
LICENSE, REGISTRATION, CHEEK SWAB: DNA TESTING AND THE DIVIDED COURT

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Midway through the oral argument in *Maryland v. King*, Justice Alito spontaneously interjected: “[B]y the way, I think this is perhaps the most important criminal procedure case that this Court has heard in decades.”¹ The juxtaposition between the breeziness of his comment and the solemnity of its content befit the case, which is best characterized as a sleeper in a Term overshadowed by monumental rulings on gay marriage, voting rights, and affirmative action. What looked on its face like just another Fourth Amendment dispute — with civil libertarians on one side and law enforcement on the other — garnered no special attention. But *King* is no ordinary Fourth Amendment case.

At first glance, *King* simply upheld the Fourth Amendment constitutionality of a state statute authorizing the collection of DNA from arrestees. But the opinion in the case represents a watershed moment in the evolution of Fourth Amendment doctrine and an important signal for the future of biotechnologies and policing. This Comment places *King* into context from three different vantage points, each one step removed. Specifically, the three Parts below address the significance of the opinion: for DNA collection from arrestees, for forensic DNA practices more generally, and for the Fourth Amendment.

Part I briefly summarizes the opinions in the case and may be skipped by those familiar with them. Part II reads between the lines of the majority opinion, in light of the greater constellation of facts and claims placed before the Court, to underscore the significance of what was *not* said about the constitutionality of arrestee DNA collection. Part III considers *King* as it exemplifies the judicial response to forensic DNA typing more generally, and imagines its precedential value in future biometric cases. Part IV situates *King* in the broader landscape of the Court’s recent Fourth Amendment jurisprudence and analyzes its insights for the evolution of the field as a whole.

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¹ Transcript of Oral Argument at 35, *Maryland v. King*, 133 S. Ct. 1958 (2013) (No. 12-207), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-207-lp23.pdf.

I. THE KING OPINIONS

In 2009, Maryland authorities arrested Alonzo King after a witness identified him as the man who had pointed a shotgun at a group in which the witness was standing.² He was charged with first- and second-degree assault.³ Under a Maryland law passed in 2008, police may collect a DNA sample from any person arrested for a crime of violence or burglary.⁴ Because the first-degree assault charge qualified as a crime of violence, officials sampled King's DNA. Ultimately, King entered an *Alford* plea to the charge of second-degree assault,⁵ a misdemeanor offense that on its own would not have qualified him for inclusion in a DNA database under Maryland law governing arrestees or convicted persons.⁶

Law enforcement took the sample and sent it to a private vendor, who analyzed it four months later, whereupon King's DNA profile was uploaded to the state's DNA database.⁷ A routine search in the database matched the profile to that taken from an unsolved sexual assault from 2003, and King was arrested and charged with that offense.⁸ He moved to suppress the evidence of the DNA match, arguing that the suspicionless collection of DNA from a person merely charged with an offense violated the Fourth Amendment.⁹ The trial court denied his motion, but the Maryland Court of Appeals reversed, based in part on the "presumption that warrantless, suspicionless searches are per se unreasonable."¹⁰ Maryland petitioned the Supreme Court for certiorari and the Chief Justice, acting as circuit justice, entered a stay of the judgment, noting the likelihood of success on the merits and the conflict in the lower courts on this issue.¹¹

Although the certiorari grant received only moderate attention from the general public, it did not escape the notice of interested parties. Over twenty amicus curiae briefs were filed, split roughly evenly between petitioner and respondent.¹² Maryland's supporters included all fifty states in a rare showing of total consensus, a variety of law en-

² Brief for the Respondent at 9, *King*, 133 S. Ct. 1958 (No. 12-207).

³ *Id.*

⁴ MD. CODE ANN., PUB. SAFETY § 2-504(a)(3)(i) (West 2013).

⁵ Brief for the Respondent, *supra* note 2, at 9 n.6 (citing *North Carolina v. Alford*, 400 U.S. 25 (1970), which permits a plea without admission of guilt).

⁶ MD. CODE ANN., PUB. SAFETY § 2-504(a)(1) (West 2013) (authorizing collection from those convicted of felonies and only certain misdemeanors).

⁷ Brief for the Respondent, *supra* note 2, at 9.

⁸ *Id.* at 9-10.

⁹ *Id.* at 10.

¹⁰ *King v. State*, 42 A.3d 549, 575 (Md. 2012).

¹¹ *Maryland v. King*, 133 S. Ct. 1, 2-3 (2012).

¹² See *Preview: Maryland v. King*, AM. BAR ASS'N, http://www.americanbar.org/publications/preview_home/12-207.html (last visited Sept. 29, 2013).

forcement and victims' rights organizations, and a consortium of businesses that sell DNA instrumentation and technology.¹³ King's advocates included civil liberties and public defense organizations,¹⁴ geneticists engaged in ethical issues, and a veterans group.¹⁵

The spirited oral argument, which signaled the likelihood of a closely divided decision, kicked off with this exchange:

MS. WINFREE: Mr. Chief Justice, and may it please the Court: Since 2009, when Maryland began to collect DNA samples from arrestees charged with violent crimes and burglary, there have been 225 matches, 75 prosecutions, and 42 convictions, including that of Respondent King.

JUSTICE SCALIA: Well, that's really good. I'll bet you, if you conducted a lot of unreasonable searches and seizures, you'd get more convictions, too.

(Laughter.)

JUSTICE SCALIA: That proves absolutely nothing.¹⁶

On June 3, 2013, the Court handed down its 5–4 decision, with Justice Kennedy writing for a majority that included Chief Justice Roberts and Justices Thomas, Breyer, and Alito.¹⁷ Justice Scalia's dissent was joined by Justices Ginsburg, Sotomayor, and Kagan.¹⁸

A. *The Majority*

Justice Kennedy's majority opinion boiled down to a balancing contest in which government need trumped privacy. The first sign of a new Fourth Amendment in town surfaced early in the opinion, when Justice Kennedy declared that "the ultimate measure of the constitutionality of a governmental search is 'reasonableness'" — not a warrant or some degree of suspicion.¹⁹ Indeed, the Court described such procedural impediments as dispensable when "the search involves no discretion that could properly be limited by the 'interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer.'"²⁰ Accordingly, all that remained was to ask whether an arrestee's interest in privacy outweighed the government's interest in collecting and storing her DNA.

¹³ *Id.*

¹⁴ Disclosure: I coauthored an amicus brief submitted on behalf of scholars of forensic evidence. Brief of 14 Scholars of Forensic Evidence as Amici Curiae Supporting Respondent, *King*, 133 S. Ct. 1958 (No. 12-207) [hereinafter Scholars' Br.].

¹⁵ *Preview: Maryland v. King*, *supra* note 12.

¹⁶ Transcript of Oral Argument, *supra* note 1, at 3.

¹⁷ *King*, 133 S. Ct. at 1965.

¹⁸ *Id.* at 1980 (Scalia, J., dissenting).

¹⁹ *Id.* at 1969 (majority opinion) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995)) (internal quotation mark omitted).

²⁰ *Id.* at 1969–70 (alteration in original) (quoting *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 667 (1989)).

On the government's side of the ledger, the Court identified the "well established . . . need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody,"²¹ which placed DNA collection within the exemptions for "routine booking" and the right to search incident to arrest.²² In the words of the Court, "it is known and must be known who has been arrested and who is being tried."²³ Specifically, the need to establish identity entitled the government to learn "more than just his name or Social Security number."²⁴ Rather, the information gleaned from collecting a DNA profile under this legal authority served five legitimate goals: it fleshed out identification by providing criminal history;²⁵ provided the authorities with greater information about the detainee's potential violent tendencies or mental disorders;²⁶ aided in the determination of proper bail;²⁷ prevented bail jumping by suspects afraid that a DNA match upon conviction would associate them with another offense;²⁸ and freed the wrongly accused.²⁹ The Court accordingly defined DNA profiling as "an important advance" in law enforcement identification techniques, spanning from photography through Bertillonage to fingerprinting.³⁰

In contrast to the government's strong interest in DNA collection, the Court viewed the defendant's privacy interests in protecting his

²¹ *Id.* at 1970.

²² *Id.* at 1971, 1980.

²³ *Id.* at 1971 (quoting *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 191 (2004)) (internal quotation mark omitted).

²⁴ *Id.*

²⁵ *Id.* ("Identity has never been considered limited to the name on the arrestee's birth certificate. In fact, a name is of little value compared to the real interest in identification at stake when an individual is brought into custody. . . . A suspect's criminal history is a critical part of his identity that officers should know when processing him for detention.")

²⁶ *Id.* at 1972 (noting that officials "must know the type of person whom they are detaining," to ensure that their decisions about custody safeguard staff, other detainees, and the arrested individual); *id.* ("Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder." (quoting *Hiibel*, 542 U.S. at 186) (internal quotation mark omitted)).

²⁷ *Id.* at 1973 ("DNA identification of a suspect in a violent crime provides critical information to the police and judicial officials in making a determination of the arrestee's future dangerousness. This inquiry has always entailed some scrutiny beyond the name on the defendant's driver's license. For example, Maryland law requires a judge to take into account not only 'the nature and circumstances of the offense charged,' but also 'the defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, length of residence in the community.'" (quoting MD. CODE ANN., RULES § 4-216(f)(1)(A), (C) (West 2013))); *id.* at 1974 ("[R]elease is not appropriate until a further determination is made as to the person's identity in the sense not only of what his birth certificate states but also what other records and data disclose to give that identity more meaning in the whole context of who the person really is.")

²⁸ *Id.* at 1973.

²⁹ *Id.* at 1974.

³⁰ *Id.* at 1975-77.

genetic material as minimal. It based this conclusion on three considerations: the status of the individual as an arrestee, the minimal expectation of privacy held in one's cheek cells, and the minimal intrusion that swabbing imposes.³¹ As to the first concern, the Court defined privacy as contextual and observed that a suspect taken into custody by necessity loses some privacy protections.³² In making this move, the Court distinguished searches of the arrestee from those of "the average citizen," in that a suspicionless search could only stand in the latter case if motivated by a "special need."³³ As to the other two interests, the Court simply concluded that "a swab of this nature does not increase the indignity already attendant to normal incidents of arrest."³⁴

In the closing pages of the opinion, the Court dismissed any privacy interests related to the analysis of the DNA code contained in the sample, or to the sample's indefinite retention.³⁵ The DNA typed, it observed, did not reveal any personal medical or physical traits, and even if they did, "they are not in fact tested for that end."³⁶ Moreover, the Court cited the statutory provisions that limit testing to identification purposes as alleviating potential privacy concerns.³⁷ Given the weak privacy concerns and the compelling government interest, the Court found the statute constitutional.

B. *The Dissent*

Justice Scalia opened his dissent as forcefully as he did the oral argument. He wrote:

The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth Amendment. Whenever this Court has allowed a suspicionless search, it has insisted upon a justifying motive apart from the investigation of crime.

It is obvious that no such noninvestigative motive exists in this case. The Court's assertion that DNA is being taken, not to solve crimes, but to *identify* those in the State's custody, taxes the credulity of the credulous.³⁸

After briefly recounting the oft-recited animosity of the Founders to the general warrant,³⁹ the dissent dispensed with the claimed doctrinal bases for legitimating the DNA search. It criticized the "search inci-

³¹ *Id.* at 1977–79.

³² *Id.* at 1978.

³³ *Id.*

³⁴ *Id.* at 1979.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 1979–80 (citing MD. CODE ANN., PUB. SAFETY §§ 2-505(b)(1), 2-512(c) (West 2013)).

³⁸ *Id.* at 1980 (Scalia, J., dissenting).

