

DRAWING LINES: UNRELATED PROBABLE CAUSE AS A PREREQUISITE TO EARLY DNA COLLECTION*

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Swabbing the inside of a cheek has become part of the custodial arrest process in many jurisdictions. The majority view is that routinely collecting DNA before conviction (and analyzing it, recording the results, and comparing them to DNA profiles from crime-scene databases) is consistent with Fourth Amendment protections against unreasonable searches and seizures. However, some judges and commentators have argued that DNA sampling in advance of a determination by a judge or grand jury of probable cause for the arrest or charge is unconstitutional. This Article shows that this position is largely unfounded. Either warrantless, suspicionless DNA collection before conviction is unconstitutional across the board or it is permissible immediately after the arrest. The Constitution does not make a probable-cause determination for an unrelated offense the dispositive moment.

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INTRODUCTION

In *United States v. Pool*, a magistrate judge,¹ a district court judge,² and a panel of the Ninth Circuit Court of Appeals³ drew a line in the sand. Indicted by a grand jury for receiving child pornography, Jerry Pool asserted that it was unconstitutional to condition his pretrial release on the collection of a DNA sample.⁴ With near unanimity, these judges rejected his claim.⁵ However, the magistrate judge denominated the grand jury's finding of probable cause to believe that the arrestee had committed the crime a "watershed event."⁶ Likewise, a member of the court of appeals panel wrote separately in this "vexing case" to underscore the "highly significant distinction" between "sampling from mere arrestees" and "DNA testing [after] a judicial or grand jury probable cause determination."⁷ "[W]e must," he insisted, "draw lines as best we can."⁸

But is this the best the courts can do? Although recent commentary in the *North Carolina Law Review* endorsed this probable-cause line, at least as a minimum requirement for suspicionless, warrantless DNA sampling,⁹ the line is not clearly congruent with the relevant Fourth Amendment interests. To expose the incongruity, Part I locates the probable-cause determination within the larger framework of the case law. Next, Part II maintains that if totality-of-the-circumstances balancing is the appropriate mode of analysis (as has generally been assumed), then the line either should be drawn later, at the point of conviction—invalidating many of the current DNA statutes on the books—or earlier, at the point of the custodial arrest. Part III goes deeper. It questions the premise that totality balancing is appropriate. To make this point, this Part examines *Haskell v. Harris*,¹⁰ a more recent Ninth Circuit case that used totality-of-the-circumstances balancing to uphold California's law requiring DNA collection "immediately following arrest, or during the booking . . . process or as soon

1. 645 F. Supp. 2d 903, 909 (E.D. Cal. 2009), *aff'd*, 621 F.3d 1213 (9th Cir. 2010), *vacated as moot*, 659 F.3d 761 (9th Cir. 2011) (en banc).

2. CR. No. S-09-0015 EJG, 2009 WL 2152029, at *1 (E.D. Cal. July 15, 2009), *aff'd*, 621 F.3d 1213 (9th Cir. 2010), *vacated as moot*, 659 F.3d 761 (9th Cir. 2011) (en banc).

3. 621 F.3d 1213 (9th Cir. 2010), *vacated as moot*, 659 F.3d 761 (9th Cir. 2011) (en banc).

4. *Id.*

5. *Id.* at 1228; *Id.* at 1234 (Lucero, J., concurring). Judge Mary Schroeder dissented from the panel opinion. *Id.* (Schroeder, J., dissenting).

6. *Pool*, 645 F. Supp. 2d at 909.

7. *Pool*, 621 F.3d at 1231, 1234 (Lucero, J., concurring).

8. *Id.* at 1234.

9. Kevin Lapp & Joy Radice, *A Better Balancing: Reconsidering Pre-Conviction DNA Extraction from Federal Arrestees*, 90 N.C. L. REV. ADDENDUM 157, 170 (2012).

10. 669 F.3d 1049 (9th Cir. 2012), *petition for reh'g en banc granted and opinions vacated*, 686 F.3d 1121 (9th Cir. 2012).

as administratively practicable after arrest.”¹¹ Part III shows that the panel’s argument for totality balancing is unconvincing and sketches a possible categorical exception for the collection of certain biometric data. It then demonstrates why this latter approach does not warrant using probable cause for an arrest as a necessary condition for the constitutionality of demanding DNA before conviction (“DNA-BC”). If this proposed exception encompasses DNA sampling at all, it applies to DNA-BC as of the moment of arrest. In bold, a formal finding of probable cause to proceed to trial is not a viable criterion for ascertaining when police can engage in DNA-BC.

I. FRAMING THE ISSUE

Limiting warrantless, suspicionless DNA collection on arrest to cases in which there is at least probable cause to believe that the suspect is guilty of the crime for which he is being detained has considerable intuitive appeal. If the state lacked the necessary probable cause to make the arrest or if the state cannot establish to the satisfaction of an independent judge or jurors that the evidence against the suspect merits a trial, what can justify taking a DNA sample from the confined individual? Of course, the same question arises with the long-established practice of recording fingerprint patterns in the booking process¹²: If the state lacks the necessary probable cause to make an arrest or to charge the suspect, what can justify taking a fingerprint from the confined individual? Here, the justifications are

11. *Id.* at 1051, 1065 (quoting CAL. PENAL CODE § 296.1(a)(1)(A) (West 2008)).

12. “Booking” occurs early in the course of a custodial arrest:

Once the search incident to the arrest is completed, the arrestee will be transported, by the arresting officer or other officers called to the scene, to a police station or similar “holding” facility. It is at this facility that the arrestee will be taken through a process known as “booking.” Initially, the arrestee’s name, the time of his arrival, and the offense for which he was arrested are noted in the police “blotter” or “log.” The arrestee then will be photographed and fingerprinted.

