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## Ohio's DNA Databank Statute

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# PUBLIC DEFENDER REPORTER

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## OHIO'S DNA DATABANK STATUTE

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Jean Ann Broderick was sexually assaulted and murdered on November 17, 1991 in Minneapolis. There were no suspects, and the possibility of another unsolved crime loomed large. The police, however, discovered semen at the crime scene, extracted a DNA profile from this evidence, and entered the profile into the state DNA databank. The computer responded with what is known as a "cold hit" — a match that in an electronic second transformed a "no suspect" case to one with overwhelming prosecutorial merit. It was the "first case in American history in which the new tool of DNA databanking was used to solve a rape or murder case." Levy, *And the Blood Cried Out: A Prosecutor's Spellbinding Account of the Power of DNA* 128 (1996). The prosecutor would later remark, "Without a DNA pool, there is no way we would have been able to identify the suspect. And we certainly would not have been able to get the conviction." *Id.* (quoting Steve Redding).

Ohio has created a DNA databank. RC 109.573 establishes the database, and RC 2901.07 specifies which prisoners are subject to profiling — mostly sex and violent crime offenders. See 1 Katz & Giannelli, *Baldwin's Ohio Practice Criminal Law* 20.14 (1999 supp.). RC 2151.315 governs juveniles.

### STATE STATUTES

The first DNA databank used for criminal enforcement purposes was established by the Virginia legislature in 1989. Va. Code Ann. § 19.2-310.2. Today, every state has enacted databanking legislation. See Hilbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 *Wake Forest L. Rev.* 767, 775 (1999). The DNA Identification Act of 1994 provides federal funds to assist in this endeavor. Although each state legislates the conditions under which DNA samples are taken, the FBI has established a national databank system, called CODIS (Combined DNA Index System), into which the state profiles can be entered. Now states can search the databases of other states.

The state databank statutes vary widely with respect to their coverage. Some states require only sex offenders to provide samples for databank use. E.g., Colo. Rev. Stat. § 17-2-201(5)(g)(sexual assault). Other states also include

crimes of violence. E.g., Wash. Rev. Code § 43.43.754; Mo. § 650.055. Still others reach all convicted felons. E.g., Ala. Code § 36-18-24; N.M. Stat. Ann. § 29-16-6; Va. Code Ann. § 19.2-310.2; Wyo. Stat. Ann. § 7-19-403. One statute extends to persons arrested for a felony sex offense or other specified crimes. La. Rev. Stat. Ann. § 15-609. Some states include juvenile offenders and others cover probationers as well as parolees. Several databanks also contain DNA profiles of missing persons and victims of mass disasters. The method of collection differs; some statutes require the collection of blood (sometimes a finger prick) while others collect cheek swabs. Some statutes contain expungement procedures, under which a person's profile may be removed from the database if that person's conviction is reversed on appeal.

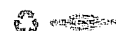
States also vary in the resources dedicated to DNA collection and analysis. Some states have made considerable headway entering samples into their databases, while others face a tremendous backlog of samples yet to be analyzed. One report notes: "So while a new national FBI databank and state databanks now hold a total of 270,000 DNA profiles, there is also a backlog of roughly 500,000 unanalyzed DNA specimens. And the DNA of an estimated 1 million more people is supposed to be added by law, but some jurisdictions are already so far behind they're not even bothering to collect new samples." *The Uncharted Future of DNA Detective Work*, U.S. News & World Report, Oct. 25, 1999, at 33.

While variations in the coverage and procedures for state databases produce inconsistencies, state databanks do share important similarities as well. First, DNA profiles are generally kept in a database that identifies them by a coded identification number. To determine the identity of the person, a separate database must be accessed that decodes the identification number and links the profile to a specific individual. These security measures help to ensure that the DNA profile does not provide readily useable information about the identity of a particular individual. Second, DNA databases generally contain one set of DNA profiles that have been taken from identified individuals, and a second set of profiles, usually taken from crime scenes, for which a match is sought. If a crime scene profile does not result in a

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match, it remains in the system. Some time in the future it may be matched with the profile of a subsequently convicted offender. Or, it may be matched with another crime scene profile, alerting the police that they are looking for a serial offender.

## PRIVACY AND RELATED CONCERNS

The privacy issues associated with DNA profiling were recognized from the beginning. In 1990 Congress's Office of Technology Assessment highlighted this issue: "Citing the inherent intimacy of genetic information, the current and developing ability to test for personal information other than unique identity, and the difficulties of maintaining the confidentiality in a computer network, experts raise concerns that genetic information could be used unfairly to deny future benefits to persons with criminal records, and that genetic profiling within the criminal justice sphere could lead to wider testing and broader threats to privacy." Office of Technology Assessment, U.S. Congress. *Genetic Witness: Forensic Uses of DNA Tests* 35 (1990).