³⁹ *Id.* at 1980–82.

dent to arrest” rationale, remarking that such a search “either serves other ends (such as officer safety, in a search for weapons) or is not suspicionless (as when there is reason to believe the arrestee possesses evidence relevant to the crime of arrest).”⁴⁰ In contrast, the DNA search is a suspicionless search for crime-solving purposes alone.⁴¹ Justice Scalia underscored this point by noting that the majority felt compelled to explain that its reasoning did not authorize suspicionless searches of arrestees’ homes or invasive surgery, adding “[t]hat the Court feels the need to disclaim these consequences is as damning a criticism of its suspicionless-search regime as any I can muster.”⁴²

As to the “routine booking” rationale, Justice Scalia disputed the claimed “identification” purpose, noting that the DNA was analyzed long after the booking, arrest, and bail decisions were made, and that the search conducted was not limited to matches in the database of known offenders, but included matches in the database for unsolved crimes.⁴³ He next refuted each of the majority’s analogies: DNA collection is not like photographs, because photographs entail no Fourth Amendment search; it is not Bertillonage, because that technique was truly used for identification and not crime-solving purposes.⁴⁴ Most powerfully, Justice Scalia explained (partially through the use of a chart) why fingerprinting differed dramatically from DNA typing.⁴⁵ He observed that known fingerprints are not “systematically compared” with latent prints from unsolved crime scenes (in contrast to DNA),⁴⁶ and even if so, courts have never approved such action. He also observed that while fingerprinting may not even be a “search,” analysis of genetic code certainly is.⁴⁷

Finally, the dissent warned of the easy breach of perceived limits in the majority opinion, and viewed no principled means of distinguishing efforts to take the DNA of those arrested even for traffic offenses.⁴⁸ It also viewed such an outcome as lamentable, given that all parties agreed that sampling of King upon conviction would have been constitutionally permissible; thus, “[t]he only arrestees to whom the outcome here will ever make a difference are those who *have been acquitted of*

⁴⁰ *Id.* at 1982.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1983–85.

⁴⁴ *Id.* at 1986–87.

⁴⁵ *Id.* at 1987–88.

⁴⁶ *Id.* at 1987.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1989 (“Make no mistake about it: As an entirely predictable consequence of today’s decision, your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason.”).

the crime of arrest (so that their DNA could not have been taken upon conviction).⁴⁹ The dissent closed as strongly as it opened:

Today's judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane (surely the Transportation Security Administration needs to know the "identity" of the flying public), applies for a driver's license, or attends a public school. Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.⁵⁰

II. KING BETWEEN THE LINES: WHAT IT MEANS FOR ARRESTEE DNA TYPING

At the same time that certiorari was sought in *King*, a case captioned *Haskell v. Harris* was winding its way through the federal courts in California.⁵¹ The named plaintiff in *Haskell*, which was brought by the ACLU of Northern California, was arrested at a political rally and forced to give a DNA sample.⁵² She brought suit in 2009, complaining that California's DNA collection law violated her civil rights.⁵³ The record amassed in *Haskell*, a civil case with the benefit of liberal discovery rules, differed dramatically from that in *King*. ACLU attorneys requested and received extensive documentation on the operation and efficiency of California's database and proffered an array of experts to testify as to various aspects of the policy.⁵⁴ The en banc Ninth Circuit heard oral arguments in the case, but announced that it would not issue a ruling until the decision in *Maryland v. King*.⁵⁵

Nevertheless, the questions raised by *Haskell*, and the information it generated about DNA practices, were a centerpiece of the litigation in *King*. Foremost, the *King* parties called attention to the dramatic differences between the Maryland and California statutes. Whereas Maryland allows analysis of DNA only after the arrest is validated by a judicial finding of probable cause, California allows an officer to analyze a DNA sample immediately. Whereas Maryland requires automatic expungement of the record and destruction of the sample if the

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Haskell v. Harris*, 686 F.3d 1121 (9th Cir. 2012) (order granting rehearing en banc); *Haskell v. Harris*, 669 F.3d 1049, 1051 (9th Cir. 2012) (finding arrestee DNA collection constitutional).

⁵² See *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1192 (N.D. Cal. 2009), *aff'd sub nom.* *Haskell v. Harris*, 669 F.3d 1049.

⁵³ *Id.*

⁵⁴ Disclosure: I submitted an affidavit on Haskell's behalf in the litigation.

⁵⁵ *Haskell v. Harris*, No. 3:09-cv-04779-CRB (9th Cir. Nov. 28, 2012) (order deferring case pending the Supreme Court's decision in *King*).

case is dismissed, California requires that the arrestee petition the authorities with such a request. And whereas the Maryland statute is limited to a narrow subset of the most serious of offenses, California's statute allows sampling of all felony arrestees.

Moreover, as the Court well knew, California's broad statute is not atypical. Twenty-seven other states and the federal government currently allow arrestee typing.⁵⁶ Of those, only fifteen limit the relevant population to serious felons; thirteen allow typing of all felons, and seven even permit collection from certain misdemeanants.⁵⁷ At least four states allow collection of DNA from juvenile arrestees.⁵⁸ In addition, two-thirds of the arrestee-collection states authorize sampling upon arrest, rather than requiring a judicial determination of probable cause,⁵⁹ and most require the sampled individual to seek expungement.⁶⁰

Although not directly raised by the *King* case, each of these issues — judicial checks on probable cause, qualifying offenses, and expungement — was squarely presented to the Court. Indeed, the brief for the United States explained that “unlike Maryland, the federal government collects DNA samples from all of its arrestees, not just those arrested for particular crimes, and may analyze a sample before an arrestee's appearance in court. In addition, unlike Maryland arrestees, federal arrestees who are not convicted must affirmatively request expungement.”⁶¹ Moreover, advocates for King, including the ACLU of Northern California, filed briefs underscoring the potential scope of the Court's ruling and encouraging attention to the particular details of the Maryland statute.⁶² The Court, in issuing the stay pending certiorari, observed the split in the circuits and acknowledged that courts were grappling with these precise issues in cases pending across the country.⁶³ The failure of the decision to offer express guidance on these matters is thus a silence that speaks at least as loudly as words, especially since the Court not only resisted declaring such safeguards as essential, but also planted seeds suggesting the contrary.

⁵⁶ Julie Samuels et al., *Collecting DNA from Arrestees: Implementation Lessons*, NAT'L INST. JUST. J., June 2012, at 18, 19, available at <https://www.ncjrs.gov/pdffiles1/nij/238484.pdf>.

⁵⁷ *Id.* at 20–21. These laws are changing all the time and are likely to change even more rapidly after *King*. These data are current as of June 2012.

⁵⁸ *DNA Collection upon Arrest*, NAT'L CLEARINGHOUSE FOR SCI., TECH. & L. (May 2011), <http://www.ncstl.org/resources/DNACollectionUponArrest>.

⁵⁹ Samuels, *supra* note 56, at 21.

⁶⁰ *Id.* at 23.

⁶¹ Brief for the United States as Amicus Curiae Supporting Petitioner at 5, *King*, 133 S. Ct. 1958 (No. 12-207) [hereinafter U.S. Br.] (citation omitted).

⁶² See, e.g., Brief of Amici Curiae American Civil Liberties Union, ACLU of Maryland, and ACLU of Northern California Supporting Respondent at 31–38, *King*, 133 S. Ct. 1958 (No. 12-207).

⁶³ *Maryland v. King*, 133 S. Ct. 1, 2 (2012).

A. *Judicial Findings of Probable Cause*

First, nothing in the opinion suggested that the constitutionality of arrestee typing hinges on a requirement that a judicial officer first validate the arrest as supported by probable cause. To be sure, in the factual background portion of the opinion, the Court described Maryland's law as prohibiting analysis of DNA until the individual is arraigned.⁶⁴ But it never pronounced that provision indispensable. Indeed, the closing of the opinion affirmed that:

When officers make an arrest supported by probable cause to hold for a serious offense and they *bring the suspect to the station* to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a *legitimate police booking procedure* that is reasonable under the Fourth Amendment.⁶⁵

Although the “supported by probable cause” language might at first glance suggest a magistrate's approval, upon reflection that reading seems strained. Instead, that phrase seems only to affirm that records from arrests not supported by probable cause may be expunged, as all statutes provide. It does not indicate a temporal limitation on taking and analyzing a sample. In fact, by describing the analysis as occurring at the station, and analogizing it to other booking procedures done there,⁶⁶ the Court seems to expressly indicate that judicial preapproval is not required. Moreover, the Court's reasoning — grounded in the importance of officer and correctional safety — reflects concerns that arise *before* an arrestee is taken to court.⁶⁷ In short, it seems clear that the majority did not view judicial validation of the arrest as constitutionally significant in any way.

B. *The Seriousness of the Offense*

The ominous ending of Justice Scalia's dissent cautioned that *King* paves the way for DNA testing of persons far beyond arrestees for serious crimes. He chided the Court for false assurances to the contrary, referencing no fewer than seven pages that he views as the majority “limiting the analysis to ‘serious offenses.’”⁶⁸ While Justice Scalia surely is correct that any such language constitutes “a limitation it

⁶⁴ *King*, 133 S. Ct. at 1967.

⁶⁵ *Id.* at 1980 (emphases added).

⁶⁶ *See id.* at 1971 (discussing “procedures at a police station house incident to booking and jailing the suspect” (quoting *Illinois v. Lafayette*, 462 U.S. 640, 643 (1983)) (internal quotation mark omitted)); *id.* (describing DNA analysis as akin to checking name or social security number).

⁶⁷ *See, e.g., id.* at 1970 (citing “the need for law enforcement officers in a safe and accurate way to process and identify the persons . . . they must take into custody”); *id.* at 1971–72 (asserting that police need to know whom they are processing).

⁶⁸ *Id.* at 1989 (Scalia, J., dissenting).

cannot deliver,”⁶⁹ it is far from clear that the majority ever made that supposed promise.

Of the multiple citations to “serious” offenses in the majority opinion, only two could plausibly be construed as intended to mark a limit; the remainder simply serve as adjectives that describe the scope of the statute. The first possible effort at restriction is found in the Court’s attempt to give weight to King’s privacy interest. Specifically, the Court diminished that interest given the fact of King’s arrest, noting that “[i]n considering those expectations in this case, however, the necessary predicate of a valid arrest for a serious offense is fundamental.”⁷⁰ To a generous reader, that might suggest that a weightier interest in privacy could be held by one arrested for a lesser offense; alternatively, it might suggest greater privacy for those whose arrests are not judicially validated. The second occasion arises in the opinion’s closing, when the Court effectively stated the holding of the case as follows: “When officers make an arrest supported by probable cause to hold for a serious offense”⁷¹ But nothing in the opinion itself seems to affirm that limit as imperative.

In contrast, the Court repeatedly suggested that it sees no reason to limit DNA testing to serious felons alone. In justifying collection of DNA for the purpose of ascertaining criminal history, the Court declared it “a common occurrence that ‘[p]eople detained for *minor offenses* can turn out to be the most devious and dangerous criminals.”⁷² The Court went on to give three examples: two hunted killers stopped in separate instances for driving without a license plate, and a 9/11 terrorist who received a speeding ticket just days before hijacking one of the planes.⁷³ In other words, the Court intimated, if only we collected DNA samples from all traffic law violators (note: not even traffic *arrestees*), then we might have closed those cases sooner.

The logical structure of the majority’s opinion also depends upon treating DNA samples as equivalent to other means of identification, whether social security number, driver’s license, photograph, or fingerprint.⁷⁴ It makes no sense to suggest that identity is important for one set of law enforcement contacts but not for another. In fact, the Court was cautious to explain that not only *detaining* a suspect, but also set-

⁶⁹ *Id.*

⁷⁰ *Id.* at 1977–78 (majority opinion).

⁷¹ *Id.* at 1980.

⁷² *Id.* at 1971 (alteration in original) (emphasis added) (quoting *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1520 (2012)).