JEROLD H. ISRAEL ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION: LEADING SUPREME COURT CASES AND INTRODUCTORY TEXT 16 (2010). Taking DNA along with fingerprints and photographs (as well as drug testing, *id.* at 20), thus can precede two probable-cause determinations that curb the discretion of the police. First, a person detained without an arrest warrant or indictment is entitled to “a fair and reliable determination of probable cause . . . made by a judicial officer either before or promptly after arrest.” *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975). This inquiry into probable cause can be part of a “preliminary arraignment” or “arraignment on the complaint” in which “the magistrate informs the defendant of the charge in the complaint and of various rights and proceedings,” and sets “the conditions for pretrial release.” *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 199 (2008). Second, after the initial appearance, a magistrate at a preliminary hearing considers whether the evidence presented by the state and the defendant (which may differ from what was available to the arresting officer or to the magistrate at the preliminary arraignment) “is sufficient for the prosecution to move forward.” ISRAEL ET AL., *supra*, at 21. Usually, probable cause on the record as it then stands suffices for the case to be “bound over to the grand jury . . . [or] directly to the general trial court.” *Id.*

twofold—authentication and criminal intelligence. The biometric record not only permits authentication of the true identity of the arrestee, but the information also sometimes serves an intelligence or investigative function by linking the arrestee to other crimes for which fingerprints were or will be recovered. Historically, the first justification was the driving force behind the adoption and judicial approval of fingerprinting on arrest.¹³ Knowing the true identity—and possible record of prior arrests and convictions—of an arrestee could be important in deciding whether to charge the suspect and what conditions to set for pretrial release or confinement. Such information could also be relevant during trial and could have a major effect on sentencing. In the case of DNA profiles, the ordering is reversed. Because fingerprints have worked well as a token of identity and because DNA databases have produced well-publicized “cold hits” in cases that had defied traditional methods,¹⁴ DNA sampling was added primarily to advance investigations of unsolved crimes.¹⁵

Courts have struggled because of this chronology. Most courts have been willing to allow legislatures to add DNA sampling to fingerprinting upon or soon after a custodial arrest.¹⁶ These courts reason that DNA sampling advances the authentication function somewhat and that this effect, combined with the criminal intelligence value, outweighs the security or privacy concerns protected by the Fourth Amendment.¹⁷ However, a growing minority of courts rejects this reasoning. Several opinions maintain that as long as fingerprinting is in place, the authentication value of DNA collection and analysis is *de minimis*, and the possibility of using DNA profiles or samples in ways prohibited by the database statutes is sufficient to outweigh the criminal intelligence value of arrestee DNA.¹⁸ The Supreme Court may address the issue in a case

13. D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORNELL J.L. & PUB. POL'Y 455, 486 (2001).

14. See, e.g., Connie Piloto, *DNA Database Helps Nab More Felons*, MIAMI HERALD, Dec. 1, 1996, at 1A; Bryan Smith, *DNA Puts Its First Rapist Away*, OREGONIAN, Jan. 12, 1996, at D3.

15. See, e.g., 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, 104 (2005).

16. See David H. Kaye, *The Constitutionality of DNA Collection Before Conviction: A Scorecard*, FORENSIC SCI., STAT. & L. BLOG (Aug. 17, 2012, 4:55 PM), <http://for-sci-law-now.blogspot.com/2012/08/the-constitutionality-of-dna-collection.html>.

17. See, e.g., *Haskell v. Harris*, 669 F.3d 1049, 1065 (9th Cir.), *petition for reh'g en banc granted and opinions vacated*, 686 F.3d 1121 (9th Cir. 2012); *United States v. Mitchell*, 652 F.3d 387, 407 (3d Cir. 2011) (*en banc*).

18. See, e.g., *People v. Buza*, 129 Cal. Rptr. 3d 753, 783 (Cal. Ct. App.) (holding California's DNA-on-arrest law unconstitutional under balancing tests), *rev. granted*, 262 P.3d 854 (Cal. 2011); *cf. Mario W. v. Kaipio*, 281 P.3d 476, 482 (Ariz. 2012) (allowing sampling from juveniles but prohibiting analysis of the samples before conviction except for the purpose of “locating an absconding juvenile”). For discussion of *King* and *Mario W.*, see DH Kaye, *The Arizona Supreme Court Adopts a No-Peeking Rule for Juvenile Arrestee DNA*, FORENSIC SCI., STAT. & L. BLOG (June 26, 2012, 6:48 PM), <http://for-sci-law->

originating in Maryland. In *King v. State*,¹⁹ the Maryland Court of Appeals held that a statute requiring DNA sampling from everyone charged with a violent crime or burglary²⁰ is unconstitutional except in “scenarios where an arrestee may have altered his or her fingerprints or facial features (making difficult or doubtful identification through comparison to earlier fingerprints or photographs on record).”²¹ In an unusual opinion, Chief Justice Roberts stayed the judgment, predicting that “it [is] reasonably probable that the Court will grant certiorari,” and stating that “there is a fair prospect that this Court will reverse the decision below.”²²

The probable-cause issue is an interesting wrinkle on the larger face of this developing case law. Conceivably, the Supreme Court could approve of the current majority view that conviction is not a *sine qua non* for collecting DNA for the purpose of criminal intelligence, yet affirm in *King* on the ground that the balance of all the interests favors the individual until a court determines that the State has a sufficient case to justify a trial. In other words, the Court might hold DNA sampling during booking unconstitutional (for an arrest without an indictment that assured probable cause for a trial) while opening the door for later pre-conviction DNA sampling.

But why should probable cause be critical to DNA-BC? Probable cause, based on what an arresting officer knows at the time of arrest, to believe that an individual has committed a crime justifies an initial period of confinement. Probable cause, based on the evidence brought to a grand jury or laid before a court at a preliminary hearing, is a prerequisite to continuing the criminal process and to keeping the defendant in custody before and during the trial. The fact that probable cause to arrest and probable cause to proceed further justify depriving someone of the liberty to move about freely does not mean that they also justify DNA sampling, profiling, storage, and database trawling. Indeed, these evidentiary states

now.blogspot.com/2012/06/arizona-supreme-court-adopts-no-peeking.html, and DH Kaye, *Maryland's Highest Court's Opinion on Arrestee DNA Is an Outlier*, FORENSIC SCI., STAT. & L. BLOG (Apr. 26, 2012, 4:44 PM), <http://for-sci-law-now.blogspot.com/2012/04/foot-in-mouth-disease-in-maryland.html>.

19. *King v. State*, 42 A.3d 549, 556 (Md.), *decision stayed*, 81 U.S.L.W. 3145 (U.S. July 30, 2012) (No. 12-207) (Roberts, C.J., in chambers).