The National Academy of Science's 1992 DNA report also took note of privacy concerns, citing developments in both molecular biology and computer technology. "Molecular geneticists are rapidly developing the ability to diagnose a wide variety of inherited traits and medical conditions. The list already includes simply inherited traits, such as cystic fibrosis, Huntington's disease, and some inherited cancers. In the future, the list might grow to include more common medical conditions, such as heart disease, diabetes, hypertension, and Alzheimer's disease. Some observers even suggest that the list could include such traits as predispositions to alcoholism, learning disabilities, and other behavioral traits (although the degree of genetic influence on these traits remains uncertain)." National Research Council, *DNA Technology in Forensic Science* 114 (1992). The report goes on to state: "Even simple information about identity requires confidentiality. Just as fingerprint files can be misused, DNA profile identification information could be misused to search and correlate criminal-record databanks or medical record databanks. Computer storage of information increases the possibilities for misuse. For example, addresses, telephone numbers, social security numbers, credit ratings, range of incomes, demographic categories, and information on hobbies are currently available for many of the citizens in our society from various distributed computerized data sources."

## LEGAL CHALLENGES

Databanks have been challenged on a wide range of constitutional grounds—for example, freedom of religion and the right to privacy. See *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992)(privacy); *State v. Olivas*, 856 P.2d 1076 (Wash. 1993)(same); *Ryncarz v. Eikenberry*, 824 F. Supp. 1493, 1502 (E.D. Wash. 1993)(Statute "is generally applied to those within its purview and there is an absence of any evidence that would question its neutrality regarding the free exercise of religion. Both the statute and the accompanying DNA policy are neutral towards imposing a burden on religion.")

Six constitutional grounds are discussed in this article: self-incrimination, ex post facto, equal protection, due process, cruel and unusual punishment, and unreasonable search and seizure. In addition, states may provide greater protection under state constitutions or statutes than the U.S. Supreme Court has recognized under the federal constitu-

tion; independent state grounds have been raised but no challenge has prevailed on this basis. See *People v. Calahan*, 649 N.E.2d 588, 592 (Ill. App. 1995)("[D]efendant has not met his burden of proving the statute unconstitutional under either the Federal or State constitution."); *People v. Wealer*, 636 N.E.2d 1129, 1137 (Ill. App. 1994)(Ill. Const. Art. I, § 6).

## SELF-INCRIMINATION CLAUSE

Challenges to the collection of blood or saliva grounded in the Fifth Amendment have been quickly dismissed based on well-established precedent. The leading case is *Schmerber v. California*, 384 U.S. 757 (1966). While being treated at a hospital for injuries sustained in an automobile collision, Schmerber was arrested for driving under the influence of alcohol. At the direction of the investigating police officer, a physician obtained a blood sample from Schmerber. Although the defendant objected to this procedure on the advice of counsel, his blood was extracted and analyzed for alcoholic content. Before the Supreme Court, Schmerber argued that the extraction of blood violated the privilege against self-incrimination. Rejecting this argument, the Court held that the privilege covers only *communicative or testimonial evidence*, not *physical or real evidence*. According to the Court:

It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take.... On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it. *Id.* at 763.

Subsequent Supreme Court cases reaffirmed the testimonial-physical evidence distinction recognized in *Schmerber*. In *United States v. Wade*, 388 U.S. 218, 222 (1967), the Court held that compelling an accused to exhibit his person for observation was compulsion "to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have" and thus not proscribed by the privilege. In *Gilbert v. California*, 388 U.S. 263, 266-67 (1967), the Court concluded that the compelled production of a "mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the Fifth Amendment's] protection."

Courts addressing the Fifth Amendment argument in the databank context have applied these precedents when rejecting such an argument. E.g., *Shaffer v. Saffle*, 148 F.3d 1180, 1181 (10th Cir.)(Oklahoma statute)("We rejected the Fifth Amendment self-incrimination claim because the DNA samples are not testimonial in nature."), cert. denied, 119 S.Ct. 520 (1998); *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1996)(Colorado statute) ("Plaintiff's Fifth Amendment claim, alleging that requiring DNA samples from inmates amounts to compulsory self-incrimination, fails because DNA samples are not testimonial in nature."); *Cooper v. Gammon*, 943 S.W.2d 699, 705 (Mo. App. 1997)(same).

## EX POST FACTO CLAUSE

The United States Constitution prohibits the retroactive application of criminal laws. Article I provides that neither Congress nor any State shall pass an "ex post facto Law." U.S. Const. Art. I, § 9, cl. 3; U.S. Const. Art. I, § 10. According to the Supreme Court, this prohibition means that "[l]egislatures may not retroactively alter the definition of crimes or increase the punishment of criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 42 (1990).

### Non-Penal Purpose

Some courts have ruled that the ex post facto prohibition does not apply because databanking statutes are not *penal* in nature. For example, the Ninth Circuit rejected such a challenge to the Oregon statute because its "obvious purpose is to create a DNA data bank to assist in the identification, arrest, and prosecution of criminals, not to punish convicted murderers and sexual offenders." *Rise v. Oregon*, 59 F.3d 1556, 1562 (9th Cir. 1995), cert. denied, 517 U.S. 1160 (1996). *Accord Shaffer v. Saffle*, 148 F.3d 1180, 1182 (10th Cir. 1998) ("other circuits have upheld similar statutes against the same challenge"; because the "statutes have a legitimate, non penal legislative purpose, they do not run afoul of the Ex Post Facto Clause under these circumstances."), cert. denied, 119 S.Ct. 520 (1998).