⁷³ *Id.*

⁷⁴ The dissent concurred, reasoning abstractly that the opinion opens such doors since “[i]f one believes that DNA will ‘identify’ someone arrested for assault, he must believe that it will ‘identify’ someone arrested for a traffic offense.” *Id.* at 1989 (Scalia, J., dissenting).

ting bail release conditions,⁷⁵ and even processing a person through a precinct, raises the need for this expansive inquiry into “identification.”⁷⁶ Following the Court’s logic, police have as much need to know the criminal history of the jaywalker as they do the robber, because either could be a dangerous killer poised to flee or threaten officer or correctional safety. Inasmuch as Justice Scalia viewed the majority as even *attempting* to limit its holding, such a reading seems at best generous.

C. Automatic Expungement

The final point on which the majority was determinedly silent relates to the consequences of erroneous collection of DNA. The majority’s reticence in this regard is, perhaps, more defensible. That is because the expungement provisions of DNA statutes are complex in ways that can be difficult to intuit and highly factual in execution.

To clarify, consider that in California, expunging an improperly loaded DNA profile often takes as long or longer than it does to analyze and upload it.⁷⁷ In general, such a request takes two to four weeks to process and complete,⁷⁸ whereas processing of samples averages thirty days.⁷⁹ Even that estimate is rapidly dwindling — as surfaced repeatedly during the oral argument, technology companies are currently designing instruments to process known samples of DNA in ninety minutes on printer-sized platforms that require no special expertise to use.⁸⁰ And once the “match” cat is out of the bag, it seems all

⁷⁵ *Id.* at 1974 (majority opinion) (“[E]ven when release is permitted, the background identity of the suspect is necessary for determining what conditions must be met before release is allowed.”).

⁷⁶ *Id.* at 1974–75 (discussing importance of “proper processing of arrestees,” *id.* at 1974, and the station-house search).

⁷⁷ California has one of the easier expungement processes available. No lawyer or filing fees are required, and the petitioner can download a form online and mail it, along with “sufficient documentation” of “identity, legal status, and criminal history” (though the instructions are vague as to what satisfies these criteria), to the state Department of Justice. See *Expungement Application Instructions*, ST. CAL. DEPARTMENT JUST., OFF. ATT’Y GEN., http://oag.ca.gov/sites/all/files/pdfs/bfs/expungement_app_instruc.pdf (last visited Sept. 29, 2013).

⁷⁸ *BFS DNA Frequently Asked Questions*, ST. CAL. DEPARTMENT JUST., OFF. ATT’Y GEN., BUREAU FORENSIC SERVICES, <http://oag.ca.gov/bfs/prop69/faqs> (last visited Sept. 29, 2013).

⁷⁹ Brief for the State of California et al. as Amici Curiae Supporting Petitioner at 18 n.10, *King*, 133 S. Ct. 1958 (No. 12-207) (“DNA identification database samples have been processed in as few as two days in California, although around 30 days has been average.”).

⁸⁰ Transcript of Oral Argument, *supra* note 1, at 17 (attorney for the United States suggesting that ninety-minute devices are in the immediate future); *id.* at 59 (Maryland attorney suggesting that these rapid platforms will be available in eighteen months to two years); Brief of the National Association of Assistant United States Attorneys and National District Attorneys Association as Amici Curiae in Support of Petitioners at 19–20, *King*, 133 S. Ct. 1958 (No. 12-207) (describing the size and convenience of these new platforms). Although, oddly, the amicus brief filed by the very companies undertaking such developments — who, it should be noted, stand to make a great deal of money from the sale of these instruments for every precinct and perhaps even squad car in the nation — did not focus on this issue. See Brief of the Global Alliance for Rapid DNA Testing

but impossible to put back in. At least one circuit has held that obtaining a DNA sample in violation of the Fourth Amendment falls under the good faith exception to the exclusionary rule, so any unlawfully seized DNA material would nonetheless be admissible as evidence.⁸¹

In fact, in some respects the expungement debate seems absurdly academic. Consider that jurisdictions across America engage in “rogue” databasing — the collection and recording of samples in local and unofficial databases that need not comply with formal statutory law.⁸² Most of these are “voluntary” or “abandoned” samples — the bits of DNA offered by victims or witnesses to exclude their own profiles from a crime scene mixture, or swabbings from doors or cups handled by suspects at the station. Such forms of collection have been almost universally held constitutional, suggesting that any profile that law enforcement wants, it can rather easily get.⁸³ One private company even offers software services to police departments looking to link their local databases to one another outside of the national system.⁸⁴ At least nine departments⁸⁵ have signed up to take advantage of the promise to “put[] your local law enforcement agency back in charge” rather than “get tied up in red tape.”⁸⁶

Informal collection programs of this kind may presently seem like a poor substitute for systematic collection of DNA from all those who come into contact with the criminal justice system, but that is more the product of short-term technological limitations than long-term feasibility concerns. Imagine the scene five years from now, the path to which has been cleared by the opinion in *King*. The Global Alliance

as Amicus Curiae in Support of Petitioner at 1, *King*, 133 S. Ct. 1958 (No. 12-207) (identifying themselves as “an association of business organizations with a common interest in promoting consensus on issues relating to the widespread implementation of biometric technologies for rapid DNA identification”).

⁸¹ *United States v. Davis*, 690 F.3d 226, 251–57 (4th Cir. 2012) (refusing to apply the exclusionary rule to unlawful collection of DNA sample). The good faith exception has, of course, broadened considerably in recent years. *See, e.g.*, *Herring v. United States*, 129 S. Ct. 695, 698 (2009) (holding evidence seized as a result of an illegal arrest caused by police record-keeping error admissible under good faith exception).

⁸² Erin Murphy, *Physician Heal Thyself: Whither the Police and Prosecutor in the Tale of Forensic Science Gone Wrong?*, 91 TEX. L. REV. SEE ALSO 101, 110 (2013), <http://www.texaslrev.com/physician-heal-thyself-whither-the-police-and-prosecutor-in-the-tale-of-forensic-science-gone-wrong>; Joseph Goldstein, *Police Agencies Are Assembling Records of DNA*, N.Y. TIMES, June 12, 2013, at A1.

⁸³ *See, e.g.*, *Williamson v. State*, 993 A.2d 626, 628–29 (Md. 2010) (upholding sample collected from McDonald’s cup offered to defendant during questioning on unrelated charges); *see also* Elizabeth E. Joh, *Reclaiming “Abandoned” DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. U. L. REV. 857, 865–66 (2006).

⁸⁴ *Local vs. National Database*, LODIS WORLDWIDE, <http://lodisworldwide.com/local-vs-national-database> (last visited Sept. 29, 2013).

⁸⁵ *See* Goldstein, *supra* note 82.

⁸⁶ *Local vs. National Database*, *supra* note 84; *see also* Goldstein, *supra* note 82.

for Rapid DNA Testing announces its lowest cost single-touch DNA typing system for known samples: one Q-tip plus ninety minutes equals a DNA profile of a known offender that can instantly be checked against any database. Every precinct and squad car is outfitted with such a device. Given the ease of swabbing, why not request or demand a sample at every police encounter? As a routine matter, officers during “stop-and-frisks” ask suspects to “voluntarily” submit to swabbing. Those arrested for low-level offenses are given the chance to “spit and acquit.”⁸⁷ Police during traffic stops lawfully request swabs to verify identity. And of course any offender actually processed at the precinct has a mug shot and DNA sample taken as a matter of course — if the law does not explicitly allow genetic sampling, then police can simply swab the cuffs or cell.

Expungement, in such a world, is so incidental it is hardly worth mentioning. Moreover, returning to the Court’s “identification” analogy, law enforcement does not routinely erase the pictures or expunge the fingerprints of arrestees whose cases are dismissed. Why, then, would the Court expect law enforcement to act any differently with a DNA sample?

* * *

Let me be clear: I would prefer to read the *King* opinion as narrowly as possible, so that it does the least amount of violence to the protections embodied in the Fourth Amendment. The text of the opinion bears either a narrow or broad reading. But it is the silences that this Part expounds upon and, for the reasons given, views them as speaking as loudly as declarations. The next two Parts explain why those declarations are unfortunate.

III. *KING* AND THE DOUBLE HELIX: THE DNA CASES TO COME

Many criminal procedure scholars who vaguely followed the *King* case had a hard time understanding what the fuss was about. Their position might be summed up by the majority’s assertion that “DNA identification is an advanced technique superior to fingerprinting in many ways, so much so that to insist on fingerprints as the norm would make little sense to either the forensic expert or a layperson.”⁸⁸ Considering that the FBI database contains over 100 million sets of fingerprints, and that it processed more than 61 million ten-print sub-

⁸⁷ See Elizabeth Jones & Wallace Wade, “*Spit and Acquit*”: *Legal and Practical Ramifications of the DA’s DNA Gathering Program*, ORANGE COUNTY LAW., Sept. 2009, at 18, 18 (describing Orange County’s “spit and acquit” program for misdemeanors).

⁸⁸ *King*, 133 S. Ct. at 1976.

missions in 2010 alone,⁸⁹ this equation of DNA identification with fingerprint technology suggests a bright future for law enforcement's DNA collection practices. So what difference would it make if police had 100 million people's genetic, rather than biometric, material?

This Part addresses three misconceptions about forensic DNA typing that permeate the *King* opinion: first, that DNA typing will only be of concern to criminals; second, that the police will not probe sensitive or private genetic information, and that laws protect against misuse; and third, that collecting more DNA samples from known individuals will solve a lot of crime. In short, the previous Part argues that the *King* opinion can be read as an embrace of expansive forensic DNA testing. This Part explains why that is a bad idea.

A. *Myth: King Matters Only to Criminals*

King might be viewed as a statement less about the legal status of DNA sampling than as one about the legal status of arrestees. It could be seen as simply a natural outgrowth of *Samson v. California*,⁹⁰ the case that justified random searches of parolees without a warrant or suspicion based on their diminished status as subjects with conditional liberty.⁹¹ In this telling, *King* is not a declaration of general disinterest in genetic privacy, but simply an expression of the Court's lack of solicitude for those entangled in the criminal justice system.

But if what decided the issue for the Court was that arrestees deserve less protection than "the average citizen,"⁹² then it seems that the Court could have rested its opinion on those grounds alone. In other words, the Court could have said, "DNA testing is a serious and significant intrusion on bodily integrity. But the Constitution permits the state, with a compelling enough interest, to impinge on the most fundamental aspects of bodily privacy when it comes to arrestees."⁹³ Thus, the Constitution permits the DNA sampling of an arrestee, despite the seriousness of the intrusion involved." It could have walled off the opinion as a categorical exception that applies only to convicted offenders and arrestees, and declared the law-abiding public's DNA out of bounds.

But that is not what the Court did. Rather than just say that arrestees may at times be forced to divulge sensitive information, the majority took pains to diminish the interest in genetic privacy altogether. It described DNA typing as a "brief" and "minimal intru-

⁸⁹ See *Integrated Automatic Fingerprint Identification System*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/ (last visited Sept. 29, 2013).

⁹⁰ 547 U.S. 843 (2006).

⁹¹ *Id.* at 847.

⁹² *King*, 133 S. Ct. at 1978.

⁹³ See *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1513–14 (2012).

sion.”⁹⁴ It devoted an entire section to equating DNA sampling with fingerprinting, effectively suggesting that anywhere a fingerprint is permissible, a DNA test might be too.⁹⁵ And lastly, the Court expressed its faith in law as a safeguard against any possibility that the government might abuse the samples in its possession.⁹⁶

Because the *King* majority argued *both* that arrestees have diminished privacy *and* that DNA is not such private information, it is difficult to know which view is paramount. But the deliberate minimization of the intrusiveness of DNA typing, coupled with the embrace of the analogy to fingerprinting, suggests that the Court simply does not think that DNA sampling is that big of a deal. That, in turn, suggests that future cases involving DNA typing are much less likely to turn on the status of the *King* defendant as an arrestee than on the Court’s general nonchalance about government genetic testing.