20. MD. CODE ANN., PUB. SAFETY § 2-504(a)(3)(i) (LexisNexis 2011). The statute also covers attempted violent crimes or burglaries. However, the “sample . . . may not be tested or placed in the statewide DNA data base system prior to the first scheduled arraignment date” *Id.* § 2-505(4)(d)(1).

21. *King*, 42 A.3d at 580.

22. *Maryland v. King*, 81 U.S.L.W. 3145 (U.S. July 30, 2012) (No. 12-207) (Roberts, C.J., in chambers) *staying, pending disposition of petition for cert.*, 42 A.3d 549 (Md. 2012). For a brief assessment of the stay, see DH Kaye, *Supreme Court to Review DNA Swabbing on Arrest??*, FORENSIC SCI., STAT. & L. BLOG (July 31, 2012, 8:25 AM), <http://for-sci-law-now.blogspot.com/2012/07/supreme-court-to-review-dna-swabbing-on.html>.

are orthogonal to most of the constitutional interests that DNA databases implicate.

II. TOTALITY-OF-THE-CIRCUMSTANCES BALANCING

A. *Pool's Premises*

The magistrate judge in *Pool* identified “[t]he judicial or grand jury finding of probable cause” as “a watershed event” because “[a]fter such a judicial finding, a defendant’s liberty may be greatly restricted—even denied,”²³ and because a defendant who is released “can be subject to electronic monitoring” and “may be ordered to obey a mandatory curfew”; “to refrain from traveling”; from possessing “a firearm”; from having “communications with a minor without the child’s parent or guardian being present”; from accessing “the internet or [possessing] a computer at his residence.”²⁴ The judge reasoned “[t]hese conditions are almost identical to those conditions which can be imposed on a probationer or parolee for whom a DNA testing requirement has been found appropriate under a totality of the circumstances standard.”²⁵

To see the non sequitur here, it helps to spell out the reasoning more fully: (1) Statutes allow restrictions *A*, *B*, and *C* to be put in place after conviction; (2) Statutes also allow *A*, *B*, and *C* before conviction but after a finding of probable cause; (3) A balancing test has been used to uphold a distinct invasion of liberty or privacy—*D* (DNA collection)—after conviction. Therefore (4) . . . what? That a balancing test has been applied to restrictions on liberty or privacy *after* a probable cause determination says nothing about whether the test applies to the same conditions, let alone to others (such as *D*), *before* that determination. Courts must confront that question directly. If they determine that the balancing test does apply, they then must ascertain the proper balance. The majority opinion on appeal recognized as much.²⁶

B. *Other Arguments*

Building on the remarks in *Pool*, Professors Kevin Lapp and Joy Radice, in an article entitled *A Better Balancing*, offer two observations to

23. *United States v. Pool*, 645 F. Supp. 2d 903, 909 (E.D. Cal. 2009), *aff'd*, 621 F.3d 1213 (9th Cir. 2010), *vacated as moot*, 659 F.3d 761 (9th Cir. 2011) (en banc).

24. *Id.*

25. *Id.*

26. After writing that the magistrate judge decided that “the determination that there is probable cause to believe Pool committed a federal felony allows the application of the totality of the circumstances test,” *United States v. Pool*, 621 F.3d at 1219, Judge Callahan carefully noted that “we need not, and do not, consider what other circumstances might allow for the use of the totality of the circumstances test.” *Id.* at 1219 n.5.

justify a possible no-DNA-before-a-probable-cause-finding rule.²⁷ First, they contend that “the fingerprint analogy,” which would seem to permit DNA collection along with fingerprint imaging, “is flawed.”²⁸ By this, they mean that even if DNA profiles are analogous to fingerprints in their limited information content, the retention of the DNA molecules from the swab poses a threat that the retention of fingerprint images does not.²⁹ As a result, they contend that courts should not blithely assume that just because fingerprinting on arrest has become ingrained, DNA sampling passes constitutional muster.³⁰

This is correct. For years, it has been clear that “[i]t is time to move on from the debate over ‘junk DNA’ and to address realistically the true privacy problems posed by the growing repositories of DNA samples.”³¹ The fingerprint analogy is not perfect—no analogy is—and the courts should not adopt it without a well-informed analysis of the specifics of DNA sampling.³² One can debate whether the statutory and administrative limitations on the extraction and use of DNA information are sufficient to make the analogy to fingerprints convincing, and this is what some courts have done.³³ Particularly for a system that retains DNA samples, the outcome of that debate is pivotal to the constitutional status of DNA-BC across the entire period before conviction. If the threat of misuse is grave enough, then DNA-BC is unconstitutional both before and after a probable-cause determination. Inversely, if fear of unauthorized sample misuse is too speculative to render DNA-BC unconstitutional after a probable-cause determination, then it is also too speculative before that point. This imperfection in the fingerprint analogy does not justify the proposed line of a judicial finding of probable cause.

Second, the concurring judge in *Pool* worried that “permitting programmatic searches in the absence of particularized suspicion [introduces] a substantial danger that law enforcement personnel will use the DNA-testing regime as a pretext for obtaining evidence against

27. Lapp & Radice, *supra* note 9, at 175–76.

28. *Id.* at 175.

29. Some judges have exaggerated the differences between DNA identification profiles and fingerprints to suggest that the former but not the latter contain medically sensitive information. See, e.g., *Haskell v. Harris*, 669 F.3d 1049, 1065, 1079 (9th Cir.) (Fletcher, J., dissenting), *petition for reh'g en banc granted and opinions vacated*, 686 F.3d 1121 (9th Cir. 2012). On the validity of the analogy between the two types of identifiers, see D.H. Kaye, *Mopping Up After Coming Clean About “Junk DNA”* (Nov. 27, 2007), <http://ssrn.com/abstract=1032094>.

30. Lapp & Radice, *supra* note 9, at 164.

31. D.H. Kaye, *Please, Let's Bury the Junk: The CODIS Loci and the Revelation of Private Information*, 102 NW. U. L. REV. COLLOQUY 70, 81 (2007).

32. See David H. Kaye, *A Fourth Amendment Theory for Arrestee DNA and Other Biometric Databases*, 15 U. PA. J. CONST. L. (forthcoming 2013) (manuscript, at 37–38, 42–46) (on file with the *North Carolina Law Review*).

