DNA Dragnet Practices: Are They Constitutional

Laurie Stroum Yeshulas
Suffolk University Law School

Follow this and additional works at: https://dc.suffolk.edu/jtaa-suffolk

Part of the Litigation Commons

Recommended Citation
DNA DRAGNET PRACTICES: ARE THEY CONSTITUTIONAL?

I. INTRODUCTION

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

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

---

1 See Oklahoma Police Launch DNA Dragnet, OKLAHOMA CITY ASSOCIATED PRESS, June 7, 2001.
2 See id.; see, e.g., Jennifer L. Brown, Police Begin Genetic Dragnet: 200 Tested, Raising Privacy Concerns, THE TIMES-PICAYUNE (NEW ORLEANS), May 31, 2001 (addressing DNA dragnet practices, focusing on case of Julie Busken); see Julie DelCour, How Far Is Too Far? DNA Dragnets Widen To Catch Attackers, THE TULSA WORLD, June 3, 2001 (addressing DNA dragnet practices, focusing on case of Julie Busken); see also Good Morning America (ABC World News television broadcast, June 1, 2001) (broadcast focused on case of Julie Busken, use of DNA dragnet to catch killer).
4 See id.
men matching a general description of the perpetrator. One of the men was the killer. In Dade County, Florida, 2,300 men were tested in 1995 in an attempt to locate the killer of six prostitutes who dumped his victims outside the Miami city limits. Yet again in 1995, a DNA dragnet was conducted in Ann Arbor, Michigan, for a serial rapist and murderer.

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

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

---

7 See id.
8 See id.
9 See id.; see also Willing, infra note 16 and accompanying text.
10 See Dateline NBC: Blood Simple (NBC television broadcast, July 19, 1998); see also Willing, infra note 16 and accompanying text.
12 See Willing, infra note 16 and accompanying text; see also Philip P. Pan, Pr. Georges’ Does Mass DNA Testing; Police Request Saliva from All Men Questioned in Hospital Slaying Probe, WASH. POST, Jan. 30, 1998; Dateline NBC: Blood Simple (NBC television broadcast, July 19, 1998).
13 See id.
14 See Oklahoma Police Launch DNA Dragnet, OKLAHOMA CITY ASSOCIATED PRESS, June 7, 2001 (focusing on case of Julie Busken); see also Julie DelCour, How Far is Too Far? DNA Dragnets Widen to Catch Attackers, THE TULSA WORLD, June 3, 2001 (focusing on case of Julie Busken); Jennifer L. Brown, Police Begin Genetic Dragnet: 200 Tested, Raising Privacy Concerns, THE TIMES-PICAYUNE (NEW ORLEANS), May 31, 2001 (focusing on case of Julie Busken - legitimacy of DNA dragnet in Oklahoma); Good Morning America (ABC World News television broadcast, June 1, 2001) (broadcast focused on case of Julie Busken, DNA dragnet legitimacy).
15 See Good Morning America (ABC World News television broadcast, June 1, 2001).
16 See Lynn Fereday, Comments at the Meeting of National Commission on the Future of DNA Evidence (July 26, 1999); see also Richard Willing, Many Rapists Were Thieves First; Results May Lead to Taking Of DNA For Lesser Crimes, USA TODAY, July 10, 2000, at 3A. This article outlines the fact that the dragnetting approach is more common in Europe. Id. For example, in Germany, 16,400 men were tested in connection with the investigation of a single rape and murder. Id. Following the Narborough murders, British police made extensive use of DNA dragnet practices in investigations, allowing sampling based only on an officer’s suspicions. Id.; see also Richard Willing, Privacy Issue
American evidentiary processes as well as American courts. Moreover, each of the fifty United States have passed legislation authorizing the use of criminal DNA databases. As of March 2000, all fifty states maintain operational DNA databases that include the DNA records for sex offenders and perpetrators of several felonies and lesser crimes.