To the extent that such an interpretation seems incompatible with Fourth Amendment doctrine, it is important to understand precisely what doctrine *King* laid down. To find constitutional footing, the Court needed to maneuver between two poles: the singular example of *Samson v. California*, which upheld random searches of parolees without a warrant, and the “special needs” cases that allow random, suspicionless searches for purposes other than law enforcement.⁹⁷ Yet neither quite fit.

King was not quite *Samson* because arrestees are legally distinguishable from convicted offenders — as underscored by the Constitution’s presumption of innocence. And although the Court’s jurisprudence has certainly made it harder to appreciate the difference between those adjudged guilty and those merely suspected of crime, there are definite constitutional boundaries that cannot be easily traversed. It is surely true that, as one commentator argued, once police arrest a person on probable cause: “[T]hey can search his person, photograph him, and fingerprint him. He can even be strip-searched. A person suspected of drunken driving can be required to take a Breathalyzer or jabbed with a syringe.”⁹⁸ But such an unqualified statement is doctrinally deceptive.

⁹⁴ *King*, 133 S. Ct. at 1979.

⁹⁵ *See id.* at 1976–80 (“The additional intrusion upon the arrestee’s privacy beyond that associated with fingerprinting is not significant.”).

⁹⁶ *Id.* at 1979–80.

⁹⁷ The problem was evident at the oral argument, when Chief Justice Roberts engaged the Deputy Solicitor General in a discussion about the proper standard. The Deputy candidly “acknowledge[d] that there is no case on my side that decides the case.” Transcript of Oral Argument, *supra* note 1, at 24.

⁹⁸ Eric Posner, *The Mother of DNA Databases*, SLATE (Mar. 5, 2013, 12:04 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/03/dna_at_the_supreme_court_the_case_for_a_universal_database.html.

Fourth Amendment law — for good reason — doctrinally distinguishes among each of those activities. Photographing (and arguably fingerprinting) an individual does not implicate the Constitution, because it is not a “search.”⁹⁹ Searches of the person are justified as necessary for officer protection and evidence preservation, not ordinary crime solving — which is why getting arrested for an offense does not open individuals to warrantless and suspicionless searches of their homes, cars, or offices.¹⁰⁰ And in fact the police do not have *carte blanche* to strip search and syringe jab any arrestee; they must have a justification *beyond* mere arrest (for example, that the person will be introduced into a general jail population,¹⁰¹ or that there is suspicion of intoxication¹⁰²). DNA, in contrast, *is* a search, done for ordinary crime-solving purposes, with no specialized justification. The line between arrestees and convicted offenders may be slim, but to hold that *Samson* controlled would have been to all but erase what Fourth Amendment distinctions remain.

Yet the “special needs” doctrine, despite its role as the traditional refuge of the warrantless, suspicionless search, did not quite work either. Indeed, the special needs cases proved problematic even for *convicted offender* DNA sampling, because they explicitly and importantly apply only to searches for purposes other than “ordinary criminal wrongdoing.”¹⁰³ Interestingly, however, the Court did not distinguish special needs on that ground. The majority conceded that the special needs cases “do not have a direct bearing on the issues presented in this case,” but *not* because the DNA collection at issue was for “ordinary law enforcement.”¹⁰⁴ Rather, those cases were inapposite because

⁹⁹ In contrast, the Court has held that police must have reasonable suspicion in order to demand something as simple as a person’s name. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 184 (2004) (summarizing constitutional history of “stop and identify” statutes); *Brown v. Texas*, 443 U.S. 47, 52 (1979) (finding violation of Fourth Amendment in stop-and-identify statute when applied without reasonable suspicion).

¹⁰⁰ As the Court wrote in *Schmerber v. California*, 384 U.S. 757 (1966), the search-incident-to-arrest exception, which typically allows a search of the arrestee without suspicion, is founded in concerns about destruction of evidence and the danger of concealed weapons, but these considerations “have little applicability with respect to searches involving intrusions beyond the body’s surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained.” *Id.* at 769–70. Thus, “[i]n the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.” *Id.* at 770.

¹⁰¹ See *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1522–23 (2012) (qualifying holding as limited to general population inmates).

¹⁰² See *Schmerber*, 384 U.S. at 770.

¹⁰³ See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 38 (2000) (striking down drug interdiction checkpoint, as distinguished from permissible sobriety checkpoint, because its purpose was to check for “ordinary criminal wrongdoing”).

¹⁰⁴ *King*, 133 S. Ct. at 1978.

they target “either the public at large or a particular class of regulated but otherwise law-abiding citizens.”¹⁰⁵ In contrast, arrestees have diminished privacy, and so the Constitution “does not require consideration of any unique needs that would be required to justify searching the average citizen.”¹⁰⁶

That maneuver yields two significant insights. First, it gestures toward a tacit concession by the Court that the DNA collection at issue constituted “ordinary law enforcement.” Second, it seemingly acknowledges that even those with some measure of diminished privacy — such as schoolchildren,¹⁰⁷ highway travelers,¹⁰⁸ public employees,¹⁰⁹ or other special needs categories — might still retain an interest in protecting their identity from police. That would seem to call into question Justice Scalia’s warning that the majority’s opinion forebodes DNA testing of “anyone who flies on an airplane . . . applies for a driver’s license, or attends a public school.”¹¹⁰

But this reading seems undermined by the ultimate legal foot upon which the opinion stands. The most radical aspect of *King* is its re-imagining of the idea of “identity” to include criminal history and other information beyond “name and social security number,” as discussed in greater depth in the next section.¹¹¹ That generous redefinition allowed the Court to rely upon analogizing DNA to “routine booking” procedures like mug shots and fingerprints, which are generally exempt from constitutional scrutiny.¹¹² Such practices have not raised much concern, because they are viewed as colorless exercises in identification. It is only the spectre of abuse that has elicited constitutional attention.¹¹³ Police have never routinely collected or used photographs or prints for random crime-solving purposes; both were always mainly for identification of persons already *suspected* of a crime (i.e., individualized suspicion).¹¹⁴ We know this intuitively: how common are newspaper headlines about thirty-year-old cases solved

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2639 (2009); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985).

¹⁰⁸ See *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 447 (1990).

¹⁰⁹ See *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 668 (1989); *O’Connor v. Ortega*, 480 U.S. 709, 717 (1987).

¹¹⁰ *King*, 133 S. Ct. at 1989 (Scalia, J., dissenting).

¹¹¹ See *infra* Part III.B, pp. 179–81.

¹¹² See *King*, 133 S. Ct. at 1971–72.

¹¹³ See *Davis v. Mississippi*, 394 U.S. 721, 727–28 (1969).

¹¹⁴ See *King*, 133 S. Ct. at 1987–88 (Scalia, J., dissenting). Indeed, police could not have used photos or fingerprints for random crime-solving even if they had wanted to, since it was not until twenty or so years ago — when large biometric databases were developed — that it was even possible to conduct a random automated comparison between known files and crime scene samples.

through “cold hit” fingerprint or mug shot matches, or exonerations based on a hit to a fingerprint or photograph newly uploaded to the database?

In contrast, DNA is collected for the primary purpose of solving past and future crimes, and can be grievously abused and misused. By ignoring this distinction and simply calling DNA a twenty-first-century mug shot or fingerprint, the Court therefore opened the door to a broad police power historically unprecedented in our constitutional jurisprudence. If DNA collection from arrestees is okay just because these are criminal arrestees, then it would seem that other groups with diminished privacy have nothing to fear. But if DNA collection is *also* okay because DNA is no more than a twenty-first century fingerprint that simply relates one aspect of “identity,” then it is hard to read the Court’s opinion as rejecting collection of DNA in any case where collection of fingerprints is presently allowed.

King, in short, seems to tell the government that taking a person’s DNA is just like taking his or her fingerprints, only better. And, of course, it is not just criminals who must give up their fingerprints. Fingerprints are currently collected in a wide range of circumstances far beyond arrest, such as from professional licensees,¹¹⁵ home health and durable medical equipment providers,¹¹⁶ educators,¹¹⁷ driver’s licenses,¹¹⁸ and even volunteers of certain kinds.¹¹⁹ One can imagine the government’s interest in “identity” might even extend to recipients of public benefits like Medicare or unemployment, student aid, or users of mass transit. The Court’s relaxed view of wide-scale DNA sampling also flashes a green light for an array of other police DNA practices. The “voluntary” swabs and “stop-and-frisk” or “spit-and-acquit” samples discussed in the preceding Part start looking more and more constitutional,¹²⁰ as do familial searches or the development of

¹¹⁵ See, e.g., *Fingerprinting Information*, FLA. DEPARTMENT FIN. SERVICES, <http://www.myfloridacfo.com/agents/licensure/agents-adjusters/fingerprinting.htm> (last visited Sept. 29, 2013) (insurers); *Fingerprinting Requirements*, CAL. BUREAU REAL EST., <http://www.dre.ca.gov/Licensees/Fingerprint.html> (last visited Sept. 29, 2013) (real estate licensing); *Live Scan Fingerprinting Occupational Licensing*, CAL. DEPARTMENT MOTOR VEHICLES, <https://www.dmv.ca.gov/vehindustry/ol/livescan.htm> (last visited Sept. 29, 2013) (car salespersons, ambulance drivers, and other workers in the vehicle industry).

¹¹⁶ See, e.g., Nathan Trexler, *Fraud and Abuse: Key Provisions in the PPACA*, DEL. LAW., Spring 2013, at 16, 17.

¹¹⁷ See, e.g., *Fingerprint Background Check*, UTAH ST. OFF. EDUC., <http://www.schools.utah.gov/cert/License-Requirements/Fingerprint-and-Background-Check.aspx> (last visited Sept. 29, 2013); *Fingerprint Submission Requirement*, COLO. DEPARTMENT EDUC., <http://www.cde.state.co.us/cdeprof/fingerprints.htm> (last visited Sept. 29, 2013).

¹¹⁸ See, e.g., CAL. VEH. CODE § 12800(c) (West 2010); COLO. REV. STAT. ANN. § 42-2-107(1)(d)(2)(A) (West 2012).

¹¹⁹ See, e.g., *Frequently Asked Questions*, ARIZ. BOARD FINGERPRINTING, <http://www.azbof.gov/faq.htm#fingerprint> (last visited Sept. 29, 2013).

¹²⁰ See *supra* Part II, pp. 167-73.

databases linking genetic profiles to surnames¹²¹ — all of which simply render DNA identification more “efficient.” In sum, by not resting its holding on the particular status of arrestees, and by eliding the distinctions between superficial identifiers and biological ones, the Court arguably invited a new era of genetic identification.

B. Myth: Police Will Not, and Legally Cannot, Test for Any Kind of Sensitive Information

The Court’s redefinition of “identification” matters for a second reason: it sheds light on the probable constitutionality of future genetic tests. The opinion talked directly only about analysis of the thirteen noncoding, “junk” identifiers currently standard in DNA testing,¹²² making it easy to assume that *King* leaves no room for testing of more sensitive information. But look closer.

At numerous points in the opinion, the Court referenced the essential role that DNA plays in law enforcement’s “routine identification process[es].”¹²³ But again, notice that the Court does *not* describe DNA identification as a simple substitute means of checking that a known suspect is who he says he is. It is *not* simply looking at genetic code in place of fingertip whorls and loops. If it were, as the dissent points out, the majority could have upheld the DNA typing of arrestees for that purpose alone,¹²⁴ allowing only comparisons between the suspect’s DNA and that kept in the known offender database, forbidding comparisons with the unsolved crimes database. Instead, the Court reconceptualized “identification.” It declared a person’s identity “more than just his name or Social Security number.”¹²⁵ Rather, the government’s interest is in knowing “whom they are dealing with.”¹²⁶ Thus, a person’s “criminal history is a critical part of his identity,”¹²⁷ as is any information found in “public and police records.”¹²⁸ In fact, this interest in identity is capacious enough to include information about “a record of violence or mental disorder.”¹²⁹ It may even stretch as broadly as does Maryland’s bail statute, which points to “family

¹²¹ See generally Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291 (2010).