The ex post facto issue, however, does not necessarily disappear merely by labeling a statute as "non-penal." Ex post facto principles apply when punishment is retroactively increased, and that may occur if a sanction for refusal to provide a DNA sample is the denial of parole or the forfeiture of good time credits (credits awarded for a period of good behavior in prison). See *Calder v. Bull*, 3 U.S. Dall. 386, 390 (1798) ("Every law that changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed."). Much depends on how a parole or good time statute is written.

### Parole

If parole is purely discretionary, a parole board may consider a refusal to comply with a valid prison regulation, such as one requiring a DNA sample, in determining the appropriateness of parole. In contrast, an increase in the length of a sentence caused by new conditions in a mandatory parole jurisdiction is suspect. For example, the Virginia parole statute mandated parole six months before the sentence release date, and the Fourth Circuit ruled that withholding release for failure to provide DNA samples would be unconstitutional. *Jones v. Murray*, 962 F.2d 302, 310 (4th Cir. 1992) ("[T]he continued incarceration beyond a time six months prior to the end of the actual sentence of an inmate convicted prior to the enactment of [the statute] for any reason not reflected in the terms of the mandatory parole provision, would constitute a retroactive extension of the inmate's sentence which is prohibited by the *Ex Post Facto Clause*.").

### Good-Time Credit

Reduction of good-time credit raises somewhat different issues. In *Weaver v. Graham*, 450 U.S. 24, 32 (1981), the Supreme Court ruled that the elimination of good time-credit constituted an increase in punishment because "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed."

*Weaver*, however, involved inmates whose good-time credit was legislatively reduced across the board, even if

they had *not* violated any prison regulation. Several courts have distinguished databank statutes on this basis, finding that at the time of sentencing good-time credits were known to be contingent on compliance with legitimate prison regulations and the nature of those regulations may be amended while the prisoner is serving penitentiary time. See *Gilbert v. Peters*, 55 F.3d 237, 239 (7th Cir. 1995) ("Disciplinary measures imposed on inmates for failing to obey orders . . . do not violate the Ex Post Facto Clause."); *Jones v. Murray*, 962 F.2d 302, 309-10 (4th Cir. 1992) ("The *Ex Post Facto* Clause does not prevent prison administrators from adopting and enforcing reasonable regulations that are consistent with good prison administration, safety and efficiency. . . . It is precisely because reasonable prison regulations, and subsequent punishment for infractions thereof, are contemplated as part of the sentence of every prisoner, that they do not constitute an additional punishment and are not classified as *ex post facto*. Moreover, since a prisoner's original sentence does not embrace a right to one set of regulations over another, reasonable amendments, too, fall within the anticipated sentence of every inmate.").

## EQUAL PROTECTION CLAUSE

The Fourteenth Amendment establishes that no state may "deny any person within its jurisdiction the equal protection of the laws." Several inmates have asserted equal protection grounds as a basis for striking down databank statutes. They claim, for example, that sex offenders are treated differently from other offenders in violation of the equal protection mandate.

These challenges have been rejected under what is known as the "rational basis" test, which is derived from a long line of Supreme Court decisions. Under this type of judicial review, a "statute is presumed to be valid and will be sustained if the classification is rationally related to a legitimate state interest." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 81 (1988).

In *Boling v. Romer*, 101 F.3d 1336, 1341 (10th Cir. 1996) (Colorado statute), the Tenth Circuit rejected the argument that taking DNA samples only from sex offenders violated the Equal Protection Clause. The court held that there was a "rational relationship" between the "government's decision to classify inmates as convicted sex offenders and the government's stated objective to investigate and prosecute unsolved and future sex crimes." See also *Roe v. Marcotte* 193 F.3d 72, 82 (2d Cir. 1999) ("The district court correctly found that the statute survives a rational basis analysis. Plaintiffs presented no evidence that there was a compelling need to test other violent felons.").

## DUE PROCESS

Both the Fifth and the Fourteenth Amendments forbid the denial of life, liberty, or property "without due process of law." Inmates have asserted two different due process arguments: substantive due process and procedural due process.

### Substantive Due Process

The Supreme Court has stated that "[d]ue process of law is a summarized constitutional guarantee of respect for those personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' . . . or are 'implicit in the concept of ordered liberty.'" *Rochin v. California*, 342 U.S. 165, 169 (1951).

In *Rochin* the Supreme Court held that the forcible stomach pumping of a suspect to recover narcotic pills "shock[ed] the conscience" and did not comport with traditional ideas of fair play and decency, thereby violating due process. By contrast, the Supreme Court, faced with a due process challenge in *Breithaupt v. Abram*, 352 U.S. 432 (1957), upheld the involuntary extraction of blood from a suspect while he was unconscious after an automobile accident in order to determine whether he was intoxicated. In distinguishing *Rochin*, the Court emphasized that unlike the extraction of stomach contents, the extraction of blood was performed "under the protective eye of a physician" and was a routine and scientifically accurate method that did not involve the "brutality" and "offensiveness" present in *Rochin*. *Id.* at 435-37 ("a blood test taken by a skilled technician is not such 'conduct that shocks the conscience' . . . nor such a method of obtaining evidence that it offends a 'sense of justice.'").