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


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


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

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

II. HISTORY

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

---

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

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

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

23 See id.


25 See id. at 767.

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

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

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

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

30 See *Schmerber*, 384 U.S. at 767. This decision was controversial because it was the first time the Court held intra-body intrusions constitutional absent a warrant. Id.
that individual's privacy expectations fall within the scope of protection guaranteed by the Fourth Amendment.\textsuperscript{31}

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

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

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

\begin{itemize}
\item \textsuperscript{33} 742 N.E.2d 4 (Ind. Ct. App. 2000).
\item \textsuperscript{34} See id. (holding special needs render warrant and probable cause requirements of Fourth Amendment impracticable).
\item \textsuperscript{35} See People v. King, 99 Cal. Rptr. 2d 220, 227 (2000) (noting DNA testing furthers government interests in solving past and future crimes). The \textit{King} court recognized the government's interest in solving past and future crimes and in discouraging criminals from recidivist activities. \textit{Id.} \textit{See also Roe v. Marcotte, 193 F.3d 72, 79 (2d Cir. 1999) (noting DNA profiling can have effect of restraining future acts of criminals).}
\item \textsuperscript{36} See Roe v. Marcotte, 193 F.3d 72, 80 (2d Cir. 1999) (holding inmate sex offenders required to submit blood to DNA data bank constitutional). The Second Circuit held the procedure by which the inmates were required to submit blood samples for the state DNA data bank required minimal intrusion when weighed against the inmates' Fourth Amendment rights and promoted an important state interest in maintaining public safety. \textit{Id.}
\item \textsuperscript{37} See Vernonia Sch. Dist., 515 U.S. at 652 (stating student athletes have diminished expectation of privacy). \textit{Vernonia} stands for the proposition that student athletes are not entitled to full Fourth Amendment protection because the state's interest in preventing drug addiction among student athletes is compelling. \textit{Id.} at 661-62. Student athletes, therefore, have a decreased expectation of privacy, and mandatory testing is not a significant invasion of privacy. \textit{Id.} at 657.
\item \textsuperscript{38} See Schmerber v. California, 384 U.S. 757, 771-72 (1966) (noting circumstances surrounding blood extraction may make intrusion reasonable even without warrant).
\end{itemize}
intrusions when time is of the essence in obtaining a blood sample.\textsuperscript{39} Two years later in \textit{Terry v. Ohio},\textsuperscript{40} the Court established a principle for individualized suspicion in weighing law enforcement’s discretion while conducting warrantless searches of an individual by using a more objective standard.\textsuperscript{41} This standard requires an objective threshold that law enforcement officers are required to overcome when conducting warrantless searches.\textsuperscript{42} Similarly, the Supreme Court in \textit{Skinner v. Railway Labor Executives’ Ass’n}\textsuperscript{43} considered the nature of blood tests, noting that the intrusion occasioned by a blood test is not significant, since such tests are “commonplace in these days of periodic physical examinations.”\textsuperscript{44} The Supreme Court held experience shows that the amount of “blood extracted is minimal, and for most people the procedure involves virtually no risk, trauma or pain.”\textsuperscript{45}

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

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

\textsuperscript{40} 392 U.S. 1 (1968).

\textsuperscript{41} \textit{id.} at 4 (describing more objective standard for weighing law enforcement’s discretion in conducting warrantless searches). The decision in \textit{Terry} sought to implement a “totality of the circumstances” test that would balance the privacy expectations of the suspect against law enforcement concerns to determine if the search was reasonable. \textit{id.} at 21-22.

\textsuperscript{42} See \textit{id.}

\textsuperscript{43} 489 U.S. 602 (1989).

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

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

\textsuperscript{46} See \textit{id.} at 619 (quoting Griffin v. Wisc., 483 U.S. 868, 873 (1987)) (referring to federal regulation requiring railroad industry to conduct breath and urine analysis in pursuit of public safety). In \textit{Skinner}, the Court acknowledged that during the operations of a regulated industry, such as a railroad, it is necessary to conduct toxicological tests because they are not administered to produce evidence in the prosecution of its employees, but rather to prevent accidents and casualties in railroad operations that could result from the impairment of railroad employees. \textit{id.} at 620-21. The Court further explained that the interest of the
cluded that while a nonconsensual blood extraction is an invasion of Fourth Amendment rights, the railway is a "regulated" industry with compelling safety interests.\textsuperscript{47} Thus, the threshold for privacy rights is lowered for employees who work in governmentally regulated industries.\textsuperscript{48} Ultimately, as seen in \textit{Griffin} v. \textit{Wisconsin},\textsuperscript{49} when the state regulates a particular industry, a court may find there are special needs beyond normal law enforcement that may justify departures from usual warrant and probable cause requirements.\textsuperscript{50}