¹²² See *King*, 133 S. Ct. at 1966–67 (differentiating between coding regions, or genes, and noncoding regions that are “not related directly to making proteins” and thus have no external significance).

¹²³ See, e.g., *id.* at 1965, 1971, 1972, 1976, 1977, 1980.

¹²⁴ See *id.* at 1984–85 (Scalia, J., dissenting).

¹²⁵ *Id.* at 1971 (majority opinion).

¹²⁶ *Id.* at 1972 (quoting *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 186 (2004)).

¹²⁷ *Id.* at 1971.

¹²⁸ *Id.* at 1972.

¹²⁹ *Id.* (quoting *Hiibel*, 542 U.S. at 186).

ties, employment status and history, financial resources, reputation, character and mental condition.”¹³⁰

What does this matter for DNA? Genetics already has the power to expose familial ties. Research into still more sensitive information is ongoing, as briefs to the Court highlighted.¹³¹ Government health and science institutes fund innumerable studies of this kind, and the research arm of the Department of Justice itself is sponsoring research into the intersection of genetics and delinquency.¹³² Academic and commercial sectors also actively pursue links between genetics and asocial behavior or addiction, and preliminary findings correlating one genetic variation with violence have recently been published.¹³³ If the “pedophile gene” were found, or the “violence gene” established, then surely law enforcement will seek to mine genetic information for that “identification purpose.” After all, law enforcement needs to know just whom it is dealing with.

If the prospect of incarcerating people based on a probabilistic predisposition to violence or pedophilia seems fanciful, then recall that we currently do just that by means of risk assessment tools of questionable reliability.¹³⁴ Those instruments help make determinations from bail to sentencing and beyond, including civil commitment of sexual predators.¹³⁵ Folding a genetic assessment into the profile — so that the offender’s report includes both performance on a clinical or actuarial instrument as well as any genetic predispositions that may be of concern — hardly seems incredible.

Moreover, contrary to the Court’s suggestion, almost none of the state or federal statutory regimes authorizing DNA collection restrict such uses of DNA samples. These laws presumably “guard against further invasion of privacy”¹³⁶ by restricting genetic testing to “identification” purposes only.¹³⁷ But as *King* itself tells us, “identification” is

¹³⁰ *Id.* at 1973 (quoting MD. CODE ANN., RULES § 4-216(f)(1)(C) (West 2013)).

¹³¹ Brief for Genetic Scientists Robert Nussbaum and Sara H. Katsanis as Amici Curiae in Support of Respondent at 31–32, *King*, 133 S. Ct. 1958 (No. 12-207) [hereinafter Scientists’ Br.]; Scholars’ Br., *supra* note 14, at 38–39.

¹³² See KEVIN M. BEAVER, INTERSECTION OF GENES, THE ENVIRONMENT, AND CRIME AND DELINQUENCY: A LONGITUDINAL STUDY OF OFFENDING (2010), available at <https://www.ncjrs.gov/app/publications/abstract.aspx?id=253671> (studying five genes for interactions).

¹³³ See Cathy Spatz Widom & Linda M. Brzustowicz, *MAOA and the “Cycle of Violence,”* 60 *BIOLOGICAL PSYCHIATRY* 684 (2006) (citing studies of MAOA “violence” gene); see also, e.g., ADRIANE RAINE, *THE ANATOMY OF VIOLENCE: THE BIOLOGICAL ROOTS OF CRIME* (2013).

¹³⁴ See generally CHRISTOPHER SLOBOGIN, *PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS* 101–09 (2007).

¹³⁵ *Id.* at 108–09.

¹³⁶ *King*, 133 S. Ct. at 1979.

¹³⁷ *Id.* at 1980 (quoting MD. CODE ANN., PUB. SAFETY § 2-512(c) (West 2013)). Indeed, most statutes also allow collected samples to be used for “identification” research as well, and research-

more than a name and social security number,¹³⁸ which at best erects a weak barrier against more intrusive forms of genetic testing, and at worst encourages the exploitation of technology as it moves in new directions. Whereas some of the lower court opinions on compulsory DNA testing directly disavowed analysis of genetic samples for any expressive information, the Supreme Court issued no such edicts. Indeed, the Court was not even troubled by the government's retention of the full DNA sample, likening it to a urine sample that is tested only for drugs even though a test could also reveal pregnancy.¹³⁹ Instead, *King* says simply that, should police conduct testing for "predisposition for a particular disease or other hereditary factors not *relevant to identity*, that case would present additional privacy concerns not present here."¹⁴⁰

C. Myth: Arrestee Sampling Is Necessary to Solve a Lot of Crime

Lurking beneath the majority's ringing endorsement of arrestee DNA testing is, without question, the sense that it is an indispensable tool in the fight against crime.¹⁴¹ But that assumption proves misguided. Study after study has shown that it is improving the collection of DNA from crime scenes, not from known offenders, that would make a real difference in solving cases. As I have written elsewhere,¹⁴² the real crisis in DNA collection is not the inadequacy of the ten-million-plus-person database of known offenders, but that of the 498,600 crime scene sample database.¹⁴³ Consider that there are typi-

ers have made use of those provisions. See, e.g., Manfred Kayser et al., *Y Chromosome STR Haplotypes and the Genetic Structure of U.S. Populations of African, European, and Hispanic Ancestry*, 13 GENOME RES. 624, 631 (2003) ("All the U.S. samples used here were provided to us by U.S. crime laboratories . . ."). A Defense Department advisory group has even advocated the association of genetic samples collected from members of the military to their medical records at Veterans Hospitals, in order to conduct highly sensitive and nuanced research. JASON, THE MITRE CORP., THE \$100 GENOME: IMPLICATIONS FOR THE DOD 43 (2010).

¹³⁸ *King*, 133 S. Ct. at 1971.

¹³⁹ *Id.* at 1979; see also *United States v. Kriesel*, 720 F.3d 1137 (9th Cir. 2013) (rejecting defendant's interest in return of blood sample taken for DNA testing, citing government's legitimate interest in retention).

¹⁴⁰ *King*, 133 S. Ct. at 1979 (emphasis added).

¹⁴¹ See, e.g., *id.* at 1966 ("The advent of DNA technology is one of the most significant scientific advancements of our era. . . . Since the first use of forensic DNA analysis . . . law enforcement, the defense bar, and the courts have acknowledged DNA testing's 'unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices.'" (quoting *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 55 (2009))).

¹⁴² Brandon L. Garrett & Erin Murphy, *Too Much Information*, SLATE (Feb. 12, 2013, 8:22 AM), http://www.slate.com/artIcles/news_and_polItics/jurIsprudence/2013/02/dna_collectIon_at_the_supreme_court_maryland_v_king.html.

¹⁴³ CODIS — NDIS Statistics, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics> (last visited Sept. 29, 2013).

cally over a million violent crimes *per year*,¹⁴⁴ and yet fewer than half a million crime scene samples have been loaded into the database in its fifteen years of existence.¹⁴⁵ Several studies, most prominently one by the RAND Corporation, have concluded that “database matches are more strongly related to the number of crime-scene samples than to the number of offender profiles in the database.”¹⁴⁶

Yet contrary to the images broadcast to the public on television shows, forensic evidence, including DNA evidence, is not collected from the vast majority of crime scenes. Indeed, one recent study of five jurisdictions found that homicide was the only offense for which forensic evidence was routinely collected, submitted for testing, and actually tested.¹⁴⁷ Physical evidence was collected in fewer than one-third of burglaries,¹⁴⁸ robberies,¹⁴⁹ and aggravated assaults¹⁵⁰ and actually tested in only about one in ten of those cases.¹⁵¹ Another study of unsolved rape and homicide cases found that, among cases in which forensic evidence had been collected, “about 40% of the unanalyzed cases were estimated to have contained DNA evidence.”¹⁵² In a perfect world, collection of known offenders’ samples would not affect crime scene sample processing. But in our resource-constrained reality,

¹⁴⁴ U.S. DEP’T OF JUSTICE & FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES (2011), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime>.

¹⁴⁵ CODIS — NDIS Statistics, *supra* note 143.

¹⁴⁶ JEREMIAH GOULKA ET AL., RAND CTR. ON QUALITY POLICING, TOWARD A COMPARISON OF DNA PROFILING AND DATABASES IN THE UNITED STATES AND ENGLAND I (2010), available at http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR018.pdf; see also HOME AFFAIRS COMMITTEE, THE NATIONAL DNA DATABASE, 2009–10, H.C. 222-II, at Ev 34 (U.K.) (Memorandum submitted by GeneWatch UK), available at <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhaff/222/222ii.pdf> (“This is because the number of crimes detected is driven primarily by the number of crime scene DNA profiles loaded, not the number of individuals’ profiles loaded or retained.”); *id.* (finding little gain from “massive increase” in known offender samples, but significant gains from loading more low-level crime scene samples).

¹⁴⁷ JOSEPH PETERSON ET AL., NAT’L INST. OF JUSTICE, THE ROLE AND IMPACT OF FORENSIC EVIDENCE IN THE CRIMINAL JUSTICE PROCESS 8 (2010), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/231977.pdf>.

¹⁴⁸ *Id.* at 60 (showing that physical evidence was collected at twenty percent of burglary crime scenes).

¹⁴⁹ *Id.* at 107 (showing that physical evidence was collected at about twenty-five percent of robbery crime scenes).

¹⁵⁰ *Id.* at 42 (showing that physical evidence was collected at thirty percent of aggravated assault crime scenes).

¹⁵¹ *Id.* at 8. These dismal numbers do not simply reflect the amenability of the offenses to collection. For instance, one study of burglary and auto theft in five communities found that arrest and prosecution rates doubled when scenes were examined properly for evidence. JOHN K. ROMAN ET AL., URBAN INST. JUSTICE POLICY CTR., THE DNA FIELD EXPERIMENT: COST-EFFECTIVENESS ANALYSIS OF THE USE OF DNA IN THE INVESTIGATION OF HIGH-VOLUME CRIMES 4 (2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/222318.pdf>.

¹⁵² KEVIN STROM ET AL., THE 2007 SURVEY OF LAW ENFORCEMENT EVIDENCE PROCESSING 3-2 (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228415.pdf>.

the funds lavished on instrumentation and personnel for widespread arrestee sampling come at the cost of greater backlogs and fewer technicians for crime scene sample collection and analysis. *King* sadly ignored the real national crisis, which is not that we do not know the genetic signatures of enough offenders, but that we rarely check for them at crime scenes.¹⁵³

IV. *KING* AND THE FOURTH AMENDMENT

The preceding Part explores the ways in which the *King* decision may impact the future of forensic DNA typing. But *King* is also an important criminal procedure opinion in its own right. This Part identifies four aspects of the Court's understanding of the scope and protections of the Fourth Amendment that *King* exemplifies: the ascendance of "reasonableness balancing" as a dominant mode of constitutional inquiry; the endorsement of a breathtakingly broad idea of "discretionless" policing; the divide in the Court as regards the special status of scientific evidence; and the ongoing failure of the Court to embrace meaningful oversight tools with regard to big data.