### Procedural Due Process

Procedural due process mandates that a person cannot be deprived of "life, liberty, or property" without a hearing and certain procedural safeguards, although the nature of the safeguards differs depending on the interest involved. Some inmates have challenged DNA databank statutes on the grounds that the taking of a DNA sample without a hearing deprives them of a liberty or property interest in their genetic material without due process of law. These challenges have uniformly failed.

In *Rise v. Oregon*, 59 F.3d 1556, 1562-63 (9th Cir. 1994), the plaintiffs argued that the Due Process Clause required prison officials to provide an opportunity for a hearing before requiring felons to submit a blood sample in accordance with Oregon's databank statute. The court held that "[t]he extraction of blood from an individual in a simple, medically acceptable manner, despite the individual's lack of an opportunity to object to the procedure, does not implicate the Due Process Clause." *Accord Cooper v. Gammon*, 943 S.W.2d 699, 706 (Mo. App. 1997).

Similarly, in *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1997), the plaintiff challenged a Colorado statute that required inmates convicted of sexual assault offenses to submit a DNA sample as a condition of release on parole. Without providing the sample, an inmate could not regain his liberty. The court nevertheless found that plaintiff's argument that the state "unconstitutionally deprived him of a property interest in his blood without due process" was "unpersuasive." The court explained that parole in Colorado was discretionary and that convicted individuals have no constitutional right to be conditionally released before the expiration of their valid sentences.

### CRUEL AND UNUSUAL PUNISHMENT

Several challenges to DNA databanks have been by prisoners who focused on the Eighth Amendment, which proscribes cruel and unusual punishment. In *Sanders v. Coman*, 864 F.Supp. 496, 498 (E.D. N.C. 1994) (North Carolina), inmates argued that the use of force to obtain blood samples violated the Amendment; they alleged: "The uses of force have included instances of several officers surrounding an inmate while one held his arm still, the spraying of mace, and bending inmates' wrists in a painful manner to induce compliance." An Eighth Amendment violation, however, occurs only if force is applied for the purpose of causing harm, *Hudson v. McMillian*, 503 U.S. 1

(1992), or if the force is excessive. *Whitley v. Albers*, 475 U.S. 312, 319 (1986) ("[T]he infliction of pain in the course of a prison security measure . . . does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force . . . was unreasonable, and hence unnecessary in the strict sense.").

Neither theory applied in this context. Here, force was used to compel compliance with a valid prison regulation. Courts have also held that placement in solitary confinement for failing to comply with an order to provide a blood sample does not violate the Clause. See *Cooper v. Gammon*, 943 S.W.2d 699, 707 (Mo. App. 1997) ("A refusal to obey a lawful order undermines the authority of prison officials and affects the security and good order of the facility."). See also *Sandin v. Conner*, 515 U.S. 472, 485 (1995) ("Discipline by prison officials in response to a wide range of misconduct falls within the expected parameters of the sentence imposed by a court of law.").

### SEARCH AND SEIZURE

The most significant legal challenge to databanks is based on the Fourth Amendment's prohibition of unreasonable searches and seizures. Although the U.S. Supreme Court has yet to address the issue, its decisions in other areas provide a framework for analysis.

The Fourth Amendment is intended to ensure "privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction." *Skinner v. Ry. Labor Executives' Association*, 489 U.S. 602, 613-14 (1989). There are three distinct Fourth Amendment issues raised in this context. First, there is a "seizure" of the person, which brings that person under the control of government officials. Second, there is the subsequent search and seizure of a biological sample or trace evidence from this person. Third, the use to which the genetic information in the sample is put raises a final Fourth Amendment issue.

A finding that the Fourth Amendment applies does not mean that a procedure is unconstitutional. That is merely the first step in the analysis. As the Supreme Court has often remarked: "[T]he Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable." *Skinner*, 489 U.S. at 619

#### Applicability of the 4th Amendment

*Seizure of the Person.* In the databanking context the first issue — seizure of the person — is not problematic because convicts are already incarcerated. The seizure would be an issue for parolees, probationers, or previously released convicts. Nevertheless, notifying such persons to report and provide DNA samples would be a reasonable seizure.

*Search to Obtain Samples.* The leading case on defining which governmental activities are "searches" within the meaning of the Fourth Amendment is *Katz v. United States*, 389 U.S. 347, 351 (1967). *Katz* substituted a privacy approach for the traditional property approach to this issue. According to the Supreme Court: "[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

There is little dispute that taking blood samples is a search. In *Schmerber* the Supreme Court held that the ex-

traction of blood for the purpose of scientific analysis "plainly constitutes searches of the 'persons'" within the meaning of the Fourth Amendment. In *Skinner*, which involved a drug testing program, the Court wrote that "it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable." In addition to blood samples, lower courts have generally treated the taking hair, *Bouse v. Bussey*, 573 F.2d 548, 550 (9th Cir. 1977); *United States v. D'Amico*, 408 F.2d 331, 333 (2d Cir. 1969), and saliva samples as searches. *United States v. Nicolosi*, 885 F. Supp. 50, 55 (E.D. N.Y. 1995).