Decided on the same day as \textit{Skinner}, the Court in \textit{National Treasury Employees Union v. Von Raab},\textsuperscript{51} held a warrant is not required when balancing individual privacy rights of United States Customs' Service employees, who were required to take drug tests in the course of their employment, against compelling governmental interests.\textsuperscript{52} If, in the course of their employment these employees were directly involved in drug interdiction, were required to carry a firearm, or handled classified material, then the government had a compelling interest in ensuring that they were physically fit and had unimpeachable judgment that outweighed those employees' privacy interests.\textsuperscript{53} The Court reasoned, since the Customs Service's program narrowly defined the specific circumstances justifying the testing traveling public justifies the privacy intrusions at issue absent a warrant or individualized suspicion. \textit{Id.} at 621.

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

\textsuperscript{48} See \textit{id.} at 620.

\textsuperscript{49} 483 U.S. 868 (1987).

\textsuperscript{50} \textit{Id.} at 873-74.

\textsuperscript{51} 489 U.S. 656 (1989).

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

\textsuperscript{53} See \textit{id.} at 670-72 (holding Customs employees have diminished expectation of privacy). The Court in \textit{National Treasury} established another 'special needs' exception to the warrant and probable cause requirements of the Fourth Amendment. \textit{Id.} As with the railroad industry, the U.S. Customs industry is another regulated industry, and as such, its employees have a diminished expectation of privacy because of the nature of the employment. \textit{Id.} The Customs industry requires a heightened measure of security and public safety that outweighs the privacy interests of its employees. \textit{Id.}
and the permissible limits of such intrusions, the blood testing withstood constitutional scrutiny.\footnote{See id. at 666-67. The Court reasoned that in light of the evidence of the case, which demonstrated that there was a national crisis in law enforcement caused by the smuggling of illicit narcotics, the Government had a “compelling interest in ensuring that front-line interdiction personnel were physically fit and had unimpeachable integrity and judgment.” \textit{Id.} at 670.} The Court went on to hold that the Customs Service’s drug testing program was not designed to serve the “ordinary needs of law enforcement” because they could not be used in a criminal prosecution of the employee without his consent.\footnote{See id. at 666.} The purpose of this program was to “deter drug use among those eligible for promotion to sensitive positions with[in] the Service and to prevent the promotion of drug users in those positions.”\footnote{See id.} The Court in \textit{National Treasury} reasoned that these governmental interests, as previously seen in \textit{Skinner}, presented a special need that justified the departure from the ordinary warrant and probable cause requirements of the Fourth Amendment.\footnote{See \textit{Nat’l Treasury Employees Union v. Von Raab}, 489 U.S. 656, 666 (1989).} These cases seem to suggest that under similar circumstances, a DNA dragnet, if conducted in response to a ‘special need’ such as one present within a governmentally regulated industry, would be upheld as constitutional.\footnote{See supra notes 37-57 and accompanying text (supporting proposition).}

Both the \textit{Skinner} and \textit{National Treasury} decisions carved out the first special needs exception to the warrant and probable cause requirements of the Fourth Amendment in determining that employees of regulated industries have diminished expectations of privacy.\footnote{See \textit{id.}; see also \textit{Skinner v. Railway Labor Executives’ Ass’n}, 489 U.S. 602 (1989).} Six years later, the Court added the second special needs exception to the warrant and probable cause requirements of the Fourth Amendment when it decided that student athletes also have a diminished expectation of privacy.\footnote{See \textit{Vernonia School District v. Acton}, 515 U.S. 646 (1995).} In \textit{Vernonia School District v. Acton},\footnote{515 U.S. 646 (1995).} petitioner school district required student athletes to submit to random drug testing.\footnote{\textit{Id.} at 650.} Respondents, a seventh grade student and his parents, refused to sign the testing consent form.\footnote{See \textit{id.} at 651-52.} The Court held that the student athlete’s Fourth Amendment interests were outweighed by the state’s compelling interest in preventing drug addiction among student athletes.\footnote{See \textit{id.} at 664-65. The Court noted that school children are regularly submitted to physical examinations and are required to be vaccinated against communicable diseases. \textit{Id.} at 656. It further reasoned that student athletes have an even lower expectation of privacy because students engaging in sports regularly change clothes and shower in locker-rooms together. \textit{Id.} at 657. The Court reasoned that by choosing to join a school athletic}
reviewing the "constitutionality of a governmental search is reasonableness." It noted, "whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of a legitimate governmental interest." If the governmental interests are compelling, and the intrusion on the individual is minimal in light of that compelling interest, courts will find the intrusion does not violate any Fourth Amendment rights.