A. *The Rise of Reasonableness*

Reconciling the two clauses of the Fourth Amendment — commonly referred to as the Warrant Clause and the Reasonableness Clause — has long vexed scholars and practitioners alike. Under the view associated most strongly with Professors Telford Taylor and Akhil Amar, the clauses are disjunctive — the core of the amendment is "reasonableness," and the Warrant Clause simply sets the standard applicable when those devices apply.¹⁵⁴ Under the contrary perspective, espoused over time by an array of scholars, the clauses are conjunctive — the Warrant Clause sets out the presumptive definition of reasonable.¹⁵⁵

The latter view historically dominated both courts and practice,¹⁵⁶ and for this reason nearly every leading criminal procedure book organizes its core materials on search and seizure in the same way, with

¹⁵³ The problem of insufficient attention to crime scene sample collection is obscured in part by the lack of transparency regarding the actual efficiency of DNA databases. The only number regularly reported is a "hits" number — the number of associations made in the database, without important information such as whether the hit produced a new suspect, arrest, prosecution, or conviction.

¹⁵⁴ See generally TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION (1969); AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE (1997); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

¹⁵⁵ See, e.g., Morgan Cloud, Book Note, *Searching Through History; Searching For History*, 63 U. CHI. L. REV. 1707, 1721–22 (1996); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 395 (1974).

¹⁵⁶ For a summary of critiques of the Taylor-Amar position, see Erik G. Luna, *The Models of Criminal Procedure*, 2 BUFF. CRIM. L. REV. 389, 433–38 (1999).

“reasonableness” cases (*Terry v. Ohio*¹⁵⁷ serving as the centerpiece) after warrant exceptions, and a short section devoted to warrantless, suspicionless searches for “special needs” at the end.¹⁵⁸ But whereas “reasonableness” cases used to fashion themselves as deviations from the rule, paying homage to warrants and suspicion,¹⁵⁹ such opinions increasingly have moved away from these qualifiers to more expressly embrace pure “reasonableness.”¹⁶⁰ This is so much true that in *King*, the United States’ brief could credibly open: “The ‘touchstone’ of a Fourth Amendment analysis ‘is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.’”¹⁶¹

But if the Court has slowly acknowledged a portal to a constitutional doctrine more disjunctive than conjunctive, then *King* may mark the moment that the door swung wide open. To be fair, it cannot be said that the warrant requirement is dead given a Term that also witnessed the handing down of *Missouri v. McNeely*.¹⁶² But Justice Kennedy’s opinion signals the demise of the warrant standard, declaring that the “touchstone of the Fourth Amendment is reasonableness, not individualized suspicion.”¹⁶³

That statement, alone, is remarkable. It is taken directly from a footnote in the *Samson* opinion,¹⁶⁴ which upheld the random and

¹⁵⁷ 392 U.S. 1 (1968).

¹⁵⁸ See, e.g., YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS & QUESTIONS xxiii–xxv (13th ed. West 2012); CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION 245–354 (LexisNexis 5th ed. 2012); JAMES B. HADDAD ET AL., CRIMINAL PROCEDURE: CASES AND COMMENTS 661–95 (Foundation Press 7th ed. 2008); JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: INVESTIGATING CRIME 421–44 (West 5th ed. 2013); RONALD JAY ALLEN ET AL., CRIMINAL PROCEDURE: INVESTIGATION AND RIGHT TO COUNSEL 598–630 (Wolters Kluwer 2d ed. 2011). But see ARNOLD H. LOEWY, CRIMINAL PROCEDURE: CASES, MATERIALS AND QUESTIONS (LexisNexis 3d ed. 2010) (grouping cases by subject area, such as automobile searches, border searches); ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE (Aspen 2008) (placing “special needs” under the warrant exceptions section).

¹⁵⁹ See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995) (“Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant.”).

¹⁶⁰ See, e.g., *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (adopting the disjunctive framework, and describing the Fourth Amendment as “thus expressly impos[ing] two requirements” — one of general reasonableness and the other of particularity and probable cause where warrants are required); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (“[T]he ultimate touchstone of the Fourth Amendment is ‘reasonableness.’”).

¹⁶¹ U.S. Br., *supra* note 61, at 11 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 108–09 (1977) (per curiam)). *Mimms* upheld the right of an officer to order outside the occupants of a lawfully stopped car. *Mimms*, 434 U.S. at 111.

¹⁶² 133 S. Ct. 1552, 1568 (2013) (finding no per se exigency exception to the warrant requirement for blood intoxication testing).

¹⁶³ *King*, 133 S. Ct. at 1970 (quoting *Samson v. California*, 547 U.S. 843, 855 n.4 (2006)) (internal quotation marks omitted).

¹⁶⁴ 547 U.S. at 855 n.4.

suspicionless search of a parolee. But *Samson* is not an iconic case describing the core of the Fourth Amendment. It was, until *King*, an outlier — a case that permitted a warrantless, suspicionless search primarily for ordinary law enforcement purposes. Doctrinally, it was explicable only as a reflection of the all but extinguished privacy expectations of those with conditional liberty.¹⁶⁵

Even still, tendrils of freestanding reasonableness have curled up in recent cases in contexts that cannot be described as “exceptional.” Two years ago, in *Kentucky v. King*,¹⁶⁶ reasonableness seemed to gain equal footing with, rather than remaining subordinate to, the warrant presumption. Writing for the Court, Justice Alito disclaimed a clear textual basis for the superiority of the warrant requirement, stating:

Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, this Court has inferred that a warrant must generally be secured. “It is a ‘basic principle of Fourth Amendment law,’” we have often said, “‘that searches and seizures inside a home without a warrant are presumptively unreasonable.’” But we have also recognized that this presumption may be overcome in some circumstances because “[t]he ultimate touchstone of the Fourth Amendment is ‘reasonableness.’”¹⁶⁷

Then, in this Term alone, the Justices thrice confronted the proper place of “reasonableness” balancing. In *Missouri v. McNeely* and *Bailey v. United States*,¹⁶⁸ a stronger version of this argument was made, but did not win a majority of the Court. Nonetheless, in *McNeely*, the opinion by Chief Justice Roberts — joined by Justices Breyer and Alito — described the text of the Amendment as “not stat[ing] that warrants are required prior to searches” but conceded that “this Court has long held that warrants must generally be ob-

¹⁶⁵ *Id.* *Samson* took the occasional language about “reasonableness” as the touchstone of the Fourth Amendment a step further, declaring that the “Fourth Amendment imposes no irreducible requirement of . . . suspicion.” *Id.* (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)) (internal quotation marks omitted). *Martinez-Fuerte*, in turn, was conventionally deemed yet another exceptional case, falling into a category of lax Fourth Amendment protection in light of the particular exigencies of border control. See, e.g., *Overview of the Fourth Amendment*, 41 GEO. L.J. ANN. REV. CRIM. PROC. 3, 21–22 (2012) (describing the type of border searches that are reasonable without any individualized suspicion). But these defined areas — border searches, corrections, schools, regulated industries, administrative needs, and the like — were considered categorical exceptions to the default presumption of a warrant or suspicion. See *id.* In other words, general reasonableness (in the absence of any suspicion) was treated as an exceptional standard for exceptional contexts, not simply an alternative formulation of the scope of Fourth Amendment protection.

¹⁶⁶ 131 S. Ct. 1849 (2011).

¹⁶⁷ *Id.* at 1856 (alteration in original) (citations omitted) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).

¹⁶⁸ 133 S. Ct. 1031 (2013).

tained.”¹⁶⁹ He continued by asserting that “the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’”¹⁷⁰

Most strikingly, in *Bailey v. United States*, Justices Thomas, Breyer, and Alito in dissent advocated a general balancing approach that underscored the “Fourth Amendment’s ‘ultimate touchstone of . . . reasonableness.’”¹⁷¹ Concurring separately, Justice Scalia, joined by Justices Ginsburg and Kagan, specifically criticized that approach, writing that “[i]t bears repeating that the ‘general rule’ is ‘that Fourth Amendment seizures are “reasonable” only if based on probable cause.’”¹⁷² They then observed that a rule allowing the detention of occupants during a search delineated a *categorical* exception to the Fourth Amendment that did not depend on any kind of ad hoc balancing in each case.¹⁷³ In other words, a court might ask whether to create *another* categorical exception justifying detention of occupants found outside the immediate vicinity, and that exception might even be applied internally using a “reasonableness” inquiry. But that differs dramatically from simply eliminating the first-order “exception to the default” inquiry in favor of case-by-case assessments under a test as elastic as “reasonableness.”¹⁷⁴

Viewed from this perspective, *Maryland v. King* lays bare a profound divide between the Justices in dissent and those in the majority.¹⁷⁵ The press found the *King* lineup confounding, but criminal proceduralists who watch the Court could have called it. Generally

¹⁶⁹ *Missouri v. McNeely*, 133 S. Ct. 1552, 1569 (2013) (Roberts, C.J., concurring in part and dissenting in part).

¹⁷⁰ *Id.* at 1569–70 (quoting *Brigham City*, 547 U.S. at 403) (internal quotation marks omitted).

¹⁷¹ 133 S. Ct. at 1048 (Breyer, J., dissenting) (alteration in original) (quoting *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011)).

¹⁷² *Id.* at 1044 (Scalia, J., concurring) (quoting *Dunaway v. New York*, 442 U.S. 200, 213 (1979)).

¹⁷³ *Id.* at 1043 (citing *Muehler v. Mena*, 544 U.S. 93, 98 (2005)) (“The existence and scope of the *Summers* exception were predicated on that balancing of the interests and burdens. But — crucially — whether *Summers* authorizes a seizure *in an individual case* does not depend on any balancing, because the *Summers* exception, within its scope, is ‘categorical.’”).

¹⁷⁴ See *id.* at 1044 (“*Summers* itself foresaw that without clear limits its exception could swallow the general rule: If a ‘multifactor balancing test of “reasonable police conduct under the circumstances” were extended ‘to cover all seizures that do not amount to technical arrests,’ it recognized the ‘protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases.’”) (quoting *Michigan v. Summers*, 452 U.S. 692, 705 n.19 (1981)).

¹⁷⁵ This debate overshadowed the oral argument in *King*. As the Deputy Solicitor General argued the reduced expectation of privacy of arrestees, Justice Kagan interrupted, noting that he “went right into free-form balancing.” But she added, “[t]hat’s typically not the way we do it [T]he way we do it is you need a warrant . . . [unless you] put yourself into a well-recognized exception where you can search without a warrant.” Transcript of Oral Argument, *supra* note 1, at 25. The response? The Court should apply “the key principle of the Fourth Amendment.” *Id.* at 26 (internal quotation marks omitted). He did not get to finish his thought, but what he meant, of course, was “reasonableness.”

speaking, the dissenters believe in the warrant requirement. They favor suspicion-based law enforcement activity. They follow a constitutional presumption that starts at that point and accepts deviation only in limited circumstances. *King* simply reflects the nascent alliance among Justices Scalia, Ginsburg, Sotomayor, and Kagan on these grounds.¹⁷⁶ But, of course, there are only four of them.

The majority, in contrast, believes in the government. They believe in “reasonableness” and “free-form balancing” as the Fourth Amendment’s anchors,¹⁷⁷ not something as rigid as suspicion or a warrant. That is why Justice Breyer’s “defection” to the right wing poses no mystery: Justice Breyer is not just an avowed pragmatist, he is also a big fan of government. It is not left or right that decided this case — or that decides most criminal procedure cases these days. It is the classic divide between rules and standards, amplified by a split between skeptics and believers in the beneficence of unfettered law enforcement.

But if freestanding interest balancing is the new touchstone of Fourth Amendment inquiry, then casebooks and class discussions deserve overhaul. And, given the increasing disconnect between the traditional Fourth Amendment hierarchy and lived experience, it is perhaps time. Warrants and suspicion are increasingly quaint relics barely recognizable to those accustomed to warrantless, suspicionless searches at schools, airports, and the like, not to mention the innumerable ways in which information is “voluntarily” shared in exchange for cell phone service or an E-ZPass.