33. See *United States v. Mitchell*, 652 F.3d 387, 411 (3d Cir. 2011) (en banc).

individual suspects rather than as a broad-based tool for ensuring the identity of convicts and pretrial releasees.”³⁴ And, Professors Lapp and Radice add, “[t]he racial bias in the criminal justice system heightens this concern of misuse. DNA collection triggered by any arrest quickly leads to a DNA database of men of color.”³⁵

It is true that arrests can occur on virtually any pretext as long as there is probable cause for the arrest.³⁶ But this means that the probable-cause requirement can only deter police officers who would make an arrest when they know they lack probable cause, just to secure a DNA sample. The assumption must be that many police will want to acquire the DNA this way (rather than by using the abandoned-DNA ploy)³⁷ in order to insert the profiles into a DNA database, and that these officers will do so without worrying about probable cause to arrest. Pretextual, causeless arrests should be discouraged—and they are. They cannot produce admissible evidence, they can jeopardize cases, and they can subject police to tort liability.³⁸ Suppose that a police officer, intent on securing a DNA sample from someone he sees on the street, arrests the person for no other reason than the desire to secure a DNA sample. He marches the arrestee to the station house and says, “Book him!” The booking officer takes fingerprints, photographs, and a DNA swab—all minimally intrusive procedures.³⁹ The DNA goes to the state laboratory, which analyzes the sample only for identifying features (the “DNA profile” that is roughly analogous to fingerprint patterns)⁴⁰ and checks the arrestee’s profile against the crime

34. *United States v. Pool*, 621 F.3d 1213, 1232 (9th Cir. 2010) (Lucero, J., concurring), *vacated as moot*, 659 F.3d 761 (9th Cir. 2011) (en banc).

35. Lapp & Radice, *supra* note 9, at 175. For earlier expressions of concern over racially disproportionate effects of arrestee sampling, see, for example, D.H. Kaye & M.E. Smith, *DNA Databases for Law Enforcement: The Coverage Question and the Case for a Population-Wide Database*, in *DNA AND THE CRIMINAL JUSTICE SYSTEM: THE TECHNOLOGY OF JUSTICE* 247 (David Lazer ed. 2004), and Kaye, *supra* note 13. Whether a majority of the Supreme Court would consider it a cognizable factor in evaluating reasonableness under the Fourth Amendment is an interesting question. The Court tends to rebuff or avoid arguments about the racial implications of policing tactics in its Fourth Amendment opinions. See, e.g., *Whren v. United States*, 517 U.S. 806, 813 (1996) (“[T]he Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”).

36. Pretextual and degrading arrests supported by probable cause are permissible under *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001), and *Whren*, 517 U.S. at 814.

37. See, e.g., *Commonwealth v. Cabral*, 866 N.E.2d 429, 431 (Mass. App. Ct. 2007) (holding that there is no reasonable expectation of privacy in DNA retrieved from a public sidewalk); *State v. Athan*, 158 P.3d 27 (Wash. 2007) (holding that a police ruse to obtain DNA from a suspect’s saliva after his licking an envelope was constitutional).

38. See, e.g., *Bradshaw v. District of Columbia*, 43 A.3d 318, 320 (D.C. 2012); *Gutierrez v. Mass. Bay Transp. Auth.*, 772 N.E.2d 552, 564 (Mass. 2002).

39. See, e.g., *Mario W. v. Kaipio*, 281 P.3d 476, 481 (Ariz. 2012) (noting the court’s agreement with several other courts that have ruled a cheek swab to be a minimally intrusive procedure).

40. See *supra* note 29 and accompanying text.

scene database. Lo and behold, there is a cold hit to a six-month-old rape case. But neither this evidence nor other evidence directly derived from the database hit can be used to convict the arrestee. The cold hit is the fruit of an illegal arrest—by definition, the officer lacked probable cause.⁴¹ As such, it cannot be used to convict the arrestee.⁴² This scenario is the status quo in a jurisdiction that allows DNA sampling as a routine part of the booking process.

Compare this to the scenario under a regime like the one proposed in *A Better Balancing*, in which DNA collection must await the suspect being indicted or bound over for trial.⁴³ If one of these events transpires, things proceed as before. The arrestee submits to DNA collection, the sample is analyzed, and the profile is compared to the crime-scene database—the rape case is solved. There is one difference, however. Ironically, in the world that is *more* protective of the arrestee’s interest in not being linked to past crimes, the arrestee might be convicted of the rape. Conviction is possible because the booking officer relied in good faith on the actions of a grand jury or magistrate. These judgments of probable cause may have been mistaken, but the Supreme Court has refused to apply the exclusionary rule for unconstitutionally acquired evidence when police have relied on faulty probable-cause determinations from judges or on reports from court and other officials of arrest warrants that no longer were in force.⁴⁴

What about the other possible outcome of the probable cause hearing (in a case in which the arrest was not based on an indictment)? Assume that the magistrate correctly finds that the state has no basis to hold the arrestee or to proceed to trial. He is released. There is no DNA sample, no profile,

41. This defect should become apparent within forty-eight hours of the arrest. See *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (“[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein* [But] this is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours.”); *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975) (“[A] fair and reliable determination of probable cause [is] a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.”).

42. E.g., *Davis v. Mississippi*, 394 U.S. 721, 728 (1969) (holding that evidence of a fingerprint match was inadmissible because it was the product of an illegal arrest); *Wong Sun v. United States*, 371 U.S. 471, 492 (1963) (barring incriminating statements made after an illegal arrest).

43. See Lapp & Radice, *supra* note 9, at 178.

44. See *United States v. Leon*, 468 U.S. 897, 922 (1984) (holding that the exclusionary rule should not apply when an officer has relied in good faith on a search warrant); *Arizona v. Evans*, 514 U.S. 1, 14 (1995) (holding that exclusionary rule should not apply when officer relied in good faith on court’s clerk’s statement of an outstanding arrest warrant); David H. Kaye, *Unraveling the Exclusionary Rule: From Leon to Herring to Robinson—And Back?*, 58 UCLA L. REV. DISC. 207 (2011) (describing the application of these and later cases to evidence resulting from the improper inclusion of a DNA profile in an offender database).

no trawl, and the police continue to investigate the unrelated rape case. Maybe police officers later discover that the arrestee is responsible, and a prosecution follows. If the police cannot build a case against the arrestee whom they had to release, however, the rape goes unsolved.