The convicted felon class is the third special needs exception to the warrant and probable cause requirements of the Fourth Amendment, but it is not without considerable opposition. Justice Dorothy W. Nelson for the Ninth Circuit strongly dissented in Rise v. State of Oregon, in which the majority held a state statute "does not violate the Fourth Amendment by requiring convicted murderers and sex offenders to submit a blood sample for DNA analysis to create an identification data bank." Judge team, students voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. Id. For example, it noted that student athletes routinely have to submit to a preseason physical exam that includes giving a urine sample. Id. Consequently, "students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy." Id.

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

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

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

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

59 F.3d 1556 (9th Cir. 1995).

Id. at 1564. The majority in Rise held that Oregon's Ch. 669, which allowed for the extraction of DNA information from convicted murderers or sex offenders absent a warrant or probable cause, did not result in an unreasonable intrusion into the individual's privacy rights and was justified by law enforcement purposes. Id. at 1559. The court drew the distinction between gathering genetic information from free persons, which generally does require a warrant supported by probable cause, as opposed to gathering the same type of information from the convicted murderer or sex offender. Id. at 1560. It reasoned that Ch. 669 only authorized the Department of Corrections to obtain blood samples from certain classes of convicted felons in order to create an identification record for possible future
Nelson’s dissent asserted DNA testing is an intrusion into bodily integrity that compromises the cherished value of privacy in our society.\textsuperscript{71} Judge Nelson further stated that the Fourth Amendment forbids any such intrusions on the “mere chance that desired evidence might be obtained.”\textsuperscript{72} Judge Nelson urged “forced blood extraction intrudes on the private personal sphere and infringes upon an individual’s ‘most personal and deep-rooted expectations of privacy.’”\textsuperscript{73} Though unpersuasive to the majority, Judge Nelson’s dissent was recognized nationally as a preeminent counter-argument to forced DNA sampling (i.e., DNA dragnet practices).\textsuperscript{74}

In 1997, the Court heard a case that helped to define and restrain government programs that called for drug testing of official candidates.\textsuperscript{75} In Chandler \textit{v.} Miller,\textsuperscript{76} a Georgia statute requiring candidates for designated state offices to undergo urinalysis drug testing was held to violate the Fourth Amendment.\textsuperscript{77} The Court opined that to be reasonable under the Fourth Amendment, “a search ordinarily must be based on individualized suspicion of wrongdoing.”\textsuperscript{78} The Court held that there are certain exceptions to the warrant and probable cause requirements of the Fourth Amendment that are accepted based upon special societal interests.\textsuperscript{79} When these special societal interests are alleged by the government, such as public safety in maintaining regulated industries, and the interest in drug use. \textit{Id.} In addition, these persons did not have the same expectations of privacy in their genetic information that free persons had. \textit{Id.} Lastly, The Ninth Circuit held once a person has been convicted of one of the enumerated felonies “under Chapter 669, his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sampling.” \textit{Id.}

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

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

\textsuperscript{73} See \textit{id.} at 1565 (quoting Winston \textit{v.} Lee, 470 U.S. 753, 760 (1985)).

\textsuperscript{74} See \textit{Rise} \textit{v.} State of Oregon, 59 F.3d 1556, 1565 (9th Cir. 1995).

\textsuperscript{75} See \textit{Chandler} \textit{v.} Miller, 520 U.S. 305 (1997).

\textsuperscript{76} 520 U.S. 305 (1997).

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

\textsuperscript{78} See \textit{id.} at 313 (quoting Vernonia Sch. Dist. \textit{v.} Acton, 515 U.S. 646, 664 (1995)).

\textsuperscript{79} See \textit{id.} at 313 (citing Skinner \textit{v.} Ry. Labor Executives’ Ass’n, 489 U.S. 602, 619 (1989)).
testing student athletes, the courts must conduct an inquiry examining the competing individual privacy issues and those public interests advanced by the government. Searches conducted without grounds for suspicion have been upheld, but only in certain limited circumstances. The Court then had to determine if this program ranked among the limited circumstances in which suspicionless searches were allowed. Ultimately, the Court held that Georgia’s program did not fit into the same category as drug testing for student athletes or for customs and railway employees because the governmental interests in requiring urinalysis were not as compelling as in the prior cases.

