reasonable comprehension’ to find that Officer McFadden had had probable cause to arrest the men before he patted them down for weapons.”²⁰⁴ None of the Justices questioned this conclusion. Yet, because of the “necessity” of the situation, the Court voted 8–1 to uphold the search of Terry. Speaking for the Court, Chief Justice Earl Warren stated: “we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they lack probable cause for an arrest.”²⁰⁵ Thus, the Court ruled that where an officer reasonably believes that a suspicious person under investigation is armed and presently dangerous, the officer may frisk the person “to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.”²⁰⁶

Prior to *Terry*, New York’s highest court, the Court of Appeals, tried to reconcile stop-and-frisk authority with the Court’s precedents by concluding that the procedure did not involve either a seizure or a search, and thus did not trigger Fourth Amendment protection.²⁰⁷ *Terry* dismissed that conclusion as implausible.²⁰⁸ At

²⁰³ *Terry*, 392 US at 6.

²⁰⁴ *Id.* at 7–8.

²⁰⁵ *Id.* at 24.

²⁰⁶ *Id.*

²⁰⁷ In *People v Rivera*, 201 NE2d 32, 35 (NY 1964), the Court of Appeals explained that the physical intrusion involved during a frisk “is not very far different from the sense of sight or hearing—senses upon which police customarily act.”

²⁰⁸ *Terry*, 392 US at 16. (“It is quite plain that the Fourth Amendment governs ‘seizures’ of the person which do not eventuate in a trip to the station house and prosecution for crime—‘arrests’ in traditional terminology. . . . And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person’s clothing all over his body or her body in an attempt to find weapons is not a ‘search.’”).

the same time, the Court had to abandon the Fourth Amendment's presumptive procedural safeguards of a warrant and probable cause, because no precedent authorized a frisk for a weapon. The Court therefore improvised and explained that "the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures."²⁰⁹ Tellingly, this and similar statements²¹⁰ in *Terry* lacked any citation to precedent. Soon, the Court extended the open-ended balancing analysis embraced in *Terry* to other cases far removed from the "necessity" in *Terry*. As a member of the *Terry* majority later said: "It seems that the delicate balance that *Terry* struck was simply too delicate, too susceptible to the 'hydraulic pressures' of the day. As a result of today's decision, the balance struck in *Terry* is now heavily weighted in favor of the government."²¹¹ Over time, the balancing analysis adopted in *Terry* eventually became the "touchstone of modern Fourth Amendment jurisprudence."²¹²

The Court's reasoning in *Terry* and *King* was motivated by the perceived necessity of upholding the challenged searches. Each case involved a controversial search that the state argued was vital to law enforcement. Although the Court's prior rulings did not authorize the respective searches, that fact did not prevent the Court from reaching its desired outcome. In *Terry*, the Court gave its approval to a police procedure that the Court recognized generated "strong resentment" in black urban communities.²¹³ In *King*, the Court sanctioned a suspicionless search unlike other procedures approved by the Court, implying unpersuasively that it was simply following the Court's precedents. There is, however, one important difference between *Terry* and *King*. In *Terry*, the Court acknowledged that it was constructing a new legal landscape in

²⁰⁹ *Id.* at 20 (footnote omitted).

²¹⁰ See, for example, *Terry*, 392 US at 19 ("The distinctions of classical 'stop-and-frisk' theory thus serve to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.").

²¹¹ *Adams v Williams*, 407 US 143, 162 (1972) (Marshall, J, dissenting).

²¹² John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 *St John's L Rev* 749, 753 (1998).