Perhaps a new set of debates should dominate criminal procedure classes, asking questions like: What is the distinction between a search by the government and one by a private party — in the sense of power differentials, values, threats to liberty, extant constraints, etc.? How is police discretion regulated outside of the strictures of the Constitution? Should we treat disclosures of information differently if done out of necessity versus convenience, and how would we define those categories if we did? What is the actual incidence of police abuse and over-

¹⁷⁶ They also joined forces in *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (finding that using a drug detection dog on the porch of a home is a “search”). Justice Scalia’s shift to a seeming preference for warrants and probable cause marks a departure from some of his earlier positions. In *Vernonia*, for instance, he wrote: “As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is ‘reasonableness.’” *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995).

¹⁷⁷ Although, it should be noted that Justice Scalia led a majority in a very different case in 2008 that laid down a categorical rule. Joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito in elevating the status of the Second Amendment right to bear arms from a collective to individual right, he declared: “We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach. . . . A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.” *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008). Little did he know that his cosigners did not mean that to be the case for long.

reaching? Under what conditions does it occur, who does it typically affect, and how is it best curbed? What information might law enforcement need to keep private, and what should be made transparent? What are the risks and benefits of mass surveillance and data mining? These topics can arise in a criminal procedure class, but they are rarely the focal point. *King* signals that it might be time for that to change.

B. The Fallacy of “Discretionless” Group Surveillance

One common defense of allowing warrantless and suspicionless police activity is that group searches do not require the same robust constitutional check on government power because democratic process effectively serves that role.¹⁷⁸ As the theory goes, we need not worry as much about sobriety checkpoints or airport security running amok, because those searches affect such a wide swath of the population that any excess could be reined in with one simple election.¹⁷⁹ A related idea is that it is in fact *suspicion*-based law enforcement itself that invites overreaching and discrimination. In this view, searching every passenger’s bag is preferable to a regime that isolates particular bags for heightened attention, because the primary concern with regard to police is improper profiling, not intrusiveness.

A burgeoning literature debates the merits of this kind of general warrantless, suspicionless searching as a means of effective and fair law enforcement.¹⁸⁰ But the purpose of this section is not to elaborate on that discussion or even to apply it, as could be done, to the *King* case. Instead, this discussion makes two modest points. First, it argues that embedded in *King* is an endorsement of the idea that the less discretion an officer has, the less the Constitution needs to worry about abuses. And second, and more alarmingly, it suggests that the *King* Court’s concept of “discretionless” is dangerously misguided.

The first point is simple. The majority, in upholding the mandatory collection policy, asserted that “the search involves no discretion that could properly be limited by the ‘interpo[lation of] a neutral mag-

¹⁷⁸ See Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 *TOURO L. REV.* 93, 197–98 (2007).

¹⁷⁹ See *id.* at 97 (“Commentators have previously observed that general searches and seizures affect large groups who presumptively can protect themselves in the political arena.”).

¹⁸⁰ See, e.g., STEPHEN J. SCHULHOFER, *MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE 21ST CENTURY* 93–114 (2012) (arguing that maintaining vigorous Fourth Amendment safeguards is “more essential than ever”); Eve Brensike Primus, *Disentangling Administrative Searches*, 111 *COLUM. L. REV.* 254, 309 (2011) (“In its current form, administrative search doctrine does little to check arbitrary, unnecessary, or harassing searches.”); Christopher Slobogin, *Government Dragnets*, *LAW & CONTEMP. PROBS.*, Summer 2010, at 107, 124–26 (elaborating on the positive and negative repercussions of dragnet searches).

istrate between the citizen and the law enforcement officer.”¹⁸¹ Presumably, the Court declared it a discretionless search because the statute applies indiscriminately to all persons arrested for an eligible charge. In the Court’s words: “The DNA collection is not subject to the judgment of officers whose perspective might be ‘colored by their primary involvement in the often competitive enterprise of ferreting out crime.’”¹⁸² Hence, the indiscriminate application of the statute rendered a magistrate’s eyes pointless.

But — and this is the second point — of course that is not quite right. The notion that arrestee testing invites no law enforcement discretion makes sense only if one believes that the police lack discretion in making decisions about arrest.¹⁸³ Yet law enforcement officers have broad discretion to select how and where to police. Should officers seek and execute warrants or cruise the streets? On which neighborhoods should police concentrate? Which people and places should undercover operations target? In fact, the very breadth of law enforcement discretion explains visible indicia of policing disparities. Nationwide data show highly disproportionate enforcement of especially low-level offenses, such as marijuana possession.¹⁸⁴ Traffic enforcement came under such strong fire that a cultural shorthand developed: “driving while Black.”¹⁸⁵

Even a statute as narrowly drawn as Maryland’s contains wide room for police discretion. Get in a fight on a gang street corner and the police may charge first-degree assault, which is eligible for DNA collection; engage in fisticuffs at an upscale bar or rowdy college party and the charge might be something lesser. If anything, arrestee DNA sampling laws accord exceptional discretion to police. Recall that an arrestee convicted of an offense that qualifies under the convicted offender laws may be included in the database on that basis, and any arrestee whose case is dismissed should, as a matter of law, receive an

¹⁸¹ *King*, 133 S. Ct. at 1969 (alteration in original) (quoting *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 667 (1989)).

¹⁸² *Id.* at 1970 (quoting *Terry v. Ohio*, 392 U.S. 1, 12 (1968)).

¹⁸³ Had the Court imposed a judicial probable cause determination, then it might have made a plausible claim to the notion that the finding of probable cause eliminated all discretion. In other words, the Court might have reasoned: the decision to arrest may be discretionary, both in that police may erroneously arrest without proper authority and in that police may arrest some persons for an offense while ignoring others who commit the same offense, but once a judicial officer finds probable cause, there is no discretion to exclude from testing those individuals against whom charges have been legally laid. But such a view depends on the check of the magistrate’s finding — there is no way to describe arrests as nondiscretionary if governed by nothing more than *police discretion*.

¹⁸⁴ AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 17 (2013), available at <http://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>.

¹⁸⁵ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 133–35 (2012).

expungement. That leaves only those arrested for an offense that qualifies for arrestee sampling, but convicted of an offense that does not qualify for convicted offender sampling, as the population netted by arrestee laws. Conviction of any offense, in other words, retroactively validates the sampling of an arrestee for a qualifying-arrest offense, even if conviction of that offense would not.

That is essentially what happened in King's case: he was charged initially with first- and second-degree assault, and the first-degree charge rendered him eligible for DNA collection under the arrestee statute, even though his ultimate conviction for second-degree assault would not have qualified him for inclusion in the convicted offender database. In his case, the initial charging decision may well have been wholly detached from the DNA statute, but it surely does not strain the imagination to consider that police may begin selecting charges with one eye on the DNA collection statute. A retired police superintendent in the United Kingdom alleged that officers there did just that in a similar situation,¹⁸⁶ and police in the United States have likewise exhibited a willingness to adjust charges for strategic reasons.¹⁸⁷

Of course, the Court knows very well that police exercise broad discretion in their decisions to arrest, as it has repeatedly admonished litigants accordingly, perhaps most vividly in *Town of Castle Rock v. Gonzales*.¹⁸⁸ So why does the majority insist that the Maryland statute does not expose individuals to the subjective "judgment of officers"?¹⁸⁹ Why does it see no benefit in the "interpolation of] a neutral magistrate"?¹⁹⁰

Those two throwaway lines may provide ominous insight into the depth of the majority's commitment to untethering Fourth Amendment doctrine from the anchors of suspicion and warrants. The opinion — by directly telling us that the Fourth Amendment's touchstone is *not* individualized suspicion¹⁹¹ — is a preview of a new doctrinal foundation, but these two lines are the explicative reasoning. In the majority's view, warrants and suspicion are doctrinally improper foundations because they unnecessarily inhibit the freedom to police in

¹⁸⁶ *Police Making Arrests 'Just to Gather DNA Samples,'* BBC NEWS (Nov. 24, 2009), http://news.bbc.co.uk/2/hi/uk_news/8375567.stm.

¹⁸⁷ See DAVID N. KELLEY & SHARON L. MCCARTHY, THE REPORT OF THE CRIME REPORTING REVIEW COMMITTEE TO COMMISSIONER RAYMOND W. KELLY CONCERNING COMPSTAT AUDITING 42 n.109 (2013), available at <http://www.nytimes.com/interactive/2013/07/03/nyregion/03crime-doc.html> (report on downgrading of charges for crime statistics purposes).

¹⁸⁸ 125 S. Ct. 2796, 2805–06 (2005) ("A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.").

¹⁸⁹ *King*, 133 S. Ct. at 1970.

¹⁹⁰ *Id.* at 1969 (alteration in original) (quoting *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 667 (1989)).

¹⁹¹ *Id.* at 1970.

their absence.¹⁹² The solution to bad policing is not the Fourth Amendment; it is the ballot box.¹⁹³

Such reasoning exposes a majority that is either tone-deaf to or uninterested in the possible inequities of unfettered police discretion and the democratic process problems that justify constitutional interventions. Indeed, refusal to acknowledge the extraordinary police discretion at play enables the majority to turn a blind eye to the arbitrariness of allowing police charging decisions to dictate database inclusion. It also ignores the absurdity of relying on the virtues of democratic debate regarding who should or should not be in the DNA database when the people's decisions about the proper scope of the database are readily overridden by police officers exercising broad discretion.

But this majority is simply not concerned with the possibility of racial and socioeconomic bias, vindictive or strategic exercises of charging discretion, or the singling out of subpopulations for a certain kind of exceptionally invasive policing. And whereas a majority blind to the discretion in arrest and charging decisions is unnerving, a majority that adds to that blindness a belief that “discretionless” policing requires minimal Fourth Amendment intervention should frighten us all.

C. *The Truth Machine*

King's third important implication for criminal procedure doctrine derives from its relationship to a different set of constitutional rules altogether: those emanating from the Confrontation Clause.¹⁹⁴ The fault line that divides the majority and the dissent may go beyond differing perspectives on the value of warrants and suspicion or basic trust versus skepticism in the unfettered exercise of the police power. It may well extend to divergent views about the promise of scientific certainty.

The majority opinion expresses almost giddy enthusiasm for scientific achievement. The Court gushes at the outset that “[t]he advent of DNA technology is one of the most significant scientific advancements of our era.”¹⁹⁵ The majority then links DNA to “scientific advancements” over time that have improved law enforcement’s identification

¹⁹² It should be noted that this is consistent with this group of Justices’ equally strong commitment to redefining the exclusionary rule as applicable only to deliberate malfeasance. *See, e.g., Herring v. United States*, 129 S. Ct. 695 (2009).

¹⁹³ This view is also consistent with one segment of the Court’s recent insistence that it is Congress, not the courts, that is in a better place to seek redress for constitutional violations. *See, e.g., United States v. Jones*, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring) (“A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.”).

¹⁹⁴ “In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him.” U.S. CONST. amend. VI.

¹⁹⁵ *King*, 133 S. Ct. at 1966. The Court later marvels that “[n]ew technology will only further improve . . . speed and . . . effectiveness” of DNA testing. *Id.* at 1977.

capacity,¹⁹⁶ locating DNA as the most recent installment in a tradition that began with photography, progressed to Bertillonage, and then, most recently, turned to fingerprinting.¹⁹⁷

In the Court's history, each of these techniques simply improved upon the previous incarnation. Tellingly, the Court papers over any admission of flaws, errors, or mistakes. The Court states that photography has been used to identify offenders almost since its invention,¹⁹⁸ but neglects to state that eyewitness misidentification — often aided by photo arrays — is the leading cause of erroneous convictions.¹⁹⁹ Similarly, the Court's fervor for Bertillonage entirely overlooks that it was partially discredited as "science" when, in a notorious case, an inmate in Leavenworth prison purportedly matched the "individualized" measurements of another prisoner who, in a coincidence too rich for words, also shared his name.²⁰⁰ Even fingerprinting has suffered its share of attack. The Court cites Professor Simon Cole's pathbreaking book in its discussion of photographs, but neglects that the main thrust of his text was to reveal the lack of foundation for fingerprints as a "science" capable of individualization.²⁰¹

The majority's rosy belief in the infallibility of the "identification sciences" explains its summary dismissal of King's privacy and liberty interests — since the only such interests are those of the criminal wishing not to get caught. It likewise explains the lack of even fleeting reference to DNA typing's own significant history of error — including mixed samples, incompetent analysts, unexpected transfer, and the like — that has led to false accusations and even convictions.²⁰² It also marks an ideological departure from the midcentury Supreme Court, which explicitly found "no merit in the suggestion . . . that fingerprint evidence, because of its trustworthiness, is not subject to the proscriptions of the Fourth and Fourteenth Amendments."²⁰³

¹⁹⁶ *Id.* at 1975.