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

---

80 See id. at 314; see also Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 656-66 (1989).
81 See id. at 314; see also Nat’l Treasury, 489 U.S. at 656-66. These circumstances include brief stops for questioning and observation at a fixed border patrol checkpoint (see U.S. v. Martinez-Fuerte, 428 U.S. 543, 545-50 (1975)), or at sobriety checkpoints (see Mich. Dep’t of State Police v. Sitz, 496 U.S. 444, 447 (1990)), and administrative inspections in ‘closely regulated’ businesses (see New York v. Burger, 482 U.S. 691, 703-04 (1987)).
82 See Chandler v. Miller, 520 U.S. 305, 314 (1997) (holding requirement that official candidates pass drug test not within category of constitutionally permissible suspicionless searches); see supra note 77 and accompanying text.
83 See id. at 319-23 (stating Georgia’s program failed to meet special needs requirement for suspicionless testing of individuals). In Chandler, the Court compared Georgia’s program of requiring candidates to state office to submit to genetic testing against other circumstances where the Supreme Court found exigent circumstances allowing for suspicionless testing of individuals. Id. The Court determined that Georgia’s program failed to establish a special need that would allow for suspicionless testing of individuals seeking public office absent a warrant supported by probable cause. Id.
84 See Roe v. Marcotte, 193 F.3d 72, 74 (2d Cir. 1999) (holding DNA statute survives Fourth Amendment scrutiny, required minimal intrusion and promoted state interest).
85 193 F.3d 72 (2d Cir. 1999).
86 Id. at 74. The statute at issue in Roe required all convicted sex offenders to submit a blood sample for inclusion in Connecticut’s DNA data bank. Id. The petitioner argued that this statute violated his Fourth Amendment rights because it compelled the taking of DNA evidence unsupported by a warrant based upon probable cause. Id. The Court in Roe rejected this argument holding that the state had a right to maintain public safety and institutional security that outweighed privacy expectations of convicted felons. Id. at 77-78. It joined three other circuit courts in carving out a special need exception to the warrant and probable cause requirements of the Fourth Amendment with respect to convicted felons. Id. at 82.
when weighed against the important state interest in public safety. In *Roe*, the Second Circuit found support for its holding based upon the precedent established by three other circuit courts that had examined the constitutionality of nearly identical DNA statutes. The subject of convicted felons provides the Supreme Court with the most compelling argument for allowing DNA dragnet practices — the legitimate governmental interest of promoting the health, safety, comfort, morals, and welfare of the general public and is more thoroughly examined in Section III of this Note.

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

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

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

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

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


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

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

The right to privacy is not explicitly expressed in any section of the United States Constitution. Nevertheless, courts find a right to privacy to be implicit in the concept of ordered liberty derived from the Fourteenth Amendment. This right to privacy includes the right to be free from illegal searches and seizures. Courts classify the analysis of DNA samples as searches within the meaning of the Fourth Amendment, applicable to the states through the Fourteenth Amendment. It is in the context of the Fourth Amendment that courts analyze the right to privacy issues with regard to DNA sampling. Opponents of utilizing DNA dragnet practices in America draw upon the concept of the preservation of individual privacy interests as their core argument. They argue that, at a minimum, DNA test results provide extremely personal data about an individual and thus, constitute an intrusion into an individual's bodily integrity. Whether or not searches and seizures violate Fourth Amendment requirements. Id. It then announced a balancing test whereby the court's task is to balance the intrusion on the individual's Fourth Amendment interests against the legitimate governmental interests at stake. Id. The court held that the ultimate measure of the constitutionality of a governmental search is reasonableness. Id. at 225. The final holding in King was that the search was reasonable because along with imprisonment for convicted offenses comes the loss of significant rights. Id. at 226. The court concluded that "any argument that Fourth Amendment privacy interests do not prohibit gathering information concerning identity from the person of one who has been convicted of a serious crime, or of retaining that information for crime enforcement purposes, is an argument that long ago was resolved in favor of the government." Id. at 227. The rationale behind the holding is: "[t]he government has an undeniable interest in crime prevention. . . . [I]t has interests in solving crimes that have been committed, in bringing the perpetrators to justice and in preventing, or at least discouraging, them from committing additional crimes. . . . DNA testing unquestionably furthers these interests." Id. at 227-28.

