

# Blood and Privacy: Towards a “Testing-As-Search” Paradigm Under the Fourth Amendment

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## INTRODUCTION

A vehicle on a public thoroughfare is observed driving erratically and careening across the roadway. After the vehicle strikes another passenger car and comes to a stop, the responding officer notices in the driver the telltale symptoms of intoxication—bloodshot eyes, slurred speech, and a distinct odor of intoxicants. On these facts, a lawfully-procured warrant authorizing the extraction of the driver’s blood is obtained. However, the document fails to circumscribe the manner and variety of testing that may be performed on the sample. Does this lack of particularity render the warrant constitutionally infirm as a mandate for chemical analysis of the blood? And, more broadly speaking, is there reason to

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posit that testing of the blood is a distinct Fourth Amendment event relative to its initial procurement?

This Note—against prevailing trends in national search and seizure jurisprudence—answers both of the preceding questions in the affirmative. In reaching these conclusions, I explore a novel “testing-as-search” paradigm that rebuts longstanding presumptions in Fourth Amendment case law. In essence, I use this analytical template to argue that DUI defendants (among others) retain a reasonable, ongoing privacy interest in their blood once it has been extracted as evidence in a prosecution. As a necessary corollary to this thesis, I also submit that police should not exploit chemical analysis of a defendant’s blood in the absence of a warrant narrowly tailoring the scope of testing that may be performed.

This work proceeds in several parts. Part I begins with a cursory recital of the Supreme Court’s search and seizure jurisprudence, elucidating familiar principles of Fourth Amendment law. Part II then proceeds to examine the Court’s case law as it relates to the procurement and analysis of biological samples, such as blood, via search warrant. Part III surveys federal and state decisions that offer competing perspectives on what law enforcement officials are entitled to do with blood samples once they have been lawfully extracted. Part IV provides an overview of Washington State’s *Martines* decision. Part V introduces the testing-as-search paradigm to contend that, given the *sui generis* nature of blood, legitimate privacy interests are being compromised under a construct of the Fourth Amendment that fails to distinguish between biological and nonbiological evidence. Accordingly, it contemplates certain remedial measures in the issuance of search warrants intended to curb the limitless and unaccountable testing of biological evidence. Finally, Part VI briefly touches upon the phenomenon of DNA databanks to illustrate the stakes associated with continued adherence to an approach that gives law enforcement unjustified latitude in analyzing a defendant’s blood.

### I. BASIC TENETS OF THE FOURTH AMENDMENT

It is well settled that searches conducted outside the judicial process, without prior approval by a judge or magistrate, are generally regarded as *per se* unreasonable under the Fourth Amendment.<sup>1</sup> Of course, a defendant can only invoke this protection when legitimate privacy interests are imperiled. As Justice Harlan observed in his oft-cited concurrence in *Katz v. United States*, the Fourth Amendment circumscribes a state’s conduct only when an individual meets a “twofold requirement”: first, the defendant must “exhibit[] an actual (subjective) expectation of

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1. *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971).

privacy,” and secondly, that “expectation [must] be one that society is prepared to recognize as ‘reasonable.’”<sup>2</sup> Perhaps the most explicit guidance in *Katz* as to the reasonableness of a privacy expectation was the pronouncement that “what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”<sup>3</sup> This basic two-dimensional inquiry provides the essential constitutional paradigm through which most Fourth Amendment challenges are construed.

Once a defendant prevails under the *Katz* threshold, other constitutional principles dictate the manner in which a search warrant must be composed in order to pass muster. The Supreme Court has observed that “indiscriminate searches and seizures conducted under the authority of ‘general warrants’ were the immediate evils that motivated the framing and adoption of the Fourth Amendment.”<sup>4</sup> General warrants “do not specify the place or sphere of a search, thereby granting unrestricted discretion to executing officers”;<sup>5</sup> as such, they are categorically prohibited under the Constitution.<sup>6</sup> The problem posed by the general warrant is not precisely interpreted as merely one of intrusion, but “a general, exploratory rummaging in a person’s belongings” that the framers sought to guard against.<sup>7</sup> The Fourth Amendment addresses this problem by requiring a particular description of the things to be seized.<sup>8</sup> This crucial element of each warrant “makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.”<sup>9</sup>

## II. GUIDANCE FROM THE SUPREME COURT ON TESTING OF BLOOD SAMPLES

Within the particularized realm of criminal prosecutions involving the withdrawal of blood from a defendant’s person, the Supreme Court has “long recognized that a ‘compelled intrusio[n] into the body for blood to be analyzed for alcohol content’ must be deemed a Fourth

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2. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

3. *Id.* at 351.

4. *Payton v. New York*, 445 U.S. 573, 583 (1980).

5. The Honorable M. Blane Michael, United States Court of Appeals for the Fourth Circuit, Madison Lecture: Reading the Fourth Amendment: Guidance from the Mischief that Gave It Birth (Oct. 20, 2009), in 85 N.Y.U. L. REV. 905, 925 (2010).

6. *Andresen v. Maryland*, 427 U.S. 463, 480 (1976).

7. *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971).

8. U.S. CONST. amend. IV.

9. *Stanford v. Texas*, 379 U.S. 476, 485 (1965) (quoting *Marron v. United States*, 275 U.S. 192, 196 (1927)).

Amendment search.”<sup>10</sup> However, not only is the case law substantiating this tradition relatively sparse, but there is even less authority from which to infer the Court’s willingness to treat the chemical analysis of blood as a distinct Fourth Amendment event.

The seminal decision for purposes of this discussion is *Schmerber v. California*.<sup>11</sup> In *Schmerber*, the Court reasoned that because “[s]earch warrants are ordinarily required for searches of dwellings,” a less stringent requirement would be implausible “where intrusions into the human body are concerned.”<sup>12</sup> Moreover, the Court stressed that the importance of requiring authorization by a neutral and detached magistrate before a law enforcement officer can “invade another’s body in search of evidence of guilt is indisputable and great.”<sup>13</sup>

The Court in *Schmerber* nonetheless proceeded to uphold the constitutionality of a blood draw from a DUI defendant under circumstances where the law enforcement officer had failed to secure a warrant beforehand.<sup>14</sup> It did so by justifying the extraction on a well-established exception to the Fourth Amendment’s warrant requirement: the officer had been confronted with an emergency that threatened the destruction of evidence, since “the percentage of alcohol in the blood begins to diminish shortly after drinking stops.”<sup>15</sup> Still, the Court emphasized that the ultimate constitutionality of such warrantless blood draws depends equally on whether the test chosen to measure blood alcohol content is a reasonable one and whether that test is performed in a reasonable manner.<sup>16</sup>

Given these latter caveats, there is concededly some merit to the argument that, under *Schmerber*, any chemical analysis of blood need be “reasonable,” irrespective of whether a warrant authorizing specific testing has been procured or not.<sup>17</sup> However, such a conclusion is by no means irrefutable given that the defendant in *Schmerber* did not attempt to distinguish the extraction of his blood from its subsequent testing; he

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10. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 616 (1989) (alteration in original) (quoting *Schmerber v. California*, 384 U.S. 757, 767–68 (1966)).