Perhaps demanding a judicial or grand jury finding of probable cause before law enforcement authorities collect or profile an arrestee's DNA would benefit law enforcement by preserving the possibility of a successful prosecution later on, in the event that an over-eager police officer makes a false arrest. But such a strategic decision regarding the costs and benefits of foregoing early DNA analysis is not the kind of judgment a court construing the Fourth Amendment should make. Determining the optimal time for DNA sampling of detainees is more an administrative issue than a matter of fundamental liberties.

Thus, the argument that incorporating DNA collection into the booking procedure is constitutionally necessary to protect against pretextual arrests fails. Other arguments for insisting on a probable cause finding can be constructed, but the remainder of this Article shows that they too are unlikely to succeed.

C. *Changing Interests Before Conviction*

The probable-cause requirement cannot be justified simply by arguing that (1) the government has little need for a DNA profile “between arrest and conviction”⁴⁵ and (2) the arrestee has strong interests in either maintaining the secrecy of his DNA identification profile or preventing the state from securing a DNA sample for identification profiling and database trawling. On these assumptions, the interests of the individual outweigh the needs of the state for the entire period before any possible conviction, and the only appropriate point for suspicionless DNA collection, if at all, is after conviction (DNA-AC).⁴⁶

To justify the proposed probable-cause line, one must show that the government interests predominate after the finding of probable cause but not before. In some respects, the government's interest in knowing the authentic identities of the people it arrests is greater after a suspect is bound over for further proceedings. In that period, the record might be useful in a bail hearing or a trial.⁴⁷ But the criminal intelligence function of identifying the perpetrators of unsolved crimes is better fulfilled by sampling DNA

45. Lapp & Radice, *supra* note 9, at 178. The government's reduced interest in DNA-BC as opposed to collecting DNA after conviction was highlighted over a decade ago in a report to the National Commission on the Future of DNA Evidence. See Kaye, *supra* note 13, at 455.

46. See *King v. State*, 42 A.3d 549, 556 (Md.), *decision stayed*, 81 U.S.L.W. 3145 (U.S. July 30, 2012) (No. 12-207) (Roberts, C.J., in chambers).

47. The government's interests in pre-conviction DNA collection and analysis are spelled out in *United States v. Mitchell*, 652 F.3d 387, 404 (3d Cir. 2011) (en banc).

earlier, especially if the suspect would have to be released in the absence of early DNA testing. The net effect on the government's interests is unclear.⁴⁸

On the other side of the balancing equation, the individual's interests in the privacy of DNA sequences probably do not shift mightily with the announcement that there is probable cause to believe that the individual has committed an unrelated crime. Why is the effect on personal security or privacy of checking a DNA sample against the crime-scene database worse for a person who is arrested without probable cause than it is for one whose arrest is based on more solid evidence? Both individuals share the powerful interest in freedom from arbitrary confinement, and this interest is respected by (among other things) the constitutional rule that requires a probable-cause determination within forty-eight hours to permit continued confinement.⁴⁹ The DNA databasing procedure does not extend the period of any unwarranted detention.⁵⁰

The actual—and limited—value of the probable-cause-determination line can be clarified by dividing the individuals affected by DNA-BC into relevant sets.⁵¹ The area within the large circle in Figure 1 represents all arrestees subject to a booking-type statute. The concentric inner circle is the outer boundary of the proper subset P of arrestees apprehended with probable cause. The donut-shaped region from this circle to the outer one, which is designated P^C , represents people detained without probable cause.⁵² The area above the horizontal line represents the arrestees for whom a judge or grand jury has made, or will make, a positive determination of probable cause. This group can be designated $D+$. The area beneath the line represents the arrestees with a present or future negative probable-cause determination, $D-$.

48. How much the government loses from the inability to do early testing is, of course, debatable. The probability of a cold hit to an unrelated crime may be lower for arrests without probable cause than for arrests with probable cause.

49. See *supra* note 41.

50. Cf. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (holding that no Fourth Amendment interest is violated by using a dog to sniff the outside of car during a traffic stop when the process does not prolong the length of the stop).

51. The graphical analysis that follows considers the presence and absence of probable cause for the arrest and a magistrate's determination of this issue. A similar analysis applies to a determination at a preliminary hearing or by an indictment that there is probable cause for continuing the criminal process.

52. The superscript C denotes the complement of P with respect to A .

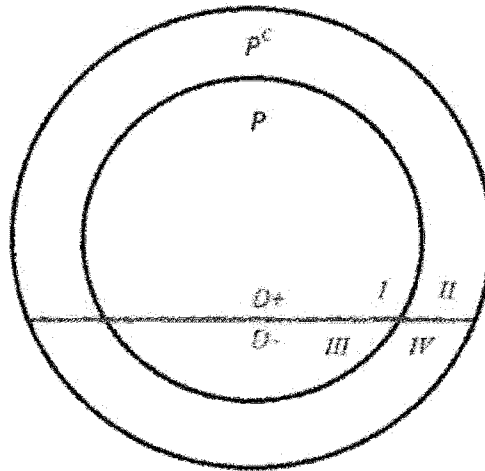


Figure 1. Groups Affected According to Probable Cause (P) and Its Determination (D)

For a balancing analysis, we can ask two questions: If there is no probable-cause-determination requirement, who among the arrestees can complain of violations of Fourth Amendment interests? Inversely, if there is no DNA-booking rule, what does the government lose? There are four intersections to consider. First, all is well in $P \cap D+$ (region *I*). Within this group, there was a correct determination of probable cause. Second, the people in the $P^C \cap D+$ (region *II*) gain nothing from the probable-cause-determination requirement, because, by hypothesis, that determination was made against them (albeit incorrectly). Third, looking beneath the probable-cause determination line, the government gets to complain that it forfeited collection of DNA from the people in $P \cap D-$ (region *III*). Their arrests were based on probable cause, and they can claim no right to an incorrect decision by the magistrate. Finally, the individuals in the bottom chunk of the donut $P^C \cap D-$ (region *IV*) cannot have any evidence derived from their DNA used against them in court, since it is the product of a known, illegal arrest. Arrestees in this region can complain that they experienced some degree of discomfort in the swabbing and that they were subjected to the risk that the state laboratory will retain and then misuse their DNA sample by (1) sharing it with insurers or other parties; (2) looking for alleged “markers for traits including aggression, sexual orientation, and substance addiction”;⁵³ or (3) performing parentage or

53. Lapp & Radice, *supra* note 9, at 172 (referencing *Williamson v. State*, 993 A.2d 626, 651 (Md. 2010) (Bell, J., dissenting)).

other kinship testing if the government also acquires the DNA of known relatives.⁵⁴ Most judges regard these risks as too speculative to deserve much weight,⁵⁵ but if the risk that the state will undertake these statutorily proscribed activities is truly serious enough to tip the constitutional balance for this subset of arrestees, then it should be grave enough to invalidate DNA-BC for the other subsets as well. And, even if that were the case, states could obviate the complaints one and two by destroying the samples after recording the identification profiles.