96 See Patterson v. State, 742 N.E.2d 4, 8 (Ind. Ct. App. 2000) (reaffirming Schmehl holding; testing procedures within meaning of search and seizures; within scope of Fourth Amendment); see also Shepherd v. State, 690 N.E.2d 318 (Ind. Ct. App. 1997) (holding collection and analysis of blood search within meaning of the Fourth Amendment). The Patterson court held the Fourth Amendment applies to states through the Fourteenth Amendment. Id. Further, the court held that "the analyses of biological samples are searches within the meaning of the Fourth Amendment." Id.
98 See Rise v. State of Oregon, 59 F.3d 1556, 1564-65 (9th Cir. 1995) (Nelson, J. dissenting); supra notes 70-72 and accompanying text.
99 See id.; see also Dan L. Burke & Jennifer A. Hess; Genetic Privacy: Constitutional Considerations In Forensic DNA Testing, 5 GEO. MASON U. CIV. RTS. L.J. 22 (1995); Michael Avery, Landry v. Attorney General: DNA Databanks Hold A Mortgage
not a particular individual has an expectation of privacy is the central axis upon which this controversy turns.

A. The Free Citizen

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

B. The Convicted Felon

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

Similarly, the Fourth Circuit held in \textit{Jones v. Murray}\textsuperscript{113} that while intrusions into a free person's privacy, without Fourth Amendment protections, are not permissible, those same protections are not afforded to individuals lawfully convicted and incarcerated of criminal offenses.\textsuperscript{114} Based on the holding in \textit{Jones}, the Fourth Circuit held in \textit{People v. King}\textsuperscript{115} that once a felon is convicted and incarcerated, his identity becomes a matter of state interest for prison officials.\textsuperscript{116} Further, the Fourth Circuit held, "there is no question that the state's interest extends to maintaining a permanent record of identity to be used as an aid in solving past and future crimes, and this interest overcomes any privacy rights the individual might re-
tain."\textsuperscript{117} By committing crimes, persons such as the appellant in \textit{King} have essentially forfeited any legitimate expectations of privacy in their identities.\textsuperscript{118} With respect to DNA sampling, the \textit{King} court held the state has an irrefutable interest in preventing crimes from occurring, in solving past crimes, and ensuring that criminals answer for their wrongdoings.\textsuperscript{119} DNA testing indisputably helps to further these goals because of its ability to match profiles derived from crime scene evidence to DNA profiles already existing in data banks.\textsuperscript{120} The Fourth Circuit maintains that DNA technology helps law enforcement officials in solving crimes accurately and expeditiously while simultaneously preventing unnecessary intrusions into privacy expectations of the innocent.\textsuperscript{121}

C. The Governmental Interest

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

\begin{footnotesize}
\textsuperscript{117} See \textit{People}, 99 Cal. Rptr. 2d at 227; \textit{supra} note 92 and accompanying text.
\textsuperscript{118} See \textit{People}, 99 Cal. Rptr. 2d at 227; \textit{supra} note 92 and accompanying text.
\textsuperscript{119} See \textit{People}, 99 Cal. Rptr. 2d at 227; \textit{supra} note 92 and accompanying text.
\textsuperscript{120} See \textit{People}, 99 Cal. Rptr. 2d at 227; \textit{supra} note 92 and accompanying text.
\textsuperscript{121} See \textit{People}, 99 Cal. Rptr. 2d at 227 (citing support for using DNA testing to further law enforcement objectives); \textit{supra} note 92 and accompanying text.
\textsuperscript{122} See \textit{Vernonia Sch. Dist. v. Acton}, 515 U.S. 646, 652 (1995) (announcing reasonableness standard in evaluating constitutionality of governmental search). In \textit{Vernonia}, the Court held that the state's interest in preventing drug addiction among student athletes was reasonable given the student's decreased expectation of privacy and that the testing requirements were not a significant invasion of privacy. \textit{Id.} at 662.
\textsuperscript{123} See \textit{Patterson v. State}, 742 N.E.2d 4, 11 (Ind. Ct. App. 2000). In \textit{Patterson}, the Indiana Court of Appeals affirmed the defendant's convictions because the state's interest in solving crimes outweighed the defendant's slight privacy interests. \textit{Id.}
\textsuperscript{124} See \textit{Skinner v. Ry. Labor Executives' Ass'n}, 489 U.S. 602, 621-22 (1989) (holding government has interest in ensuring safety of traveling public); \textit{see also} \textit{Roe v. Marcotte}, 193 F.3d 72, 78 (2d Cir. 1999) (DNA statute survived constitutional scrutiny because of promoted state interest in maintaining public safety).
\textsuperscript{125} See \textit{People v. King}, 99 Cal. Rptr. 2d 220, 227 (2000) (noting DNA testing helps government ensure innocent persons are not needlessly investigated); \textit{People, supra} note 17 and accompanying text.
\textsuperscript{126} See \textit{id.}
\end{footnotesize}
Amendment requirements, may be found to be an extension of state police powers, if conducted in accordance with a legitimate governmental interest.127