11. *Schmerber v. California*, 384 U.S. 757 (1966).

12. *Id.* at 770.

13. *Id.*

14. *Id.* at 758, 772.

15. *Id.* at 770; see also *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (“[T]he need ‘to prevent the imminent destruction of evidence’ has long been recognized as a sufficient justification for a warrantless search.”).

16. *Schmerber*, 384 U.S. at 771.

17. Assuming that analysis of the blood does indeed qualify as a search to begin with, technicians could not, for instance, screen a sample for sexually transmitted diseases in a DUI investigation. See *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 388 (2009) (“[T]he reasonableness of a search’s scope depends . . . on whether it is limited to the area that is capable of concealing the object of the search.”). For commentary on this reasonableness standard, see *infra* Part III.

challenged only the constitutionality of the former.<sup>18</sup> Accordingly, there was no justiciable basis on which to reach the question of blood testing as a discrete Fourth Amendment event.<sup>19</sup>

The Court seemingly clarified its interpretation of the relationship between the extraction of biological samples and their subsequent analysis in *Skinner v. Railway Labor Executives' Ass'n*.<sup>20</sup> *Skinner* concerned the Federal Railroad Safety Act (FRSA) of 1970, which “authorize[d] the Secretary of Transportation to ‘prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety.’”<sup>21</sup> Pursuant to the statute, the Federal Railroad Administration promulgated regulations that mandated the blood and urine analysis of railroad employees involved in certain accidents.<sup>22</sup> The issue presented was “whether these regulations violate[d] the Fourth Amendment.”<sup>23</sup>

Before reaching the merits of the case, however, the Court offered a primer on what it perceived to be uncontested Fourth Amendment law:

We have long recognized that a “compelled intrusio[n] into the body for blood to be analyzed for alcohol content” must be deemed a Fourth Amendment search. In light of our society’s concern for the security of one’s person, it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. *The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee’s privacy interests.*<sup>24</sup>

Interestingly, a number of scholars have taken *Skinner* at its word and accepted a literal interpretation of the “further invasion” language as set forth in the opinion.<sup>25</sup> This would seem to counsel in favor of requiring a separate warrant for testing in order to safeguard the privacy interests at stake in the continued intrusion. Viewed in context, however, the

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18. *Schmerber*, 384 U.S. at 766.

19. *Id.* at 771.

20. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602 (1989).

21. *Id.* at 606; *see also* 45 U.S.C. § 431(a) (1970) (repealed 1994).

22. *Skinner*, 489 U.S. at 606.

23. *Id.*

24. *Id.* at 616 (emphasis added) (citations omitted).

25. *See, e.g.*, Leigh M. Harlan, Note, *When Privacy Fails: Invoking a Property Paradigm to Mandate the Destruction of DNA Samples*, 54 DUKE L.J. 179, 192 (2004) (“[The Supreme Court] has expressly recognized that the initial procurement of a biological sample and the subsequent analysis of the sample are two conceptually distinct events necessitating independent Fourth Amendment analyses.”); Natalie Logan, Note, *Questions of Time, Place, and Mo(o)re: Personal Property Rights and Continued Seizure Under the DNA Act*, 92 B.U. L. REV. 733, 739–40 (2012) (“Collection of [a biological] sample . . . constitutes a seizure of the person’s tissue and accompanying ‘DNA fingerprint.’ Once collected, the analysis of the sample constitutes a second, independent search of the seized sample.”).

Court in *Skinner* did not strictly apply this principle to the legal issue under consideration—namely, whether the FRSA’s regulations directly contravened the Fourth Amendment.<sup>26</sup> Rather, given the safety concerns associated with rail travel, it resolved the case under the superseding “special needs” exception to the warrant requirement.<sup>27</sup> As in *Schmerber*, the *Skinner* Court came nowhere close to adjudicating whether the testing of a blood sample is a distinct Fourth Amendment event relative to its initial lawful procurement, rendering the “further invasion” language dicta.

Another remark from the Court without the force of precedent has spoken more directly to the significance of biological testing. *Ferguson v. City of Charleston* concerned a state hospital’s testing of urine samples of pregnant women suspected of drug abuse where those patients had consented to providing such samples as a condition to receiving obstetric care.<sup>28</sup> The Court ultimately invalidated the hospital’s policy as a surreptitious prosecutorial scheme rather than a valid exercise of the “special needs” exception to the warrant requirement.<sup>29</sup> However, Justice Scalia dissented to emphasize the importance of the patients’ consent in providing the urine samples:

There is only one act that could conceivably be regarded as a search of petitioners in the present case: the *taking* of the urine sample. . . . Some would argue, I suppose, that testing of the urine is prohibited by some generalized privacy right “emanating” from the “penumbras” of the Constitution (a question that is not before us); *but it is not even arguable that the testing of urine that has been lawfully obtained [through consent] is a Fourth Amendment search.*<sup>30</sup>

Justice Scalia’s dissent in *Ferguson* suggests that the more conservative members of the Court are unlikely to be receptive to attempts at dissociating the analysis of a biological sample from its initial extraction by lawful warrant or consent. Decisions such as *Schmerber* and *Skinner*, meanwhile, are comparatively less instructive in gleaning the Court’s potential treatment of the issue under the Fourth Amendment. But, as the discussion below illustrates, the lower federal and state courts have not waited for the Supreme Court to render a decisive opinion before reaching a consensus that a state can lawfully exploit testing of a blood sample in its possession without secondary judicial authorization.

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26. *Skinner*, 489 U.S. at 606.

27. *Id.* at 633. For a recent articulation of the “special needs” doctrine, see *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080–81 (2011).

28. *Ferguson v. City of Charleston*, 532 U.S. 67, 70–74 (2001).

29. *Id.* at 85–86.

30. *Id.* at 92–93 (emphasis in second sentence added).