It thus appears that the talk of a “better balance” actually amounts to a call for sample destruction, perhaps across the full spectrum of DNA database laws. This might be a good idea, at least as a policy matter.⁵⁶ However, the presence of probable cause—the fact that the individual might well have committed the distinct offense for which he was arrested—seems to have little bearing on the balancing of governmental and individual interests. Either DNA sampling is constitutional because the state’s interests outweigh those of the individuals throughout the period of arrest, or it is unconstitutional for the entire period because the balance goes the other way.

D. Presuming Innocence

Although the proposed probable-cause-determination line lacks a secure foundation in the Fourth Amendment, perhaps it follows from another part of the constitution, namely, the Due Process Clause. *A Better Balancing* does not explicitly advance such an argument, but its subtext suggests this possibility when it speaks of “those presumed innocent and the privacy interest of the presumed innocent in their genetic tissue.”⁵⁷ However, any reliance on the presumption of innocence suffers from the same problem as the reliance on the privacy interests—neither the privacy interests nor the presumption clearly changes with a probable-cause determination. If the presumption of innocence protects mere arrestees from DNA-BC, it protects them for the entire period before conviction. The presumption does not steadily (or abruptly) evaporate before conviction. A

54. For simplicity, this analysis assumes that the state does not use arrestee DNA for “familial searching.” See generally David H. Kaye, *The Genealogy Detectives: A Constitutional Analysis of “Familial Searching,”* 51 AM. CRIM. L. REV. (forthcoming 2013) (on file with the North Carolina Law Review) (describing kinship analysis and its Fourth and Fourteenth Amendment implications).

55. E.g., *Haskell v. Harris*, 669 F.3d 1049, 1062, 1065 (9th Cir.), *petition for reh’g en banc granted and opinions vacated*, 686 F.3d 1121 (9th Cir. 2012); *United States v. Mitchell*, 652 F.3d 387, 407 (3d Cir. 2011) (en banc).

56. See D.H. Kaye, *Behavioral Genetics Research and Criminal DNA Databanks*, 69 LAW & CONTEMP. PROBS. 259, 296–97 (2006) (discussing policy grounds for sample destruction as well as retention).

57. Lapp & Radice, *supra* note 9, at 179.

finding of probable cause simply justifies the initial arrest or the continuation of the criminal process.

Furthermore, in this context the presumption of innocence, for all its rhetorical power, does not demarcate any relevant right. Historically and at its core, the presumption is an aspect of the right to due process of law that applies at trial rather than during investigations.⁵⁸ It prevents the mere fact that government authorities have charged an individual with a crime from being treated as evidence of guilt. The Supreme Court confirmed this in *Bell v. Wolfish*,⁵⁹ when it explained that the presumption of innocence “has no application to the determination of the rights of a pretrial detainee during confinement before his trial has ever begun.”⁶⁰

In sum, under a totality balancing test, a DNA statute need not make judicial or grand jury approval of the arrest a necessary condition for collection. Either the balance of interests does not permit the practice of

58. See ANDREW STUMER, *THE PRESUMPTION OF INNOCENCE: EVIDENTIAL AND HUMAN RIGHTS PERSPECTIVES* 1–8 (2010) (discussing the progression of the presumption from Roman into English law); Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science from Hale to Blackstone*, 45 EMORY L.J. 438, 479 (1996). Traditionally, courts merely treated “the presumption of innocence as synonymous with the burden of proof.” Note, *The Presumption of Innocence in Criminal Cases*, 3 WASH. & LEE L. REV. 82, 84 (1941) (referring to “ample authority in support of [this] concept”). A more muscular conception of the presumption would require the judge to instruct the jury that not only must there be proof beyond a reasonable doubt, but also that the defendant “starts the trial with a clean slate, with no evidence against him (her) and with no suspicions of guilt.” William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 417 (1995).

59. 441 U.S. 520 (1979).

60. *Id.* at 533. The Court described the “important role [the presumption plays] in our criminal justice system” as follows:

The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused’s guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial. It is an inaccurate, shorthand description of the right of the accused to remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; . . . an assumption that is indulged in the absence of contrary evidence.

Id. (citations and internal quotation marks omitted). Likewise, both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights explicitly limit the presumption to individuals “charged with” crimes. Article 11(1) of the Declaration provides that “[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.” Universal Declaration of Human Rights, G.A. res. 217 (III) A, U.N. Doc. A/RES/217(III), at 73 (Dec. 10, 1948). The Covenant is more succinct. Article 14(2) states that “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” Int’l Covenant on Civil and Political Rights, art. 14(2), Dec. 16, 1966, 999 U.N.T.S. 171. Nonetheless, the European Court of Human Rights has read something more into the presumption. STUMER, *supra* note 58, at xxxix. This “second, broader facet,” *id.*, has been criticized as a “vaporous euphemism for fairness.” *Id.*

DNA-BC at all, or it supports it from the arrest onward. The proposed middle ground has little to recommend it.