In contrast, the taking of fingerprints, voice exemplars, or handwriting samples are not searches. *Cupp v. Murphy*, 412 U.S. 291, 294 (1973); *United States v. Dionisio*, 410 U.S. 1, 14 (1973); *United States v. Mara*, 410 U.S. 19, 21 (1973).

*Use of Genetic Information.* In *Skinner* the Supreme Court also ruled that the subsequent chemical analysis of a blood sample to obtain physiological data "is a further invasion" of privacy interests — informational privacy. This point was further refined when the Court considered the collection of urine samples. Even though this procedure did not involve a bodily intrusion, the Court held that it was a search. Like blood, the chemical analysis of urine can "reveal a host of private medical facts," including whether a person is epileptic, pregnant, or diabetic. See also *People v. Wealer*, 636 N.E.2d 1129, 1132 (Ill. App. 1994) ("conducting additional analysis on the sample further implicates fourth amendment interests.")

The courts addressing the constitutionality of databank statutes have acknowledged the applicability of the Fourth Amendment to the taking of a sample as well as its subsequent analysis. E.g., *Schlicher v. (NFN) Peters, I & II*, 103 F.3d 940, 942 (10th Cir. 1996) ("It is agreed that the collection, analysis and storage of blood and saliva as authorized by [the Kansas statute] is a search and seizure within the meaning of the Fourth Amendment.") (citing *Skinner* and *Schmerber*); *Landry v. Attorney General*, 709 N.E.2d 1085, 1090 (Mass. 1999) ("There is no disagreement that the involuntary collection of a blood sample from a person designated to furnish one under the Act constitutes a 'search and seizure' for purposes of the Fourth Amendment and art. 14 [of the state constitution]."); *People v. Wealer*, 636 N.E.2d 1129, 1132 (Ill. App. 1994) ("Nor do the parties dispute that the taking of saliva samples implicates fourth Amendment concerns, although it seems that the level of intrusion necessary to obtain a saliva sample would on its face appear lower than the required for extracting blood."); *State v. Olivas*, 856 P.2d 1076, 1081 (Wash. 1993) ("The State acknowledges that nonconsensual blood extraction constitutes a search.")

Consequently, the databanking litigation has focused on the second step in Fourth Amendment analysis — the reasonableness of these programs.

### Reasonableness of Search

As noted above, the Fourth Amendment does not prohibit all searches, only unreasonable ones. Traditionally, reasonable searches are those conducted pursuant to a warrant issued by a neutral and detached magistrate and based on probable cause. Moreover, search warrants must describe the place to be searched and the items to be seized with "particularity." The particularity requirement circumscribes the police's discretion in executing a search warrant. Nevertheless, exceptions to these traditional requirements

have been recognized, and courts have cited several in upholding DNA databank statutes.

The databank cases can be grouped around three lines of precedents: (1) administrative searches, (2) "special needs" searches, and (3) prisoner searches. These categories, however, are not mutually exclusive — and they all involve a balancing of interests in determining the reasonableness of the procedure. The next sections focus on sex-offenders, the most common category in the DNA databanks. Later sections discuss persons convicted of other crimes and arrestees.

### Administrative Search Model

Originally, the phrase administrative search was used to describe non-law enforcement searches. For example, the landmark case, *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967), involved housing inspections. The purpose of these inspections was not to gather evidence of criminal conduct but rather to ensure compliance with health and safety standards. Housing inspectors rather than police officers conducted these searches. Violation of the regulations, however, could result in criminal prosecution.

In *Camara*, the Court held that the reasonableness of an administrative search is determined by balancing the governmental interest against the nature and extent of the intrusion on privacy.

The . . . argument is in effect an assertion that the area inspection is an unreasonable search. Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails. But we think that a number of persuasive factors combine to support the reasonableness of area code-enforcement inspections. First, such programs have a long history of judicial and public acceptance. Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions — faulty wiring is an obvious example — are not observable from outside the building and indeed may not be apparent to the inexperienced occupant himself. Finally, because inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy. *Id.* at 536-37 (citations omitted).

The Court found the inspection system "of indispensable importance to the maintenance of community health." Thus, in *Camara*, the Court concluded that housing inspection programs were supported by the compelling government interest of avoiding dangerous living conditions and maintaining housing stock and that the inspection programs were a reasonable means for enforcing these societal interests.

Later cases involved the inspection of liquor stores, gun dealers, mines, and the workplace pursuant to the Occupational Safety and Health Act. See *United States v. Biswell*, 406 U.S. 311 (1972); *Donovan v. Dewey*, 452 U.S. 594 (1981); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978). Perhaps, the most familiar administrative search is the metal detector procedures at airports.