²¹³ *Terry*, 392 US at 17. Stop-and-frisk practices continue to generate anger in certain minority neighborhoods. See *Floyd v City of New York*, 2013 WL 4046209 (SDNY) (concluding that the stop-and-frisk practices of the New York City Police Department violate the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment).

authorizing searches of the person on less than probable cause. The first sentence of Chief Justice Warren's opinion recognized the "serious questions" presented by the case.²¹⁴ A few pages later, Warren observed: "We would be less than candid if we did not acknowledge that this [case] thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court."²¹⁵ Justice Harlan's concurrence was more direct; he stated in no uncertain terms that *Terry* announced an "important new field of law."²¹⁶

By contrast, Justice Kennedy's opinion in *King* proceeds as if the Court was merely applying settled principle to a new set of facts. DNA collection from arrestees serves a state interest "that is well established: the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody."²¹⁷ Obtaining and analyzing an arrestee's DNA sample is just like taking an arrestee's fingerprints. "[T]he only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides."²¹⁸ Comparing an arrestee's DNA profile to the DNA profiles in unsolved cases "uses a different form of identification than a name or fingerprint, but its function is the same."²¹⁹ Finally, Kennedy declared that the privacy interests at stake are a close equivalent to the privacy interests invaded by fingerprinting. "The additional intrusion upon the arrestee's privacy beyond that associated with fingerprinting is not significant, and DNA is a markedly more accurate form of identifying arrestees."²²⁰

Chief Justice Warren wanted to confine the police power newly approved in *Terry* to cases where police safety was threatened,²²¹ but *Terry*'s "reasonableness" analysis was soon extended to give

²¹⁴ *Terry*, 392 US at 4.

²¹⁵ *Id.* at 9.

²¹⁶ *Id.* at 31 (Harlan, J., concurring).

²¹⁷ *King*, 133 S Ct at 1970.

²¹⁸ *Id.* at 1972.

²¹⁹ *Id.*

²²⁰ *Id.* at 1976.

²²¹ Barrett, 72 St John's L Rev at 794 (cited in note 212) ("*Terry* would be, as Warren saw things, a decision that gave the Court's limited approval solely to Detective McFadden's frisks of the three men.")

the police additional authority to detain suspicious persons in contexts presenting no danger to the police.²²² *Terry*, in other words, fundamentally changed Fourth Amendment law and diminished Fourth Amendment protections. It is too early to assert that *King* will inevitably alter search and seizure jurisprudence.²²³ Eight years ago, I predicted that the Court would not invalidate a DNA arrestee statute “on Fourth Amendment or any other constitutional grounds.”²²⁴ Now, I predict that *King* will follow in *Terry*’s footsteps and chart a path that similarly narrows Fourth Amendment liberties.²²⁵

²²² See, for example, *United States v Montoya de Hernandez*, 473 US 531 (1985) (*Terry* analysis used, in part, to uphold a sixteen-hour border detention of a person suspected of alimentary canal smuggling); *United States v Place*, 462 US 696 (1983) (*Terry* analysis used to validate detention of luggage for investigation); *Florida v Royer*, 460 US 491 (1983) (*Terry* analysis supports detaining a person suspected of narcotics smuggling); *Michigan v Summers*, 452 US 692 (1981) (*Terry* analysis used to uphold detention of occupants found on premises subject to a search warrant for contraband).

²²³ Compare Murphy, 127 Harv L Rev at 196 (cited in note 16) (“Whether [*King*] marks the beginning of a new era, however, only time will tell.”).

²²⁴ Maclin, 33 J L Med & Ethics at 118 n 261 (cited in note 120).

²²⁵ It is worth noting that the Obama administration cites *King* to defend the constitutionality of a program whereby the Foreign Intelligence Surveillance Court directs telecommunications companies to provide telephone “metadata” in bulk to the National Security Agency (“NSA”). Under this program, analysts from the NSA have access to telephone metadata from almost every telephone call made “within the United States and between the United States and foreign countries.” Federal Government, *Administration White Paper: Bulk Collection of Telephony Metadata Under Section 215 of the USA Patriot Act* at 1 (Aug 8, 2013). By the government’s account, telephone metadata “includes information about what telephone numbers were used to make and receive the calls, when the calls took place, and how long the calls lasted.” The phone companies do not report any information about the content of calls. *Id.*

The Obama administration contends that even if the collection of telephone metadata constitutes a search under the Fourth Amendment, the Court’s reasonableness standard “authoriz[es] the Government to conduct large-scale, but minimally intrusive, suspicionless searches.” *Id.* at 21. The administration cites *King*’s balancing test to conclude that a balancing analysis “overwhelmingly favors the Government in this context.” *Id.* The administration argues that telephone metadata collection results only in a “minimal” intrusion on privacy interests, the program does not collect or disclose the content of calls, and data may be accessed only when the government has a reasonable suspicion that a particular phone number is associated with a specific foreign terrorist organization. The government emphasizes that “only an exceedingly small fraction of the data collected has ever been seen,” and claims that this “weighs heavily in the Fourth Amendment calculus.” *Id.* (citing *King*, 133 S Ct at 1979, for the proposition that intrusions on privacy interests are limited when DNA analysis is used to provide identification information alone).