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

In 1999, Wyoming’s DNA database was questioned, but nonetheless, was held constitutional.131 A Wyoming court held that collecting DNA samples either from the blood, saliva or hair of inmates did not violate the Fourth Amendment prohibition against unreasonable searches and seizures because the procedures were minimally intrusive and convicted felons had diminished privacy rights.132 In conclusion, the Wyoming state court held that the purpose of the DNA database was to collect identification information to advance the legitimate state interest of criminal law enforcement.133 Also in 1999, a Pennsylvania court held that the slight intrusion occasioned by the withdrawal of blood is outweighed by the spe-
cial interest in maintaining an identification data bank of convicted felons. 134

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

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

---

134 See Dial v. Vaughn, 733 A.2d 1, 7 (Pa. 1999).
136 See id.; supra note 92 and accompanying text.
137 See id. at 227; supra note 92 and accompanying text.
138 See id.
139 See id.
140 See People v. King, 99 Cal. Rptr. 2d 220, 229-30 (Cal. Ct. App. 2000); supra note 92 and accompanying text.
141 See Smith v. State of Indiana, 744 N.E.2d 437, 440 (Ind. 2001) (holding police action in obtaining DNA sample from rape suspect and comparing to profile reasonable, not invasion of privacy).
142 744 N.E.2d 437 (Ind. 2001).
143 Id.
144 See id. at 439. In Smith, a victim was raped in her home but was unable to identify the perpetrator. Id. at 438. Police created a DNA profile utilizing samples collected from the victim. Id. Later, Damon Smith was arrested and charged with an unrelated crime. Id. Smith was required to provide hair, blood and saliva samples to create a DNA profile on him. Id. In compliance with police procedures, Smith’s DNA profile was compared to profiles maintained in the state’s DNA data bank. Id. Smith’s DNA profile matched that of the profile created earlier from the rape victim. Id. Smith was arrested and tried for rape. Id. Smith moved to suppress the DNA evidence arguing that it’s admission violated his Fourth Amendment rights. Id. The Court subsequently rejected Smith’s argument and allowed the evidence. Id. at 442.
145 See id.
ownership interests in his legitimately obtained DNA. The advancement of legitimate state interests of criminal law enforcement and in solving and preventing crimes provides the government with its strongest support for upholding DNA dragnets.

IV. MASSACHUSETTS DECISIONS: AN OVERVIEW

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

146 See id. at 439.
148 See In the Matter of Richard R. Lavigne, 641 N.E.2d 1328, 1329-31, 418 Mass. 831, 832-35, (1994) (held search of unindicted, unarrested suspect reasonable, if conducted with probable cause, after judicial hearing). The Supreme Judicial Court of Massachusetts (SJC) noted that prior to this case police had the right to search the body of a suspect who had been arrested on probable cause. Id. (citing Commonwealth v. Brown, 237 N.E.2d 53, 58-59, 354 Mass. 337, 342-43 (1968)). Compounding the decision in Brown, the SJC in Lavigne announced that it would extend the common law rule to provide that in order to extract the DNA sample from an uncharged, unarrested suspect, the police need probable cause to believe that the suspect committed the crime in question. Id. The SJC also held that the suspect is entitled to a hearing to determine whether it is reasonable to compel the suspect to submit to the DNA extraction. Id. At the hearing, the judge must weigh the degree of intrusion on the suspect against the need for the evidence sought and the seriousness of the crime. Id. If the intrusion is minimal and the need for evidence is high, then the intrusion will be considered reasonable and the extraction will be allowed. Id.
150 Id. at 1329-30, 418 Mass. at 832-33.
151 See id.; 418 Mass. at 832-33.
twenty-one years later. Lavigne argued that the taking of his DNA was an intrusion and as such, a violation of his Fourth Amendment rights to be free of illegal searches and seizures. The SJC ruled in favor of the seizure of blood for criminal investigation purposes if based upon probable cause and after a judicial hearing allowing the seizure. The dissent disagreed with the majority’s holding because it effectively authorized the forcible taking of blood from an unarrested, uncharged, and unindicted person. This decision effectively allows a suspect’s blood to be taken absent being charged with a crime, but based upon probable cause.