*New York v. Burger*, 482 U.S. 691 (1987), is a transitional case in this context. It involved a New York statute authorizing warrantless administrative searches of automobile junkyards, which the Supreme Court upheld. The key point is



that the statute was aimed specifically at finding evidence of *crime*. In contrast, prior administrative searches had focused on governmental interests such as health and safety. Moreover, the junkyard inspections were conducted by the *police*. In a later case, the Court employed the balancing test to uphold sobriety roadblock-checkpoints. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

While the balancing approach provides flexibility in achieving significant government objectives, such as airline passenger safety, the danger exists that this approach will result in the "balancing" away of constitutional rights. Therefore, this approach demands rigor. For example, while the Supreme Court has upheld drug testing of railroad employees after an accident and custom's officers involved in drug interdiction operations, it has struck down the drug testing of political candidates as mandated by a Georgia statute. *Miller v. Chandler*, 502 U.S. 305 (1997). The Court simply found that the justification for this procedure lack compelling reasons.

*Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999), can be used to illustrate this approach. In this case, the Second Circuit reviewed the Connecticut databank statute, which is limited to sex offenders. First, the court correctly found the government interest — solving past and future violent sex crimes — both legitimate and significant. See *People v. Wealer*, 636 N.E.2d 1129, 1136 (Ill. App. 1994) ("Its interest is especially compelling when we consider that sex offenders frequently target children as their victims."). Moreover, the databank system "may" deter future crimes by those whose profile are in the system.

Second, the means selected to accomplish these objectives were reasonable. The state cited studies showing a high rate of recidivism for sexual offenders. Moreover, DNA evidence is "particularly useful" in investigating these crimes "because of the nature of the evidence left at the scenes of these crimes and the demonstrated reliability of DNA testing."

Third, the blanket testing of all sex offenders eliminated the need for discretionary decisions, an historical concern in Fourth Amendment jurisprudence. See *Shelton v. Gudmanson*, 934 F. Supp. 1048, 1051 (W.D. Wis. 1996) ("the sampling was carried out pursuant to state regulations that required the testing of every inmate falling within a certain category, thus ensuring that arbitrary testing decisions would not be made.").

Fourth, the intrusion — the extraction of blood — is slight ("minimal" in the Supreme Court's view) and does not raise a health risk. See *Skinner*, 489 U.S. at 625 (blood tests do not "infringe significant privacy interests"); *Winston v. Lee*, 470 U.S. 753, 762 (1985) ("recognized society's judgment that blood tests do not constitute an unduly extensive imposition on a individual's personal privacy and bodily integrity."). In these circumstances, the Second Circuit held that the balance tipped in favor of the databanking statute.

Three other aspects of the Connecticut scheme are noteworthy. First, trained medical personnel are required to take the blood sample. See also *People v. Wealer*, 636 N.E.2d 1129, 1136 (Ill. App. 1994)("[T]he collection of samples must be performed in a medically approved manner, and only certain qualified medical personnel are permitted to withdraw blood."). Second, the identifying information associated with the DNA profile remains anonymous until a match is made. Third, procedures limiting access to and dissemination of information in the system are specified. See also

*People v. Wealer*, 636 N.E.2d 1129, 1136 (Ill. App. 1994)("[T]he information is kept strictly confidential and is made available only to law enforcement officials.").

### "Special Needs" Search Model

Over time, the Supreme Court extended the rationale underlying administrative searches to other areas, commonly called "special needs" searches. For example, the Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), applied this rationale to searches of public school children by teachers; the "special need" was the maintenance of a safe, orderly, and contraband-free school environment in order to create a healthy learning atmosphere. To achieve the desired environment, the Court recognized that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." *Id.* at 340. See also *O'Connor v. Ortega*, 480 U.S. 709 (1987)(employing "special needs" concept to the search of a government employee's work space for evidence of work-related violations).

Similarly, in *Griffin v. Wisconsin*, 483 U.S. 868 (1987), the Supreme Court upheld a Wisconsin regulation that permitted a warrantless search of a probationer's home if there existed "reasonable grounds" to believe that the probationer possessed contraband. The Court observed that "[a] State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements" and that "in certain circumstances government investigators conducting searches pursuant to a regulatory scheme need not adhere to the usual warrant or probable-cause requirements as long as their searches meet 'reasonable legislative or administrative standards.'" *Id.* at 873-74 (quoting *Camara* at 538).

Subsequently, the Court applied this rationale in cases involving government-required alcohol and drug testing for railroad employees and customs agents involved in drug interdiction. See *Skinner v. Railway Labor Executives Assn*, 489 U.S. 602, 620-21 (1989)(railway safety)(Federal Railway Administration "has prescribed toxicological tests, not to assist in the prosecution of employees, but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs'"); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989)("[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."). See also *Vernonia School District v. Acton*, 515 U.S. 646 (1995) (approving suspicionless drug testing of student athletes).

In the school and probationer cases, the special need resulted in a lesser standard (reasonable suspicion instead of probable cause) of justification for an invasion of privacy, while the drug testing cases upheld regulatory schemes that did not require any quantum of proof.

A number of courts have used the "special needs" rationale to uphold databank statutes. See *Shelton v. Gudmanson*, 934 F. Supp. 1048, 1051 (W.D. Wisconsin 1996)("Although the state's DNA testing of inmates is ultimately for a law enforcement goal, it seems to fit within the

special needs analysis the Court has developed for drug testing and searches of probationers' homes, since it is not undertaken for the investigation of a specific crime."); *State v. Olivas*, 856 P.2d 1076, 1086 (Wash. 1993) (rejecting a Fourth Amendment challenge to a DNA identification based on "special needs" analysis of *Skinner*).