## III. TRENDS IN THE FEDERAL AND STATE COURTS

Despite the Supreme Court's lack of guidance in resolving the Fourth Amendment significance of chemical analysis of a biological sample, national search and seizure jurisprudence is largely in agreement: No express judicial authorization is needed to analyze a suspect's blood (or any other biological sample) once it has already been lawfully procured.<sup>31</sup>

*United States v. Snyder* represents a prototypical application of this principle by the Ninth Circuit.<sup>32</sup> In *Snyder*, the defendant's blood was drawn without his consent at the scene of an automobile accident after the attending officers suspected he was intoxicated.<sup>33</sup> A blood test performed two days later revealed that his blood alcohol level was over the legal limit.<sup>34</sup> Appealing his DUI conviction, Snyder acknowledged that the blood draw at the scene had been constitutionally permissible under *Schmerber* but "challenge[d] the subsequent warrantless analysis of the [blood] sample as an unreasonable search."<sup>35</sup>

The court found this argument unavailing. "The flaw in Snyder's argument," it reasoned, was his "attempt to divide his arrest, and the subsequent extraction and testing of his blood, into too many separate incidents, each to be given independent significance for [F]ourth [A]mendment purposes."<sup>36</sup> In the court's view, "*Schmerber* viewed the seizure and separate search of the blood as a single event."<sup>37</sup> Accordingly, under well-settled Supreme Court precedent, it was able to conclude that the "performance of a blood-alcohol test has no independent significance for [F]ourth [A]mendment purposes."<sup>38</sup>

As discussed in the preceding section, *Schmerber*'s treatment of the issue in *Snyder* was effectively nonexistent due to the fact that the defendant in that case did not challenge the constitutionality of the state's blood analysis. Therefore, any extension of *Schmerber* in this respect rests on tenuous grounds. Given the lack of a search warrant for the defendant's blood in either case, neither *Schmerber* nor *Snyder* are instruc-

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31. 2 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.10(e) (5th ed. 2013) ("[I]t is generally understood that a lawful seizure of apparent evidence of crime pursuant to a search warrant carries with it a right to test or otherwise examine the seized materials to ascertain or enhance their evidentiary value . . .").

32. *United States v. Snyder*, 852 F.2d 471 (9th Cir. 1988).

33. *Id.* at 472.

34. *Id.*

35. *Id.* at 473.

36. *Id.*

37. *Id.* at 474.

38. *Id.*

tive in terms of what should be expected of a magistrate who authorizes the procurement of such a sample.

Nonetheless, several state decisions have unequivocally advanced the reasoning adopted in *Snyder* for the proposition that a defendant's privacy interests in his or her blood do not survive past the point of initial extraction by law enforcement. For example, in *People v. King*, a New York court offered the following interpretation of Fourth Amendment jurisprudence with regard to the testing of biological samples:

It is . . . clear that once a person's blood sample has been obtained lawfully, he can no longer assert either privacy claims or unreasonable search and seizure arguments with respect to the use of that sample. Privacy concerns are no longer relevant once the sample has already lawfully been removed from the body, and the scientific analysis of a sample does not involve any further search and seizure of a defendant's person.<sup>39</sup>

Similarly, in *State v. Hauge*, the Supreme Court of Hawaii looked to nationwide trends in search and seizure cases to reach an identical conclusion about any privacy interests the defendant may have retained in the biological sample seized by law enforcement in the case at bar:

Our review of the case law of other jurisdictions indicates that the appellate courts of several states have ruled that expectations of privacy in lawfully obtained blood samples . . . are not objectively reasonable by "society's" standards. Specifically, a number of jurisdictions have held on analogous facts that once a blood sample and DNA profile is lawfully procured from a defendant, no privacy interest persists in either the sample or the profile.<sup>40</sup>

While the conclusions reached in *King* and *Hauge* are certainly representative of prevailing state approaches, some decisions have made minimal inroads in articulating limitations on a state's ability to conduct testing of a biological sample in its possession.

*State v. Sanders*, an unpublished case from Wisconsin, is such an example.<sup>41</sup> In *Sanders*, police obtained a search warrant for the defendant's blood after his involvement in a serious automobile collision.<sup>42</sup> The warrant "[did] not limit—or even address—what the police could or could not do with the blood once it was drawn."<sup>43</sup> Although there was

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39. *People v. King*, 663 N.Y.S.2d 610, 614 (N.Y. App. Div. 1997).

40. *State v. Hauge*, 79 P.3d 131, 144 (Haw. 2003).

41. *State v. Sanders*, Nos. 93-2284-CR & 93-2286-CR, 1994 WL 481723 (Wis. Ct. App. Sept. 8, 1994).

42. *Id.* at \*1.

43. *Id.* at \*5.

merely probable cause to suspect that Sanders had been under the influence of alcohol at the time of the collision, his blood was tested for the presence of tetrahydrocannabinols (THC) in addition to being analyzed for its alcohol content.<sup>44</sup> The results indicated an illegal degree of intoxication on both counts.<sup>45</sup>

Sanders argued on appeal that “testing his blood for the presence of drugs, as opposed to alcohol alone, exceeded the scope of the search warrant and thus was itself an illegal search under the Fourth Amendment.”<sup>46</sup> Sanders’s position relied primarily on the “further invasion” language from *Skinner*.<sup>47</sup> However, the court found *Skinner* unpersuasive for many of the same reasons voiced earlier—the opinion’s reference to a “further invasion” is, at best, dicta in a “special needs” exception case that was resolved on different principles.<sup>48</sup> Instead, the court maintained that “once the police came into lawful possession of the blood samples, Sanders lost any expectation of privacy he may have had in them, at least insofar as testing for intoxicants . . . [was] concerned.”<sup>49</sup>

The court also felt compelled to respond to Sanders’s contention that the rule being adopted “open[ed] the door to allow testing of blood for *any purpose* the state might elect to pursue.”<sup>50</sup> In rebuttal, the court stated that “the ‘reasonableness standard’ of the Fourth Amendment would protect against the significant, but unnecessary, invasion of a defendant’s privacy interests that subjecting his blood to unrestricted testing for every fact that it could possibly reveal would entail.”<sup>51</sup>

However, there is a troubling obstacle to the endorsement of such a reasonableness standard—by its terms, it delegates to the state the task of policing itself when it comes to the testing of blood and other biological samples. Dispensing with the warrant requirement plainly means that there is no initial opportunity for a neutral magistrate to evaluate the necessity of the state’s testing; as such, testing of the sample only stands to be deemed unreasonable by a court *after the fact* (i.e., after the defendant may have been adversely impacted within the criminal justice system).<sup>52</sup>

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44. *Id.* at \*1–2.

45. *Id.* at \*2.

46. *Id.* at \*3.

47. *Id.* at \*4; *see supra* Part II.

48. *Sanders*, 1994 WL 481723, at \*5.

49. *Id.*

50. *Id.* at \*5 n.5 (emphasis added) (internal quotation marks omitted).

51. *Id.*

52. Such consequences are not difficult to imagine: a defendant’s name and reputation may be tarnished by the mere fact of an indictment alone, even where the charge is later dismissed because of Fourth Amendment violations. *See Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599 (1950) (“The impact of an indictment is on the reputation or liberty of a man. The same is true where a

The Supreme Court has previously stressed that even when law enforcement officials take it upon themselves to ensure the “reasonableness” of their search without first deferring to a magistrate, there is nonetheless little chance of the officers conducting a search that comports with the Fourth Amendment, absent certain exceptions.

In *Katz*,<sup>53</sup> the Government urged that “because [its agents] did no more . . . than they might properly have done with prior judicial sanction,” their warrantless search of the defendant should be “retroactively validate[d].”<sup>54</sup> Yet the court was unambiguous in proclaiming that it had “never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and *voluntarily confined their activities* to the least intrusive means consistent with that end.”<sup>55</sup> Accordingly, there is little doubt that self-imposed restraints on state conduct are inimical with the protections contemplated by the Fourth Amendment.