III. BETTER MODES OF ANALYSIS

Thus far, I have assumed that the totality balancing test is the appropriate vehicle for discovering the constitutional perimeters of arrestee DNA databases. So have other commentators and most courts.⁶¹ *Haskell v. Harris*,⁶² the recently vacated Ninth Circuit case that rejects the determination of probable cause as the constitutional threshold for DNA-BC,⁶³ is such a case. *Haskell* was a class-action case, challenging the California Proposition that initiated DNA arrestee sampling in that state.⁶⁴ The district court denied plaintiffs' motion for a preliminary injunction against the enforcement of the DNA sampling law.⁶⁵ The court of appeals panel affirmed, splitting two to one in favor of DNA-BC.⁶⁶ Judge Milan D. Smith, Jr., wrote for the majority, and Judge William A. Fletcher wrote a sharp dissent.⁶⁷ The case has been reargued to the court en banc.⁶⁸

The majority of the original panel asked whether the "totality of the circumstances" was such that DNA-BC under California law is "reasonable" under the Fourth Amendment.⁶⁹ To justify totality balancing, Judge Smith tersely wrote that "[i]n line with the Constitution's plain text, '[t]he touchstone of our analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'"⁷⁰

Yet, as many scholars have pointed out, neither the text nor the history is that plain.⁷¹ In contrast to Judge Smith's understanding of the "plain

61. Professors Lapp and Radice realize that "[d]uring most of the twentieth century, courts considered a search reasonable if the government obtained a search warrant prior to the search, or if a recognized exception to the warrant requirement applied." Lapp & Radice, *supra* note 9, at 161. "More recently," they write, "courts have cooled to this . . . view and held that the Fourth Amendment simply requires reasonableness." *Id.* at 161–62. As we shall see, this free-wheeling balancing is not the norm in the Supreme Court.

62. 669 F.3d 1049 (9th Cir.), *petition. for reh'g en banc granted and opinions vacated*, 686 F.3d 1121 (9th Cir. 2012).

63. *Id.* at 1061.

64. *Id.* at 1051–52.

65. *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1203 (N.D. Cal. 2009).

66. *Haskell*, 669 F.3d at 1049.

67. *Id.* at 1065.

68. *Haskell v. Harris*, 686 F.3d 1121, 1121 (9th Cir. 2012) (en banc).

69. *Id.* at 1053–54 ("We apply the 'totality of the circumstances' balancing test to determine whether a warrantless search is reasonable.").

70. *Haskell*, 669 F.3d at 1053 (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 108–09 (1977) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968))) (internal quotation marks omitted).

71. For a sampling of the contentious literature, see generally TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION (1969); Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1044 (2011); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999); Tracey

text,”⁷² the Supreme Court has repeatedly insisted that searches are per se unreasonable, regardless of the other circumstances, when (1) they are undertaken without a warrant and (2) they do not fall within a categorical exception to the warrant requirement.⁷³ The two cases Judge Smith cited as supporting his “plain text” position—*Terry v. Ohio*⁷⁴ and *Pennsylvania v. Mimms*⁷⁵—are not counter-examples. *Terry* is indeed famous for balancing individual and government interests.⁷⁶ Its compromise between the demands for the historical protection of a warrant based on probable cause and the arguments for proactive policing was to permit police to conduct a warrantless “stop and frisk” only if an officer could articulate grounds for reasonably suspecting that criminal activity was afoot and that the suspect could be armed and dangerous.⁷⁷ Thus, *Terry* certainly balanced state and individual interests, but it did so only to recognize a new, generally applicable exception to the warrant requirement.⁷⁸ With regard to searches, *Mimms* merely applied the *Terry* exception to a driver stopped for having an expired license plate who also had a bulging pistol in his waistband.⁷⁹ Consequently, it is inaccurate to state baldly that totality-of-the-circumstances balancing is the norm in Fourth Amendment cases. *Terry*

Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997); Bruce P. Smith, *The Fourth Amendment, 1789–1868: A Strange History*, 5 OHIO ST. J. CRIM. L. 663, 678 (2008); David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 SAN DIEGO L. REV. 227 (2005).

72. In the article *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 761, 800 (1994), Professor Akhil Reed Amar famously argued that this is the most natural reading of the text, provoking some of the commentary cited in the previous note. *Id.* at 761, 800 (1994).

73. *E.g.*, *Kentucky v. King*, 131 S. Ct. 1849, 1863 (2011) (applying the exigent circumstances exception); *City of Ontario v. Quon*, 130 S. Ct. 2619, 2633 (2010) (finding that a text message audit of an employer-issued pager reasonable under a special-needs exception); *Katz v. United States*, 389 U.S. 347, 357 (1967) (deeming a warrantless search without an applicable exception unreasonable). *But see* Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1135, 1139–47 (2012) (contending that “the modern Court” has largely abandoned this position).

74. 392 U.S. 1 (1968).

75. 434 U.S. 106 (1977).

76. *See, e.g.*, Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 396 (1988).

77. *Terry*, 392 U.S. at 30 (“[W]here a police officer observes unusual conduct which leads him reasonably to conclude . . . that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.”).

78. *See Minnesota v. Dickerson*, 508 U.S. 366, 372–73 (1993) (describing, in an unanimous opinion, the *Terry* rule as an “exception” to the general per se rule).

79. *Pennsylvania v. Mimms*, 434 U.S. 106, 111–12 (1977) (“[T]he answer is controlled by *Terry v. Ohio* The bulge in the jacket permitted the officer to conclude that Mimms was armed, and thus posed a serious and present danger to the safety of the officer.”).

and *Mimms* are not cases of totality balancing. In fact, the Supreme Court has resorted to this procedure in only two cases.⁸⁰

Rather than leap to the conclusion that totality balancing is normal under the Supreme Court's Fourth Amendment jurisprudence, the dissent in *Haskell* maintained that the Court already has answered the question of DNA-BC by holding that probable cause or other individualized suspicion is necessary to acquire fingerprints.⁸¹ According to Judge Fletcher, the Supreme Court held in *Hayes v. Florida*⁸² and *Davis v. Mississippi*⁸³ that identifying information such as fingerprints "may not be taken from an arrestee solely for an investigative purpose, absent a warrant or reasonable suspicion that the [information] would help solve the crime for which he was taken into custody."⁸⁴ This characterization overlooks the most critical facts in these cases and the explicit reasoning of the opinions. *Hayes* clearly explained that the cases simply hold "that transportation to and investigative detention at the station house without probable cause or judicial authorization together violate the Fourth Amendment."⁸⁵ That the fingerprints were used for investigative purposes and not just to establish the true identities of the arrested suspects had nothing to do with the constitutional infirmity. "[T]he fingerprints . . . were the *inadmissible fruits* of an illegal detention"⁸⁶ because "the police at that time were without probable cause for an arrest, there was no warrant, and [the suspects] had not consented to being taken to the station house."⁸⁷ The exclusion of the fingerprints in *Hayes* and *Davis* is entirely a response to the constitutionally unjustified deprivation of liberty in the arrests. With no explanation or analysis, Judge Fletcher transformed this unremarkable result into a condemnation of all forms of DNA-BC.⁸⁸

But if both the majority and the dissent in *Haskell* misread existing case law, what is the proper analytical framework? The answer, at a general level, is simple. Upholding DNA-BC requires a showing that the program falls within an established exception to the search warrant requirement—or recognizing a new one (as *Terry* did for pat-down searches). Both approaches are possible for DNA-BC.