In contrast, other courts have balked at applying the "special needs" rationale in this context, noting that this category is limited to governmental objectives "beyond normal law enforcement." See *People v. Wealer*, 636 N.E.2d 1129, 1135 (Ill. App. 1994) ("[W]e are reluctant to extend the special needs line of cases to the present statute, which has an ostensible law enforcement purpose."); *State v. Olivas*, 856 P.2d 1076, 1092 (Wash. 1993) (concurring opinion) ("The choice of balancing tests, however, is critical. Because 'special needs' is not limited to minimally intrusive searches or seizures, an extension of the analysis into the area of criminal law enforcement could ultimately render the warrant requirement itself illusory.").

Other courts point out, however, that special needs searches, such as probationer searches, are also associated with law enforcement but do not involve the investigation of a *specific* crime. *Shelton v. Gudmanson*, 934 F. Supp. 1048, 1050-51 (W.D. Wis. 1996) (Wisconsin statute) ("In *Griffin*, for example, the Court noted that the warrantless search of the probationer's home had been carried out pursuant to valid regulation promulgated by the state. Although the state's DNA testing of inmates is ultimately for a law enforcement goal, it seems to fit within the special needs analysis the Court had developed for drug testing and search of probationers' homes, since it is not undertaken for the investigation of a specific crime.") (citation omitted).

More importantly, as noted above, the administrative search and "special needs" categories are not mutually exclusive — indeed, they often overlap. This is because the "special need" beyond traditional law enforcement is typically some administrative objective. For example, an inventory search of the personal belongings of arrestees prior to incarceration in a jail cell is reasonable, whether classified as a "special need" or an administrative search. Similarly, this procedure could also be considered a prison search, the next category to be considered. The important point is the "balancing" rationale employed in determining reasonableness. There may, however, be a tendency in some opinions to use the "special needs" as a talismanic incantation, curtailing further inquiry.

#### Fourth Amendment Rights of Prisoners

In *Jones v. Murray*, 62 F.2d 302 (4th Cir. 1992), the Fourth Circuit adopted a third type of analysis. In upholding the Virginia statute, the Fourth Circuit relied on several Supreme Court decisions that had held that prisoners had reduced expectations of privacy under the Fourth Amendment. See also *Shaffer v. Saffle*, 148 F.3d 1180, 1181 (10th Cir. 1998) (Oklahoma statute) ("[W]hile obtaining DNA samples implicates Fourth Amendment concerns, it is reasonable in light of an inmate's diminished privacy rights, the minimal intrusion involved, and the legitimate government interest in using DNA to investigate and prosecute crimes."); *Schlicher v. (NPN) Peters, I & I*, 103 F.3d 940 (10th Cir. 1996) (Kansas statute) (same); *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1996) ("[W]hile obtaining and analyzing the DNA or saliva of an inmate convicted of a sex offense is a search and seizure implicating Fourth Amendment concerns, it is a reasonable search and

seizure. This is so in light of an inmate's diminished privacy rights; the minimal intrusion of saliva and blood tests; and the legitimate government interest in the investigation and prosecution of unsolved and future criminal acts by the use of DNA in a manner not significantly different from the use of fingerprints."); *Rise v. Oregon*, 59 F.3d 1556, 1562 (9th Cir. 1995) ("Taking into account all of the factors discussed above — the reduced expectations of privacy held by persons convicted of one of the felonies to which [the statute] applies, the blood extractions' relatively minimal intrusion into these persons's privacy interests, the public's incontestable interest in preventing recidivism and identifying and prosecuting murderers and sexual offenders, and the likelihood that a DNA data bank will advance this interest — we conclude that [the statute] is reasonable and therefore constitutional under the Fourth Amendment."), *cert. denied*, 517 U.S. 1161 (1996); *In re Maricopa County Juvenile Action*, 930 P.2d 496 (Ariz. App. 1996) (juvenile sex offenders); *Landry v. Attorney General*, 709 N.E.2d 1085, 1092 (Mass. 1999); *Cooper v. Gammon*, 943 S.W.2d 699, 705 (Mo. App. 1997) ("Because of the reduced expectation of privacy held by prisoners . . .").

The first Supreme Court decision is *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979), in which the Court upheld the constitutionality of body cavity inspections of pretrial inmates following "contact visits," even in the absence of probable cause. The Court's rationale in determining the reasonableness of the procedure focused on the security dangers inherent in this environment: "A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record."

In a later case, *Hudson v. Palmer*, 468 U.S. 517 (1984), the Supreme Court upheld cell searches ("shakedown" inspections) for the purpose of discovering contraband in a prison. The Court, in a 5-4 decision, ruled that a prisoner did not have a reasonable expectation of privacy in a cell. Yet, this holding (like *Wolfish*) was justified on institutional security needs. The Court wrote: "The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions." *Id.* at 526.