Other decisions have treaded a slightly different path in announcing that it is only the noncontraband contents of blood that an individual can assert a legitimate privacy interest in after its lawful extraction. For instance, in *State v. Price*, police sought and obtained a warrant for the defendant’s blood after his involvement in a fatal car crash.<sup>56</sup> Although the accompanying affidavit to the warrant only contemplated analyzing Price’s blood alcohol content, the warrant itself “did not specify what tests could be conducted.”<sup>57</sup> The tests results came back positive for the presence of THC.<sup>58</sup>

Like the defendant in *Sanders*, Price challenged the testing of his blood for THC as “outside the scope of the warrant.”<sup>59</sup> However, the court relied on Supreme Court precedent for the proposition that any interest in possessing contraband cannot be deemed legitimate.<sup>60</sup> As such, the court was bound to hold that “once a blood sample has been legitimately seized, the individual from whom that sample was taken has no legitimate expectation of privacy in the contraband contents of his blood.”<sup>61</sup> Although the court conceded that testing Price’s blood, by con-

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prosecutor files an information charging violations of the law. The harm to property and business can . . . be incalculable by the mere institution of proceedings.”).

53. *See supra* text accompanying note 2.

54. *Katz v. United States*, 389 U.S. 347, 356 (1967).

55. *Id.* at 356–57 (emphasis added).

56. *State v. Price*, 270 P.3d 527, 529 (Utah 2012).

57. *Id.*

58. *Id.*

59. *Id.* at 529–30.

60. *Id.* at 530 (quoting *Illinois v. Caballes*, 543 U.S. 405, 408 (2005)); *see infra* text accompanying notes 70–71.

61. *Id.*

trast, for “HIV status, DNA information, blood type, or other private medical facts . . . would have infringed upon a legitimate privacy interest,” it noted conclusively that this did not happen in the present matter.<sup>62</sup>

Similarly, in *State v. Loveland*, the defendant was searched after being detained for fleeing an officer, and marijuana was discovered on his person.<sup>63</sup> After booking Loveland into a detention center, officers procured a urine sample without his consent.<sup>64</sup> The sample tested positive for both marijuana *and* cocaine, which officers ostensibly could not have suspected would be found.<sup>65</sup> Loveland subsequently argued that the test for cocaine was an unreasonable search and seizure because it was unsubstantiated by probable cause.<sup>66</sup>

The court remarked, “While the State urges us to find that Loveland had no reasonable expectation of privacy in the sample *generally*, we restrain ourselves to a more limited holding.”<sup>67</sup> As in *Price*, the court ultimately resorted to articulating the principle that possession of contraband is irreconcilable with the sort of legitimate privacy interests safeguarded by the Fourth Amendment.<sup>68</sup> In Loveland’s case, that rule dictated that “testing to determine whether [his urine] contained traces of cocaine compromise[d] no legitimate privacy interest.”<sup>69</sup>

Though the noncontraband approach adopted in *Price* and *Loveland* appears to make an important concession towards defendants’ privacy rights, it is ultimately as unavailing as the reasonableness standard endorsed in *Sanders*. To expose the fundamental infirmity in this argument, however, it is first necessary to consult the Supreme Court precedent being invoked as authority for a Fourth Amendment exception.

Both *Price* and *Loveland* rested heavily on *Illinois v. Caballes* in declaring that the defendants could not maintain a legitimate privacy interest in the contraband contents of their blood.<sup>70</sup> *Caballes* was concerned with neither search warrants nor blood testing, but a challenge to the constitutionality of drug sniffs conducted outside the exteriors of vehicles pulled over for reasons unrelated to narcotics interdiction.<sup>71</sup> Reject-

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62. *Id.*

63. *State v. Loveland*, 696 N.W.2d 164, 164 (S.D. 2005).

64. *Id.* The record is unclear as to the exact procedure by which the sample was obtained; there is no mention in the case of a search warrant.

65. *Id.* at 165.

66. *Id.*

67. *Id.* at 166 (emphasis added).

68. *Id.*

69. *Id.* at 167.

70. See *State v. Price*, 270 P.3d 527, 530 (Utah 2012) (citing *Illinois v. Caballes*, 543 U.S. 405, 408 (2005)); *Loveland*, 696 N.W.2d at 166–67 (citing *Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005)).

71. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

ing defendant Caballes's argument that probable cause related to his possession of marijuana was needed to authorize a dog sniff after his vehicle had been detained, the Court stated:

We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that *only* reveals the possession of contraband "compromises no legitimate privacy interest." This is because the expectation "that certain facts will not come to the attention of the authorities" is not the same as an interest in "privacy that society is prepared to consider reasonable."<sup>72</sup>

At first blush, transposing the logic of *Caballes* into blood testing cases appears eminently reasonable. After all, is it not the case that a defendant can "possess" contraband—such as illegal narcotics—in his bloodstream? The answer, as it turns out, is less clear than initial presumptions might suggest.

The conventional legal understanding of "possession" is not always amenable to being applied in contexts where an individual has narcotics in his system.<sup>73</sup> While precise statutory definitions may differ from state to state, one North Carolina appellate court surveying the case law concluded that, in most jurisdictions, "a positive drug test alone cannot support a conviction for possession."<sup>74</sup> A significant number of precedents bear out that conclusion, with fairly consistent justifications among them.<sup>75</sup>

Traditionally, legal "possession" requires an individual's control and knowledge of the property in question.<sup>76</sup> In *State v. Flinchpaugh*, the Kansas Supreme Court adeptly explained why both of these elements are lacking for possession purposes when narcotics are in a defendant's

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72. *Id.* at 408–09 (citations omitted) (quoting *United States v. Jacobsen*, 466 U.S. 109, 122–23 (1984)).

73. One dictionary definition of "possession" explains that it is "the right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object." BLACK'S LAW DICTIONARY 1351 (10th ed. 2014).

74. *State v. Harris*, 632 S.E.2d 534, 536 (N.C. Ct. App. 2006).

75. *See, e.g., State v. Thronsen*, 809 P.2d 941, 943 (Alaska Ct. App. 1991) (positive drug test could not sustain conviction for cocaine possession because defendant ceased having control of it once it entered his body); *People v. Spann*, 232 Cal. Rptr. 31, 33–35 (Cal. Ct. App. 1986) (crimes of "use" and "possession" should not be merged); *State v. Vorm*, 570 N.E.2d 109, 111 (Ind. Ct. App. 1991) (positive drug test alone fails to prove defendant knowingly and voluntarily possessed cocaine); *State v. Flinchpaugh*, 659 P.2d 208, 211 (Kan. 1983) (once drug is in a person's blood, he no longer controls it, and positive drug test alone is insufficient to establish knowledge because it could have been ingested involuntarily or by trick); *State v. Lewis*, 394 N.W.2d 212, 217 (Minn. Ct. App. 1986) ("[E]vidence of a controlled substance in a person's urine specimen does not establish possession . . . absent probative corroborating evidence of actual physical possession.").