¹⁹⁷ *Id.* at 1975–76.

¹⁹⁸ *Id.* at 1975 (citing SIMON A. COLE, *SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION* 20 (2002)).

¹⁹⁹ See BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 52–53 (2011) ("Among the 161 exonerees studied, 118 were identified in a photo array . . ."). The Court's indifference to the overwhelming social-scientific evidence concerning eyewitness misidentification also emerged in its recent opinion in *Perry v. New Hampshire*, 132 S. Ct. 716, 730 (2012) (rejecting due process claim because police did not create the conditions of unreliability).

²⁰⁰ COLE, *supra* note 198, at 140–44.

²⁰¹ See *id.* at 270–86.

²⁰² See generally William C. Thompson, *Forensic DNA Evidence: The Myth of Infallibility*, in *GENETIC EXPLANATIONS: SENSE AND NONSENSE* 227 (Sheldon Krimsky & Jeremy Gruber eds., 2013); Scholars' Br., *supra* note 14, at 25–36 (cataloging errors); 4 DAVID FAIGMAN ET AL., *MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY* § 31:15 (2012) (listing fifteen laboratories involved in DNA-related scandals).

²⁰³ *Davis v. Mississippi*, 394 U.S. 721, 723–24 (1969).

But it also exposes something more fundamental about the divide between the Justices in the majority and those in the dissent that matters greatly as scientific and technological evidence continues to flood into the criminal justice system. Specifically, the Justices in the majority believe in the possibility of scientific certainty, and either ignore the possibility of error or view the risks as inconsequential.²⁰⁴ The dissenters, in contrast, view technology as the appendage of the persons who wield it, subject to the same flaws and abuses that characterize any human endeavor.

This division played out in *King*, but it has also played out in a seemingly unrelated area that raises these questions even more directly: the Confrontation Clause. In a series of cases addressing the Sixth Amendment and scientific evidence, the very same core constellation of Justices has squared off against one another. *Melendez-Diaz v. Massachusetts*,²⁰⁵ *Bullcoming v. New Mexico*,²⁰⁶ and *Williams v. Illinois*²⁰⁷ each grapple with the obligation of the government to introduce firsthand testimony versus rely on hearsay witnesses or documents, about the results of forensic tests. In those cases, Chief Justice Roberts and Justices Kennedy, Breyer, and Alito formed a regular block — dissenting together in the first two cases and finally forming a majority (with Justice Thomas) to triumph in the last.²⁰⁸ In contrast, Justice Scalia has emerged as the strongest voice and architect of the opposing view, and most recently (in *Bullcoming* and *Williams*) counted Justices Ginsburg, Sotomayor, and Kagan as his allies.²⁰⁹

The same division of Justices, and relationship to scientific truth, is evident in *King*.²¹⁰ The skepticism that motivated the dissenters in *Williams* to open their opinion with the prospect of a testing error²¹¹ also explains their intuition in *King* that universal DNA testing is not harmless, but “scary.”²¹² Conversely, the same trust that leads Justice

²⁰⁴ A more cynical view might find the majority’s faith in scientific certainty opportunistic or ideological, in light of the reticence of some of those same Justices to express such unequivocal faith in the accuracy of DNA testing when it comes to its exculpatory use. *See, e.g.*, *Dist. Attorney’s Office v. Osborne*, 129 S. Ct. 2308, 2327 (2009) (Alito, J., concurring) (“DNA testing — even when performed with modern STR technology, and even when performed in perfect accordance with protocols — often fails to provide ‘absolute proof’ of anything.” (quoting *id.* at 2337 (Stevens, J., dissenting))).

²⁰⁵ 129 S. Ct. 2527 (2009).

²⁰⁶ 131 S. Ct. 2705 (2011).

²⁰⁷ 132 S. Ct. 2221 (2012).

²⁰⁸ *Melendez-Diaz*, 129 S. Ct. at 2530; *Bullcoming*, 131 S. Ct. at 2709; *Williams*, 132 S. Ct. at 2227.

²⁰⁹ *Melendez-Diaz*, 129 S. Ct. at 2530; *Bullcoming*, 131 S. Ct. at 2709; *Williams*, 132 S. Ct. at 2227.

²¹⁰ With the slight exception of Justices Sotomayor and Kagan when it comes to *Melendez-Diaz*, which preceded their appointments.

²¹¹ *Williams*, 132 S. Ct. at 2264 (Kagan, J., dissenting); *see also Bullcoming*, 131 S. Ct. at 2714 (rejecting the argument that the analyst was a “mere scrivener” of “a machine-generated number” (quoting *State v. Bullcoming*, 226 P.3d 1, 9 (N.M. 2010))).

²¹² 133 S. Ct. at 1989 (Scalia, J., dissenting).

Kennedy to write in his *Bullcoming* dissent that “neither cause nor necessity” justifies “a constitutional bar on the admission of impartial lab reports like the instant one, reports prepared by experienced technicians in laboratories that follow professional norms and scientific protocols,”²¹³ surfaced in his majority opinion in *King*, where he lauded the “unparalleled accuracy” of DNA testing with nary a mention of the incessant stories of lab scandals and mistakes.²¹⁴

The Court will continue to confront technology cases, and particularly cases involving scientific evidence. Some will present as questions of criminal procedure, others as evidence, perhaps some as substantive law. *King* is instructive in that it renders more visible a relationship between seemingly discrete doctrines. It reveals a division among the Justices couched in the language of constitutional text, but originating from a disagreement about the fundamental promise and potential of science to solve criminal justice problems.

D. The Infallibility of Big Data

The final overarching trend illuminated by *King* relates to the Court’s ongoing refusal to regulate the database when used as a tool of law enforcement. At its core, *King* is a database case — not just about the power of government to compel information from a person but also to keep, search, or manipulate that information for perpetuity.

Yet to read *King*, it is barely evident that there even *is* a database involved. The Court made passing reference to the database search that linked King to the offense at hand,²¹⁵ but in the words of the dissent, the opinion is “strangely silent on the actual workings of the DNA search at issue.”²¹⁶ The Court also seemed to view the introduction of the database as insignificant, treating the digitalization and databasing of fingerprints as simple changes in “efficacy . . . not constitutionality.”²¹⁷ In other words, to the extent that databasing and data-mining extended the portfolio of DNA beyond that of fingerprints and mug shots, the Court praised the older methods for catching up, rather than viewed the database as presenting a distinct set of constitutional issues. There is even some indication that the majority did not quite understand the basic operation of the database, since it described testing of samples for nonidentification purposes (i.e., biological DNA testing) as

²¹³ 131 S. Ct. at 2726 (Kennedy, J., dissenting).

²¹⁴ 133 S. Ct. at 1972; *see also id.* at 1976.

²¹⁵ *Id.* at 1968. Databases come up again when the Court points to the laws limiting what information may be uploaded and the kinds of searches allowed, *id.* at 1967, but all of this is presented as background.

²¹⁶ *Id.* at 1983 (Scalia, J., dissenting).

²¹⁷ *Id.* at 1976–77 (majority opinion).

equivalent to “tests for familial matches” (which are primarily *searches* of the database, not biological or genetic *tests* of relatedness).²¹⁸

In short, the import of a *database* of genetic information never features as a central part of the Court’s analysis of the constitutionality of the law enforcement action. Instead, the Court seems to summarily conclude that “[i]t is reasonable in all respects for the State to use an accepted database to determine if an arrestee is the object of suspicion” without detailing precisely what makes a database “accepted.”²¹⁹ Even the dissent largely ignores the data retention aspect of the case in favor of focusing on collection.²²⁰

Accordingly, a host of important questions — database quality control, the possibility for leaks or research without informed consent, the scope and efficacy of privacy guarantees, and the permissible length of retention and kinds of searches — go largely unexamined.²²¹ And this indifference to database accuracy and privacy is not atypical, as underscored by the Court’s similar indifference in two recent cases — *Florence v. Board of Chosen Freeholders*²²² and *Herring v. United States*.²²³ In both cases, the Court upheld police searches based on warrants erroneously left in a computer database.²²⁴ And in both cases, the majority skirted questions about the significance of the lack of reliability of the database, the regularity of maintenance, and the existence of documentation regarding the rate of past error or the probability of future mistakes.²²⁵

King presented yet another opportunity to ask an increasingly recurring question on the Court’s docket: how does the Constitution regulate big databases? But the degree to which the *King* Justices were not even *incidentally* inclined to view it as a database case suggests the answer is, “it does not.” To be sure, big data is vexing to the criminal justice system, and to the courts, for both doctrinal and policy rea-

²¹⁸ *Id.* at 1967. Maryland does prohibit familial *searches*. MD. CODE ANN., PUB. SAFETY § 2-506(d) (West 2009) (“A person may not perform a search of the statewide DNA data base for the purpose of identification of an offender in connection with a crime for which the offender may be a biological relative of the individual from whom the DNA sample was acquired.”). Nothing in the law prohibits familial *testing*, however.

²¹⁹ *King*, 133 S. Ct. at 1974.

²²⁰ The dissent’s irritation with the majority stems from frustration with the attempt to pass off as an “identification check” the search of the forensic unknown database, rather than just the known offender database (which, in turn, contains no direct identifying information). *Id.* at 1984–85 (Scalia, J., dissenting).

²²¹ *But see id.* at 1968 (majority opinion) (summarily reciting the quality assurance provisions).

²²² 132 S. Ct. 1510 (2012).

²²³ 129 S. Ct. 695 (2009).

²²⁴ *Florence*, 132 S. Ct. at 1514; *Herring*, 129 S. Ct. at 698.

²²⁵ *Florence*, 132 S. Ct. at 1514 (referring only to “some unexplained reason”); *Herring*, 129 S. Ct. at 704. In fact, in *Herring* the majority so trusted the government’s facial assertions of accuracy that it dismissed initial contradictory testimony by a clerk, who had stated under oath that miscommunications occurred in the past. *Id.* at 704 n.5.

sons that commentators including myself have well aired.²²⁶ But overlooking the imperative of such an inquiry is a mistake. The job of the Fourth Amendment should be to ensure the accuracy and reliability of big data as vigorously as it might police a tipster.²²⁷ Whatever its doctrinal response, it is discouraging that the Court seems determined to ignore these difficult questions and allow the digitalization of information to escape constitutional notice of any meaningful kind.

V. CONCLUSION

Without question, Justice Alito was right to call *King* one of the most important criminal procedure cases in recent history. Whether it marks the beginning of a new era, however, only time will tell. What is clear, and what this Comment hoped to convey, is that *King* carries profound significance for DNA testing of arrestees, for forensic DNA testing more generally, and for the future of the Fourth Amendment.

²²⁶ See, e.g., Erin Murphy, *Databases, Doctrine & Constitutional Criminal Procedure*, 37 FORDHAM URB. L.J. 803, 826 (2010).

²²⁷ See *Illinois v. Gates*, 462 U.S. 213 (1983).