There are no institutional security needs in the databanking context, and thus this rationale is simply inapplicable. Indeed, some statutes apply even in the absence of incarceration. See *People v. Wealer*, 636 N.E.2d 1129, 1135 (Ill. App. 1994) ("[P]ractical considerations of prison administration, as an underlying justification, cannot be reconciled with the express language of [the statute] which mandates taking samples regardless of whether the convicted sex offender is ultimately incarcerated."). Moreover, both *Wolfish* and *Hudson* acknowledged that the Court's jurisprudence in prisoner cases recognizes the applicability of constitutional protections: "There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). See also *Giannelli & Gilligan, Prison Searches and Seizures: "Locking" the Fourth Amendment Out of Correctional Facilities*, 62 Va. L. Rev. 1045 (1976).

#### Expansion of Coverage Beyond Sex Offenders

Most databank statutes are limited to sex-offenders. These provisions are supported by empirical research on



recidivism, a fact noted by several courts in upholding databank statutes. See *Shelton v. Gudmanson*, 934 F. Supp. 1048, 1051 (W.D. Wis. 1996) (The state "has confined the collecting of such data to those offenders [sex offenses] that have been shown to have a relatively high likelihood of recidivism."). The nature of these offenses — their brutality and their often serial nature — is a critical point, because in one sense all law enforcement is a legitimate governmental objective. However, some statutes also encompass homicides and crimes of violence. Still others include all felons. The justification for including prisoners who have been convicted of white-collar felonies is difficult to discern. Even the sex offender category is problematic if it includes prostitution and public indecency as some statutes do.

*Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992), the Fourth Circuit case cited above, addressed this issue because all felons are included in the Virginia system. To buttress its position, the court cited recidivism studies encompassing all felons. The inmates, however, argued that the statistics on nonviolent felons undercut the state's position. The inmates' "statistics indicate[d] that 97% of the cases in which DNA evidence was used to link a defendant with a crime involved murder or rape, and further, less than 1% of all non-violent offenders are later arrested on murder and rape charges." *Id.* at 308. In response, the *Jones* majority merely noted that the percentages need not be high where the objective is significant and the privacy intrusion is limited; the court cited *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding roadblock to detect drunk drivers despite resulting arrest rate of 1.5%).

The dissent in *Jones* believed that the distinction between violent and nonviolent felons was determinative: "The only state interest offered by the Commonwealth for including non-violent felons is administrative ease" but such an interest does not suffice "to outweigh a prisoner's expectation of privacy in not having blood withdrawn from his body when that prisoner is not significantly more likely to commit a violent crime in the future than a member of the general population." *Id.* at 313-14. Indeed, the state senate report concluded that recidivism data *only* "supported the inclusion of plaintiffs convicted for felony sex offenses, assault, capital murder, first and second degree murder, voluntary manslaughter, larceny and burglary." *Id.* at 314. All felons were added to make the databank "more efficient and cost effective." The dissent also pointed to other statistics in the record: "United States Justice Department statistics provided in the record show that only %0.4 of non-violent felons are later arrested on rape charges, and only %0.8 are later arrested on murder charges. One might assume

non-violent drug offenders would be more likely to commit violent crime subsequent to release than other non-violent felons; yet, only %0.4 of them are later arrested for rape, and %0.3 for murder." The dissenting judge concluded: The lack of justification "leads me to a deep, disturbing, and overriding concern that, without a proper and compelling justification, the Commonwealth may be successful in taking significant strides toward the establishment of a future police state, in which broad and vague concerns for administrative efficiency will serve to support substantial intrusions into the privacy of citizens." *Id.*

The British experience, which commenced earlier than that of the United States, may be instructive. The British initially focused on sex offenses but later included burglaries and car theft because of the high number of matches. They found a cross-over between offenses. According to one official, "People who commit serious crime very often have convictions for petty crime in their history." Wade, *F.B.I. Set to Open Its DNA Database for Fighting Crime*, N.Y. Times, Oct. 12, 1998 (quoting David Ward, manager of the DNA database for England and Wales). While the cross-over concept is significant, the scope of the British system is breathtaking; they expect to "eventually include a third of all English men between 16 and 30, the principal ages for committing crimes."

The category of crimes subject to databanking should be supported by empirical data or persuasive reasons. There is apparently some support for including property crimes. Property crimes, however, should be further defined. For example, historically, burglary was not considered a "property" crime; it was a crime against habitation, intended to protect people in their dwellings. Burglars must anticipate what action they will take if surprised by an occupant, including the use of force. Therefore, an argument to include burglary could be made, but felony tax evasion would be a different issue.

#### **Expansion of Coverage to Arrestees**

The Louisiana statute applies to sex offender *arrestees*. Moreover, New York Police Commissioner Howard Safir has proposed that DNA be collected from every arrestee. Hansen, *Banking on DNA*, 85 A.B.A. J. 26, 27 (Aug. 1999). Not satisfied with that proposal, New York Mayor Rudy Giuliani suggested that all newborns should be tested. Higgins, *Acid Test*, 85 A.B.A. J. 64, 65 (Oct. 1999). In contrast, a concurring opinion in *State v. Olivas*, 856 P.2d 1076, 1094 (Wash. 1993), notes: "We would be appalled, I hope, if the State mandated non-consensual blood tests of the public at large for purposes of developing a comprehensive Washington DNA databank."