76. *State v. Farris*, 125 S.W.3d 382, 394 n.6 (Mo. Ct. App. 2004).

bloodstream.<sup>77</sup> With regard to control, the court reasoned that once a drug has been assimilated into the body, “the power of [a] person to control, possess, use, dispose of, or cause harm is at an end.”<sup>78</sup> Simply put, “[t]he ability to control the drug is beyond human capabilities.”<sup>79</sup> As for knowledge of the presence of a drug, the court stated that it would be untenable to ever infer that the drug had been willfully consumed—rather, it “might have been injected involuntarily, or introduced by artifice, into the defendant’s system.”<sup>80</sup>

As *Flinchpaugh* illustrates, imputing possession to an individual who has narcotics in his bloodstream is fraught with obstacles.<sup>81</sup> This makes *Price* and *Loveland*’s reliance on *Caballes* particularly unconvincing. In *Caballes*, the defendant obviously “possessed” the marijuana that officers discovered as a result of the drug sniff; it was in the trunk of his car and thus easily susceptible to being moved or transported at his discretion.<sup>82</sup> Not so with the defendants in *Price* and *Loveland*, who had no way to manipulate the drugs in their systems. Nor could knowledge of the drugs be attributed to them absent corroborating evidence that they had purposefully ingested the narcotics. In the final analysis, there is insufficient symmetry between *Caballes* and the Fourth Amendment issues presented in blood analysis cases for a reviewing court to find the juxtaposition instructive.

#### IV. WASHINGTON’S *MARTINES* DECISION

Against the preceding backdrop of cases stands *State v. Martines*, a Washington Court of Appeals decision that—prior to its review by the state supreme court—was a jurisprudential anomaly in the realm of Fourth Amendment case law.<sup>83</sup>

In *Martines*, state patrol officers obtained a warrant for the defendant’s blood after taking him into custody on suspicion of drunk driving.<sup>84</sup> The warrant failed to make any mention of the testing that the State intended to perform on the sample.<sup>85</sup> The test results indicated that Martines’s blood alcohol level was significantly above the legal limit; however, beyond this preliminary finding that had been the subject of the

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77. *Flinchpaugh*, 659 P.2d at 213.

78. *Id.* at 211.

79. *Id.*

80. *Id.* at 212.

81. *See id.* at 213.

82. *Illinois v. Caballes*, 543 U.S. 405, 406 (2005).

83. *State v. Martines*, 331 P.3d 105 (Wash. Ct. App. 2014), *rev’d*, No. 90926-1, 2015 WL 5076693 (Wash. Aug. 27, 2015).

84. *Id.* at 107.

85. *Id.*

affidavit for probable cause, Martines's blood was *also* tested for narcotics, which revealed the presence of Valium.<sup>86</sup>

Martines maintained on appeal that because the warrant authorizing the extraction of his blood failed to explicitly authorize its subsequent testing, "the results should have been suppressed as the fruit of an illegal search."<sup>87</sup> The State responded that blood is "a thing to be seized, not a place to be searched," and once a blood sample is lawfully seized, the individual whose blood has been seized no longer has a constitutionally protected privacy interest in it.<sup>88</sup>

The *Martines* court disagreed with the State, holding that "the testing of blood intrudes upon a privacy interest that is distinct from the privacy interests in bodily integrity and personal security that are invaded by a physical penetration of the skin."<sup>89</sup> Interestingly, the court relied heavily on *Skinner*<sup>90</sup> to discern that "the testing of the blood constitutes a second search."<sup>91</sup> As such, a separate warrant thereafter became required for chemical analysis in Washington.<sup>92</sup> The court also contemplated whether Martines had "knowingly exposed" the valuable information contained in his blood, stating: "Blood is not like a voice or a face or handwriting or fingerprints . . . . The personal information contained in blood is hidden and highly sensitive. Testing . . . can reveal not only evidence of intoxication, but also evidence of disease, pregnancy, and genetic family relationships."<sup>93</sup>

However, the Washington Supreme Court reversed, disregarding *Skinner* entirely and applying a "commonsense reading" to the warrant to hold that the document "authorized not merely the drawing and storing of a blood sample but also the toxicology tests performed to detect the presence of drugs or alcohol."<sup>94</sup> With comparatively little analysis, the court concluded that because "[t]he purpose of the warrant was to draw a sample of blood from Martines to obtain evidence of DUI," it would not be "sensible to read the warrant in a way that stops short of obtaining that evidence."<sup>95</sup> Perhaps most importantly, the court did opine that testing of

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86. *Id.* Valium is not considered "contraband" since it can be obtained by prescription. Accordingly, the facts in *Martines* did not provide an opportunity for the court to adopt the noncontraband approach discussed in *Price* and *Loveland*.

87. *Id.* at 107.

88. *Id.* at 108.

89. *Id.* at 111.

90. *See supra* text accompanying notes 20–24.

91. *Martines*, 331 P.3d at 110.

92. *Id.* at 111.

93. *Id.* The court stated that "one has no reasonable expectation of privacy in one's voice, fingerprints, handwriting, or facial characteristics." *Id.* at 110–11.

94. *State v. Martines*, No. 90926-1, 2015 WL 5076693, at \*5 (Wash. Aug. 27, 2015).

95. *Id.*

a defendant's blood does have to be "confined to the finding of probable cause," although it offered no direct authority for that proposition.<sup>96</sup>

While the Court of Appeals's willingness to treat the testing of blood as a distinct Fourth Amendment event in *Martines* is commendable, its express reliance on *Skinner* as irrefutable authority supporting the testing-as-search paradigm is questionable.<sup>97</sup> In the ensuing sections, I depart from adherence to the Court of Appeals's reasoning in order to take up several justifications for why *Martines*'s reversal by the Washington Supreme Court will work substantial prejudice to the Fourth Amendment rights of accused citizens. I consider not only why the Fourth Amendment's prohibition against general warrants supports a biological/nonbiological distinction with regard to items to be seized by warrant, but also specific privacy concerns associated with state DNA databases.

#### V. A NEW PARADIGM FOR TESTING OF BLOOD SAMPLES UNDER THE FOURTH AMENDMENT

In arguing that the testing of a lawfully-procured blood sample constitutes a distinct Fourth Amendment event, it is first necessary to revisit the two-pronged *Katz* test elaborated in Part I. As the Supreme Court established in *Katz*, Fourth Amendment concerns are only implicated when an individual displays a subjective expectation of privacy, and that expectation is one that society is readily prepared to accept as "reasonable."<sup>98</sup>

Under this inquiry, it is perhaps self-evident that the primary point of contention in most challenges to a search or seizure will inhere in the determination of whether the asserted privacy interest is congruous with societal norms. On the one hand, it is plausible to contend that an individual's privacy interests are significantly diminished when his person or property is legitimately seized by law enforcement.<sup>99</sup> On the other hand, the Supreme Court has also acknowledged the countervailing concern that "chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an [individual], including whether he or she is epileptic, pregnant, or diabetic"—facts that may be extraneous to any criminal investigative aims.<sup>100</sup> This latter concern is of paramount importance because, as one scholar has observed, "a person has no reason

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96. *Id.*

97. *See supra* Part II.

98. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

99. This is the stance adopted by the court in *People v. King*, 663 N.Y.S.2d 610, 614 (N.Y. App. Div. 1997), and excerpted *supra* Part III.

100. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 617 (1989).

to know much of the information that will be revealed when [a biological sample containing DNA] is analyzed. [She] has little to no discretion over what information is stored in her body and likely has not . . . evaluated that information herself.”<sup>101</sup> Thus, it appears reasonable under *Katz* to conclude that society is prepared to recognize at least some privacy expectations in a biological sample retained by law enforcement officials—not least because biological material should plainly be regarded as *sui generis* within the greater taxonomy of evidence. Under that analysis, it necessarily follows that the testing of a biological sample is a discrete Fourth Amendment search.

Many dismissals of the testing-as-search paradigm have been predicated on the notion that a biological sample should be treated as any other type of evidence for the purposes of constitutional analysis.<sup>102</sup> In other words, this approach construes “evidence” in a monolithic sense that serves as an indiscriminate shelter for anything gathered pursuant to a warrant over the course of a criminal investigation. Consider, for example, the approach embraced by the Wisconsin Court of Appeals in the following case.

In *State v. VanLaarhoven*, the defendant submitted the familiar argument that “his blood sample, once obtained, [could not] be analyzed for evidentiary purposes without obtaining a second search warrant.”<sup>103</sup> Rebutting the merits of VanLaarhoven’s claim, the court looked to the Wisconsin Supreme Court’s decision in *State v. Petrone* as guiding precedent.<sup>104</sup> *Petrone* concerned a suppression challenge to photographs developed by law enforcement after the 35mm negatives had been seized pursuant to a warrant.<sup>105</sup> The thrust of *Petrone*’s Fourth Amendment argument was that “the process of developing the films [went] beyond the authority of the warrant.”<sup>106</sup> Holding that officers did not need a separate warrant to develop the film, the court suggested that officials “simply used technological aids to assist them in determining whether items within the scope of the warrant were in fact evidence of the crime alleged.”<sup>107</sup> Surely, the court went on, *Petrone* “could not have objected had the deputies used a magnifying glass to examine lawfully seized documents or

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101. Kelly Lowenberg, *Applying the Fourth Amendment When DNA Collected for One Purpose is Tested for Another*, 79 U. CIN. L. REV. 1289, 1311 (2011).

102. See, e.g., *King*, 663 N.Y.S.2d at 118 (“Although human blood, with its unique genetic properties, may initially be qualitatively different from [evidence such as a gun or controlled substance], once constitutional concerns have been satisfied, a blood sample is not unlike other tangible property which can be subject to a battery of scientific tests.”).

103. *State v. VanLaarhoven*, 637 N.W.2d 411, 413 (Wis. Ct. App. 2001).

104. *Id.* at 416 (citing *State v. Petrone*, 468 N.W.2d 676 (Wis. 1991)).

105. *State v. Petrone*, 468 N.W.2d 676, 678–79 (Wis. 1991).

106. *Id.* at 679.

107. *Id.* at 681.

had enlarged a lawfully seized photograph in order to examine [it] in greater detail.”<sup>108</sup>

*VanLaarhoven* invoked *Petrone* for the unsurprising proposition that examination of evidence—any evidence, biological or otherwise—seized pursuant to a warrant does not require secondary judicial authorization.<sup>109</sup> However, the court in *VanLaarhoven* failed to take account of the fact that undeveloped photo negatives and the contents of an individual’s blood implicate vastly different privacy concerns. The functional result of its holding was to create an equivalency between biological evidence and tangible, physical evidence that leaves little room for nuanced analysis where it is most needed.

The following concerns raised by the State of Washington before the Court of Appeals in *Martines* also illustrate the same unwillingness to confront the unique characteristics of a defendant’s blood:

If judicial authorization is required to test blood for alcohol or drugs, even once that blood is lawfully in police custody, there is no principled reason to conclude it would not be needed for a host of other forensic testing as well: to test controlled substances seized from a car during an inventory search; to test[-]fire a handgun to determine its operability or to determine whether bullet casings at the scene of a shooting were fired from the same gun . . . ; to analyze fingerprints left at a crime scene . . . ; [or] to translate writings from a foreign language into English . . . .<sup>110</sup>

Implicit in this reasoning is the fear that, taken to its purportedly logical conclusion, the testing-as-search paradigm would emasculate the efficiency of law enforcement practices.<sup>111</sup> But, contrary to the State’s assertion, there is indeed a “principled reason” *against* extending this approach to nonbiological evidence. Simply put, there is only so much investigative information that can be gleaned from test-firing a handgun, analyzing fingerprints,<sup>112</sup> or translating a piece of writing. Even before police intervention into his affairs, a criminal suspect would be able to speculate about the type and extent of information that law enforcement could gather against him from seizing such evidence. For example, a suspect who fires a gun in the commission of a felony is likely aware that the gun might be traced back to him through either fingerprints or ballis-

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108. *Id.*

109. *VanLaarhoven*, 637 N.W.2d at 417.

110. Brief of Respondent at 17–18, *State v. Martines*, 331 P.3d 105 (Wash. Ct. App. 2014) (No. 69663-7-1), 2010 WL 9592903, at \*17–18.

111. *See id.*

112. In any case, fingerprints fall under the “knowing exposure” exception to the *Katz* test. *See State v. Martines*, 331 P.3d 105, 110–11 (Wash. Ct. App. 2014).

tics testing. Yet the investigative inquiry in this particular example is circumscribed by certain practical limitations: police would not be able to discern the suspect's hereditary history or related medical information from the weapon alone. This is evidently not the case with biological information, about which a suspect might remain profoundly ignorant when it comes to the nature and scope of testing that the state might perform, and which the state has far more diverse technological resources to exploit in doing so.<sup>113</sup>

A corollary justification for distinguishing between biological and nonbiological evidence lies in the Fourth Amendment's prohibition against general warrants.<sup>114</sup> Recall that general warrants are inimical with the Fourth Amendment's protections because a "general, exploratory rummaging" of a suspect's person or property has been held constitutionally impermissible.<sup>115</sup> This is precisely the language alluded to by the Court of Appeals in *Martines* when it held that "the requirement to obtain a particularized warrant for blood testing will prevent the State from *rummaging among the various items of information* contained in a blood sample for evidence unrelated to drunk driving."<sup>116</sup>

By contrast, a Fourth Amendment paradigm of blood testing that does not recognize the need for express judicial authorization seeks to legitimize general warrants. This is so because "blood is a substance whose evidentiary value lies in its components," and it "has no probative value in itself."<sup>117</sup> Instead, "it *must* be examined for its evidentiary value to be understood."<sup>118</sup> Acknowledging this reality makes it clear that blood is more akin to a "place" to be searched than a "thing" to be seized. No one would contest that a warrant authorizing the search of John Doe's home "for evidence of any and all crimes" could not pass constitutional muster. The same principle holds true here, given that blood is simply a repository for a myriad of potentially incriminating evidence sought by the State. An approach that advocates essentially unrestricted testing is therefore compromised by a fatal constitutional infirmity. This concern about general warrants is particularly critical in light of the fact that "[a]s technology advances, more meaningful information will be extractable from . . . genetic material . . . . [T]he only practical limit on information that can be extracted from biological sam-

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113. See Lowenberg, *supra* note 101.