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

---

152 See id.; 418 Mass. at 832-33.
153 See id.; 418 Mass. at 832-33.
154 See id. at 1331-32, 418 Mass. at 834-35.
156 See id. at 1329-1330, 418 Mass. 832-33.
157 See MASS. GEN. LAWS ch. 22E, §§ 1-15.
158 Id.
159 709 N.E.2d 1085, 1086, 429 Mass. 336, 337, (1999) (holding extraction of blood from convicts for inclusion in state database reasonable). This Act created a new policy in the Commonwealth whereby any person convicted of one of 33 enumerated crimes must submit a DNA sample to the state crime lab. Id. at 1087, 429 Mass. at 338.
160 See id. at 1089, 429 Mass. at 340. See also MASS. GEN. LAWS ch. 22E, §§ 1-15. The statute provides that the director shall establish protocol governing the testing and analysis of DNA samples and a quality assurance program. Id. The statute mandates that these protocols and quality assurance programs be compatible with those utilized by the FBI. Id.
161 See id. at 1087, 429 Mass. at 338.
162 See id. at 1091-92, 429 Mass. 441-42. The SJC recognized the Commonwealth had an indisputable interest in preserving a permanent identification record of convicted persons for resolving past and future crimes. Id. The court announced that it will now use DNA identification procedures for these purposes. Id.
The SJC held the intrusion occasioned by the blood test was not significant and was reasonable under the Fourth Amendment and under MASS. CONST. art. XIV. The SJC announced:

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

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

---

163 See id.
164 See Landry v. Harshbarger, 709 N.E.2d 1085, 1092-93, 429 Mass. 336, 442-43, (1999) (holding DNA results similar to use of fingerprints). The SJC held that DNA results were similar to the use of fingerprint information in preserving a record of convicts. Id. The procedure by which these results were obtained, as well as statutory restrictions, prevented the results from being used for obtaining impermissible genetic information. Id.
165 See id. at 1091-92, 429 Mass. at 441-42 (citing Boling v. Romer, 101 F.3d 1336, 1340 (10th Cir. 1996)) (holding Act provides for legitimate state interests and does not violate Fourth Amendment).
166 See Murphy v. Dep't of Corrections, 711 N.E.2d 149, 429 Mass. 736 (1999).
168 Id. at 152-53, 429 Mass. at 739-40 (statute applies to anyone convicted of one of 33 enumerated crimes on or after statute's effective date). Murphy argued that the Act violated his fundamental right to privacy under the Fourth Amendment. Id. at 152, 429 Mass. at 739. Relying on its decision in Landry, the SJC held that taking blood samples from convicted criminals for use in the Commonwealth's DNA identification database does not violate an inmate's fundamental rights. Id.
169 See id.
170 See id.
171 See id.
mate governmental interest of investigating and prosecuting criminal ac-
tions.\textsuperscript{172}

V. CONCLUSION

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

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

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

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

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

\textsuperscript{172} See supra notes 148-68 and accompanying text.

Martin, 930 P.2d 318 (Wash. App. 1997)). The Robinson court held suspicionless
pre-employment drug testing provisions within the State of Washington as proper and abid-
ing concern for government. \textit{Id. at} 467. It holds that even with these compelling state
interests in keeping drugs off streets, courts must guard against government’s abridgment of
fundamental constitutional rights afforded every citizen. \textit{Id. at} 469-70. The court con-
cluded that government’s compelling right did not outweigh fundamental rights of its citi-
zens. \textit{Id.}
dragnets, as a society, we are sanctioning the violation of one of the most basic fundamental rights of any free society. Therefore, the preservation of privacy requires the Supreme Court to refrain from holding DNA dragnet practices constitutional.

Laurie Stroun Yeshulas

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