As this article goes to press, two federal district courts have split on the constitutionality of the NSA’s telephone surveillance program. See *Klayman v Obama*, 2013 WL 6571596, *2 (DDC 2013); *ACLU v Clapper*, 2013 WL 6819708, *21 (SDNY 2013).

Although this is not the place to closely examine whether the government action to collect and review phone records is constitutional, it is interesting to note the similarities between DNA registries and the NSA telephone surveillance program. Both intrusions involve collecting and storing vast amounts of personal information, and are executed

Forty years ago, Justice Powell bluntly stated that an arrestee retains no privacy interest in his person in the face of “a legitimate and overriding government concern.”²²⁶ He saw no reason to frustrate law enforcement goals by requiring that every search incident to arrest be justified by the twin rationales of seizing evidence or weapons; searches could serve other government interests as well—like solving crimes. “The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest.”²²⁷

I believe the result in *King* is best explained as a search incident to arrest. Taking DNA samples from arrestees may help close unsolved crimes.²²⁸ It certainly accelerated the identification of King as the perpetrator of an unresolved rape. But the search incident to arrest doctrine does not allow DNA searches. Rather than openly confront this obstacle and expand the boundaries of permissible searches incident to arrest, Justice Kennedy’s opinion in *King* fashioned a definition of “identification” that allowed the Court to elude settled doctrine. More troubling, *King* invites law

without individualized suspicion of wrongdoing. Both intrusions also yield potential fruits that facilitate law enforcement interests.

While many are alarmed that the government collects and warehouses massive amounts of information about individuals, extensive surveillance and data mining do not necessarily amount to a Fourth Amendment violation. Indeed, when confronted with comparable intrusions in prior cases, the Court has not ruled that collecting and stockpiling large amounts of information publicly disclosed or revealed to third parties constitutes a search under the Fourth Amendment. The Court most recently considered collection of informational data in *United States v. Jones*, 132 S Ct 945 (2012). *Jones* held that a search occurred when the government attached a global positioning system (GPS) tracking device to a vehicle and used that device to monitor the vehicle’s movements on the streets for twenty-eight days. However, the result in *Jones* did not turn on the amount of data revealed and retained through government surveillance, but on the *trespass* associated with the attachment of the GPS device. Thus, *Jones* did not decide whether obtaining extensive location data is a search, let alone an unreasonable search. Compare *id.* at 955 (Sotomayor, J, concurring) (observing that “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.”).

At first glance, the result and reasoning of *King* seem to be miles away from the broad data mining involved with the NSA’s telephone surveillance program. Yet, it is telling that the government views *King* as support for collecting and analyzing the nation’s telephone metadata.

²²⁶ *Robinson*, 414 US at 237 (Powell, J, concurring).

²²⁷ *Id.* at 237–38 (footnote omitted).

²²⁸ Although some law enforcement officials and scholars argue that expanding DNA databases will help solve more cold cases and deter future crimes, Professors Brandon Garrett and Erin Murphy contend that “[r]esearch shows that bigger is only better if DNA databases grow in the right way: by entering more samples from *crime scenes*, not samples from arrestees.” Garrett and Murphy, *Supreme Court 2013* (cited in note 96).

enforcement officials to extend DNA searches to persons arrested for any offense and even to persons merely detained by the police. Justice Scalia may be right that “most Members of the Court” are not quite ready to “just come out and say that any suspicionless search of an arrestee is allowed if it will be useful to solve crimes.”²²⁹ More time is needed before the Court will openly embrace that result. That conclusion is coming, and *King*’s balancing analysis provides the template for achieving that goal.

²²⁹ *King*, 133 S Ct at 1982 n 1 (Scalia, J, dissenting).