114. See *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971); *supra* text accompanying notes 1–9.

115. *Coolidge*, 403 U.S. at 467; see *supra* Part I.

116. *Martines*, 331 P.3d at 111 (emphasis added).

117. Brief of Respondent, *supra* note 110, at 17.

118. *Id.* (emphasis added).

ples are currently-available analysis techniques and our knowledge of what genetic variations mean.”<sup>119</sup>

In sum, jurisdictions adopting the testing-as-search paradigm should proceed as follows: When a magistrate is faced with a petition for a search warrant attempting to seize biological evidence (such as blood) from a criminal suspect, the warrant that issues should explicitly incorporate the scope of testing authorized on that sample. To obviate the general warrant problem, such restrictions need to be narrowly tailored in light of the supporting affidavit of probable cause presented. In the alternative, the State could seek a second warrant after it has collected the biological evidence in question. Because biological evidence is *sui generis*, this practice need not be replicated under circumstances when the object of the warrant is nonbiological.<sup>120</sup>

For illustrative purposes, consider a relatively straightforward example: John Doe is pulled over for driving erratically late at night. During the encounter, the attending officer notices that Doe’s breath smells strongly of liquor. A search of his criminal history reveals prior convictions for DUI. When the officer shines her flashlight inside the car, she notices a small plastic bag of white powder lying in plain view on the passenger seat. Doe subsequently fails a field sobriety test, and the officer confirms that the plastic bag contains cocaine. If the officer seeks a warrant for extraction of Doe’s blood, the magistrate should be satisfied that probable cause exists to authorize extraction of the blood for evidence of driving under the influence. But, on its face, the warrant should also be narrowly tailored to specifically permit testing only for blood alcohol and cocaine. Chemical analysis outside these boundaries (such as for marijuana or any other intoxicant police may wish to find) should be strictly prohibited.

I would stress that, as a policy matter, there is effectively no reason for law enforcement officials to seek a *separate* warrant authorizing testing distinct from the warrant authorizing procurement of the sample. The two mandates can—and should—be incorporated in the same document. This is the better practice, at least in theory, because it avoids compounding administrative burdens; as the Supreme Court observed in a recent case, “[w]arrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review.”<sup>121</sup> Accordingly,

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119. Lowenberg, *supra* note 101, at 1311.

120. I argue in favor of an important qualification, however, when the state seizes evidence and subsequently discovers that it has biological evidence in its possession—such as when a weapon is found to have blood on it. In that situation, I would argue that a separate search warrant is necessary to restrict the scope of testing on that biological evidence.

121. *Missouri v. McNeely*, 133 S. Ct. 1552, 1562 (2013).

the State should not complain of undue delays under the testing-as-search paradigm, unless it determines that it needs to analyze a biological sample for a different purpose than originally contemplated. Under those circumstances, a second warrant supported by sufficient probable cause would indeed be necessary.

In the following section, I provide an imperative for the testing-as-search paradigm by offering some speculation as to the privacy interests we stand to undermine by failing to adopt changes in nationwide search and seizure jurisprudence with regard to testing of biological samples.

#### VI. DNA DATABANKS AND RELATED PRIVACY CONCERNS

The need for restrictions on the testing of a defendant's blood carries particular importance in the realm of DNA databanks.

DNA analysis has been hailed as "one of the most important advances in forensic science."<sup>122</sup> Because the presence of genetic markers on certain chromosomes is highly unique, DNA testing allows police to reliably compare the genetic profile of a known person with a genetic profile left at a crime scene by an unknown individual.<sup>123</sup> DNA can be derived from a wide variety of bodily sources, including blood, saliva, semen, or shed skin cells.<sup>124</sup> Moreover, forensic technology has advanced such that "[o]nly a miniscule amount of biological material is needed to produce [a] DNA profile."<sup>125</sup>

A DNA databank is a storehouse of genetic records that law enforcement agencies use for criminal identification purposes.<sup>126</sup> Every state in the union has "passed statutes requiring convicted offenders to provide DNA samples for inclusion in a national database of identifying profiles."<sup>127</sup> That national databank of genetic profiles is known as the Combined DNA Index System (CODIS) and is overseen by the Federal Bureau of Investigation.<sup>128</sup> CODIS is subdivided into local, state, and national levels; after a profile enters the database at the local level, it then becomes accessible by state and nationwide searches.<sup>129</sup> The CODIS databank contained more than 11,628,300 profiles as of September

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122. Stephen Mercer & Jessica Gabel, *Shadow Dwellers: The Underregulated World of State and Local DNA Databases*, 69 N.Y.U. ANN. SURV. AM. L. 639, 643 (2014).

123. *Id.* at 643–44.

124. *Id.* at 643.

125. *Id.*

126. Bonnie L. Taylor, Comment, *Storing DNA Samples of Non-Convicted Persons & the Debate over DNA Database Expansion*, 20 T.M. COOLEY L. REV. 509, 513 (2003).

127. Paul M. Monteleoni, Note, *DNA Databases, Universality, and the Fourth Amendment*, 82 N.Y.U. L. REV. 247, 247 (2007).

128. Catherine W. Kimel, Note, *DNA Profiles, Computer Searches, and the Fourth Amendment*, 62 DUKE L.J. 933, 938 (2013).

129. *Id.*

2012.<sup>130</sup> A complete match between a genetic profile in CODIS and an unknown DNA sample points to the individual associated with the CODIS profile.<sup>131</sup> Meanwhile, a partial match “may identify a family member as the source of crime scene DNA because related persons inherit their DNA profiles from the same family tree.”<sup>132</sup>

Even where an individual is never prosecuted or convicted of a crime, a significant number of states now have statutory schemes authorizing the warrantless DNA sampling of certain arrestees.<sup>133</sup> The constitutionality of such laws has been vigorously debated, and a discussion on the merits is outside the scope of this Note.<sup>134</sup>

However, at the nexus of biological evidence testing and the proliferation of DNA databanks, there are at least three important privacy concerns that warrant brief scholarly inquiry. In raising these issues, I am primarily concerned with the State’s extraction of a DNA profile pursuant to a warrant that does not restrict the type of testing that may be performed on a blood sample.