80. *Samson v. California*, 547 U.S. 843, 848 (2006) (citing *United States v. Knights*, 534 U.S. 112, 118 (2001)) (parolee); *Knights*, 534 U.S. 112 (2001) (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)) (probationer).

81. *Haskell v. Harris*, 669 F.3d 1049, 1066 (9th Cir. 2012) (Fletcher, J., dissenting), *petition for reh'g en banc granted and opinions vacated*, 686 F.3d 1121 (9th Cir. 2012).

82. 470 U.S. 811 (1985).

83. 394 U.S. 721 (1969).

84. *Haskell*, 669 F.3d at 1066 (Fletcher, J., dissenting).

85. *Hayes*, 470 U.S. at 815.

86. *Id.* at 813 (emphasis added).

87. *Id.* at 813–14.

88. Judge Smith gently called this aggressive reading of the cases a "novel interpretation." *Haskell*, 669 F.3d at 1061.

A. *Special-Needs Balancing*

First, an exception to the warrant requirement exists for what Justice Blackmun, concurring in *New Jersey v. T.L.O.*,⁸⁹ described as “special needs, beyond the normal need for law enforcement, [that] make the warrant and probable-cause requirement impracticable.”⁹⁰ Like the totality standard embraced in *Haskell*, the special-needs exception requires balancing, but the balancing is a consequence of the presence of special interests that give rise to a special need. The balancing is not a freely and widely available tool to compensate for the absence of a warrant and a categorical exception, as the *Haskell* majority assumes. For example, in *T.L.O.* the state’s interest in “an environment in which learning can take place”⁹¹ justified the balancing for a “specific class of searches.”⁹²

That said, the applicability of special-needs balancing to DNA databases is unclear,⁹³ and the balancing test is the same as that used in totality balancing. Consequently, if, as argued in Part II, totality balancing does not lead to the probable-cause-determination line, then neither does special-needs balancing.

B. *A Categorical Exception*

This leaves one other possible justification for DNA-BC within the normal framework that treats the absence of a warrant and an exception as per se unreasonable—a new, categorical exception. The most candid and convincing mode for analyzing DNA-BC for criminal intelligence work would be to define an exception to the warrant requirement for certain biometric data. A case can be made that the Fourth Amendment does not necessitate judicial warrants to acquire biometric data when five conditions hold: (1) the person legitimately is detained (or the data are acquired without confining the individual); (2) the process of collecting the data is minimally invasive; (3) the collection proceeds according to rules that prevent arbitrary selection of individuals; (4) the biometric data are used only to establish or authenticate the true identity of a given individual or to link individuals to crime scenes; and (5) the authentication or intelligence-gathering system is valid, reliable, and effective. Admittedly, no court has recognized this exception, but, then again, no party in any DNA database case has pressed any court to consider it. As I have suggested elsewhere,

89. 469 U.S. 325 (1985).

90. *Id.* at 351 (Blackmun, J., concurring).

91. *Id.* at 339.

92. *Id.* at 337.

93. A careful reading of the Supreme Court’s special-needs cases shows that these cases neither compel nor preclude the application of the special-needs exception to a DNA-BC program that simultaneously serves two distinct functions: criminal intelligence (locating the perpetrators of unsolved or future crimes) and authentication (of the true identities of arrestees). *See* Kaye, *supra* note 32, at 10, 47.

the exception would offer a principled basis for analyzing DNA profiling, not to mention fingerprinting, photographing, and iris scanning,⁹⁴ of arrestees.⁹⁵

It would not, however, justify the desired probable-cause-determination line.⁹⁶ Either DNA data collection, in light of the protections of a given statute, falls into the new category, or it does not. If it does, all such DNA-BC is constitutionally permissible. If it does not, no such DNA-BC—whether collected before or after the probable-cause determination—does.

CONCLUSION

A finding of probable cause for a trial is constitutionally critical to the continued detention of an arrestee. But this does not necessarily make the same determination equally critical to the state's power to collect biometric data from a detained individual. Three standards for evaluating the constitutionality of routinely collecting DNA are available: totality-of-the-circumstances balancing, special-needs balancing, and a biometric-data exception to the usual warrant and probable-cause-to-search requirements. The balance between the state's law enforcement interests in acquiring identification information and the individual's Fourth Amendment interests does not change sharply as a result of a grand jury or judicial finding of probable cause. And, if the processing, storage, and use of a DNA sample is truly confined to generating and using biometric data for authentication of identity and criminal intelligence purposes, then the proposed biometric exception also applies throughout the pretrial period of confinement. Consequently, the "watershed event"⁹⁷ can be either the initial detention or a later conviction. Courts and commentators who wish to draw the line at some intermediate point need to advance a convincing rationale for doing so. If the constitution permits routine DNA sampling at any point before conviction, then, under any plausible constitutional analysis—totality balancing, special-needs balancing, or a biometric exception to the warrant

94. See generally *Iris*, FBI BIOMETRIC CENTER OF EXCELLENCE, <http://www.biometriccoe.gov/Modalities/Iris.htm> (last updated Aug. 1, 2012) (providing general information on iris recognition).

95. 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, 195 (2006); Kaye, *supra* note 32 (manuscript at 42).

96. It might seem that a probable-cause determination is required to satisfy condition three. However, DNA statutes do not leave the collection decision to the whim of the booking officer. Cf. *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983) (holding the standard inventory search of arrestee's shoulder bag was permissible under the special-needs exception). It remains possible that the underlying arrest is unfounded, but that possibility creates little incentive for pretextual arrests to secure DNA samples without probable cause. See *supra* Part II.A.

97. *United States v. Pool*, 621 F.3d 1213, 1216, 1228 (9th Cir. 2010), *vacated as moot*, 659 F.3d 761 (9th Cir. 2011) (en banc).

requirement—it follows that the acquisition of DNA can be part of the booking process.