First, and perhaps most obviously, “[i]f a person’s genetic identification profile is created, that person can be implicated in future crimes and will constantly be compared to crime scene DNA samples, which some have referred to as lifelong ‘genetic surveillance.’”<sup>135</sup> As some commentators have pointed out, federal courts have yet to specifically address the issue of whether any subsequent use of DNA profiles constitutes an unreasonable search or violates an individual’s right to “informational privacy.”<sup>136</sup> Nevertheless, it is easy to envisage the Fourth Amendment difficulties posed by a scenario in which a drunk driving suspect has blood drawn pursuant to a generalized warrant, the State extracts his DNA profile, and that profile subsequently incriminates him in a far more serious offense such as a homicide.

Second, if DNA is subject to familial searching, to reveal other family relationships, the individual may feel responsible for subjecting his entire family to such genetic surveillance.<sup>137</sup> Furthermore, “if a family member were to be subsequently prosecuted for a crime, that individual could feel responsible for implicating their family member.”<sup>138</sup> Discon-

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130. *Id.*

131. Mercer & Gabel, *supra* note 122, at 644.

132. *Id.*

133. Lowenberg, *supra* note 101, at 1298.

134. *See generally* Taylor, *supra* note 126.

135. Lowenberg, *supra* note 101, at 1317.

136. Taylor, *supra* note 126, at 523.

137. Lowenberg, *supra* note 101, at 1317; *see also* Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 347 (2010).

138. Lowenberg, *supra* note 101, at 1317.

certingly, relatives of the initial suspect might “find themselves eligible for the database based on nothing more than their relationship to a convicted offender.”<sup>139</sup>

Finally, information about paternity could be used as evidence of statutory rape if the mother of the child is underage or as evidence in a civil case to require the father to pay child support.<sup>140</sup> In addition, “government-conducted paternity testing could harm the mother if it keeps a man involved in her life whom she had hoped to avoid.”<sup>141</sup> These issues could cause further familial disturbances to which—at present—magistrates give virtually no deference when they issue warrants for the seizure of biological evidence without restricting its testing.<sup>142</sup>

To concretize some of the privacy concerns discussed above, consider the following hypotheticals. Although it must be conceded that they exist merely within the realm of the *possible* rather than the *probable*, these examples are nonetheless informed by the current state of the law. Assume that each takes place in a jurisdiction, such as Washington, where DNA extraction is not mandated by statute upon a defendant’s arrest.<sup>143</sup>

#### A. Hypothetical #1

The Gotham Police Department is investigating the grisly double murder of two women found shot to death in a hotel on the outskirts of town. Initially, there are few promising leads. However, the forensics team eventually manages to create two distinct genetic profiles from hairs discovered on the women’s bodies and on the linens of the beds in hotel room.

One of the DNA profiles is a direct match to John Doe, a suburban man who had been arrested for drunk driving twelve years earlier after police suspected he was responsible for a multicar collision. At that time, police obtained a warrant to extract Doe’s blood and subsequently analyzed it for its alcohol content, which was technically over the legal limit. Pursuant to common practice, the police also created a DNA profile and added it to the state databank. Doe contested the DUI charge and was acquitted after his lawyer persuaded the jury that the forensic machinery had not been properly calibrated prior to testing and was thus unreliable.

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139. Murphy, *supra* note 137, at 326.

140. Lowenberg, *supra* note 101, at 1317.

141. *Id.* at 1317–18.

142. Indeed, rather than deferring to such concerns, “[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 214 (1983).

143. *See* WASH. REV. CODE § 43.43.754(1) (2015).

The other DNA profile yields no positive identification. However, technicians are able to inform police detectives that the profile is that of a male individual who bears a familial relation to John Doe—possibly his brother.

With this information in hand, police call Doe in for questioning and press him for answers about his involvement. Doe admits that he and his brother, Mark, had been out celebrating a recent promotion at his real estate firm on the night of the murders. At some point in the evening, when the pair were heavily inebriated and strolling along the waterfront, they were approached by the victims, who intimated that they were “working girls” and offered their services. On a whim, John and Mark followed them back to their hotel, but ultimately decided against doing anything and promptly left a few minutes after arriving. (Assume this account is factually correct.)

Detectives are unconvinced. Considering the physical evidence far too inculpatory, John and Mark are both arrested and charged with murder. The jury convicts John, partly on the basis of his statement to police. Mark is acquitted, but his marriage and family life are destroyed beyond repair. Because of the publicity from the trial, he is no longer able to find gainful employment and is ostracized from his community.

### *B. Hypothetical #2*

The electoral race for Gotham City Attorney is one of the most hotly contested in recent memory. The incumbent, John Doe, is fending off constant criticism in the media by his opponent, Mark Roe. The latest polls have City Attorney Doe trailing by a significant margin.

Doe has been contemplating capitalizing on rumors that Roe fathered a child with a mistress some years ago. He has avoided leaking the topic to the media because he knows it would be considered a desperate ploy if he could not substantiate the allegation.

Late one night, Doe receives a phone call at home informing him that Roe has been arrested for drunk driving. After police obtain a warrant for Roe’s blood, Doe directs that a DNA profile for Roe be created as well. Before the blood can be tested for its alcohol content—but after the DNA profile is extracted—the sample is inadvertently contaminated and rendered useless. No charges are filed against Roe for the drunk driving incident.

However, Doe’s campaign hires a private investigator to surreptitiously obtain a discarded straw containing trace saliva from the girl they suspect to be Roe’s daughter. Further DNA comparison reveals that the girl is indeed related to Roe. After the sensational story is leaked to the

press, Roe is utterly discredited as a “family values” politician. Doe narrowly avoids defeat and is re-elected.

#### CONCLUSION

This Note has attempted to elaborate a testing-as-search paradigm under which the testing of biological evidence qualifies as a distinct Fourth Amendment event apart from its initial seizure. In doing so, I have proffered several justifications rooted in existing Supreme Court precedent, even though such arguments appear inconsistent with national trends in search and seizure jurisprudence.<sup>144</sup>

Nonetheless, I have submitted that the *sui generis* nature of biological evidence, coupled with the Fourth Amendment’s prohibition against general warrants, counsels in favor of magistrates explicitly restricting the variety of testing that may be performed on biological evidence in the same warrant authorizing its seizure. In most respects, this approach does not require a radical revision of existing privacy case law or principles; only the acknowledgement that the use of biological evidence poses farther-reaching privacy dilemmas than may have originally been contemplated. The use of nationwide DNA databanks and attendant privacy concerns provide just one tangible example of the constitutional protections we stand to compromise (and currently are compromising) by failing to adopt the testing-as-search paradigm.

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144. As the preceding discussion demonstrates, I have placed principal reliance on *Katz v. United States*, 389 U.S. 347 (1967), which is a testament to the continuing legacy of a decision nearly half a century old. *See supra* Part I. The ensuing decades and future advances in technology will determine whether *Katz* remains a constitutional bulwark against privacy intrusions.