Last week, you killed someone. You meticulously removed any evidence which might link you to the crime. You are still the prime suspect, but you’re not worried. The police have nothing, not even probable cause to search your apartment. You are literally getting away with murder. But you have a nagging cold with an awful cough. On your way out the door one morning, you spit some phlegm on the sidewalk. A few days later, you find yourself under arrest and wondering what went wrong.

This very scenario is currently playing itself out in Jacksonville, Florida. The police suspected an individual of murder, but were unable to obtain a search warrant. Undeterred, they trailed the suspect as he left his home, and when he spat on the pavement, they collected his saliva and tested it against genetic material found at the crime scene. A DNA match transformed the suspect into a murder defendant.

Should the officers be lauded for their ingenuity in obtaining crucial evidence? Or should they be disciplined for shirking the warrant system intended to protect the constitutional rights of criminal suspects? Although the matter is not settled, existing case law suggests that the officers deserve praise. However, before such maneuvers become standard practice in criminal investigations, Americans would do well to examine the broader interests at stake. If we proceed without reflective pause, we risk the uncritical surrender of important civil liberties.

The Case Law

An individual’s right to privacy during the course of a criminal investigation is constitutionally protected by the Fourth Amendment. However, this protection against unreasonable search and seizure is limited: the police may seize a piece of personal property without a warrant and use it as evidence if the individual is deemed to have legally “abandoned” the item. Absent abandonment, police may obtain evidence only after demonstrating probable cause for a more personal search, requiring more than a bare suspicion, but not so much evidence as to justify a conviction. The touchstone for determining abandonment is whether the individual had a reasonable expectation of privacy in the seized property. Fourth Amendment protection is granted when a person had a sincere expectation of privacy in the disputed item (the subjective prong) and the expectation is one that society is prepared to recognize as reasonable (the objective prong).

In order to refute a claim that the property—in this case, genetic material—was abandoned, a potential defendant must show that he maintained a reasonable expectation of privacy in the seized item despite the appearance of abandonment. Since part of this test is subjective, the individual’s intent is key, including the efforts he took to maintain the privacy of his property. However, the potential defendant must also show that his beliefs about abandonment were objectively reasonable—that is, were beliefs that the typical reasonable person would have. Therefore, to protect his genetic material and prevent its admission as evidence under the law as it now stands, the defendant in the Florida case would need to show that when an average person spits on the sidewalk, sips a drink at a restaurant, or licks an envelope, he believes that his genetic material has not been abandoned.

A strong challenge to such a demonstration will come from the “garbage cases.” Courts have generally held that when garbage is located in a place accessible to the public, it is abandoned and its previous owner has forfeited any reasonable expectation of privacy he may have previously had. A few decisions to the contrary have relied on the objective prong of the abandonment test to hold that society recognizes a reasonable expectation of privacy in one’s garbage in proportion to the intimacy of the matter discarded. This line of argument may be more promising to our Floridian defendant, as it allows use of a slippery slope argument about the way in which “abandoned” genetic material is used. After all, if a “spitter” lacks a reasonable expectation of privacy in the contents of his saliva, nothing stands in the way of private individuals collecting this genetic material for any purpose they might imagine. Celebrities beware—in addition to tabloid reporters sneaking over your fences for unflattering photographs, you will now have to take extreme care to prevent your DNA from sloughing off in public.
Social interests that impinge on law-abiding citizens and criminals alike may require the acceptance of a reasonable expectation of privacy in genetic material, even when discarded in the public domain. Nevertheless, the majority of current cases, when applied by analogy to the issue of DNA abandonment, points to a holding that, like garbage on the curb, spit on the sidewalk has been abandoned without any reasonable expectation of privacy. The American Civil Liberties Union, however, has aptly noted that the current judicial focus on the objective prong of the abandonment test “can only reflect, not prevent, deterioration in societal respect for privacy.”6

**Dragnets to Databases**

New cases are arising in which DNA samples are obtained from volunteers and non-volunteers through questionable law enforcement tactics and outright coercion. The issue in these situations differs from the Florida case, as there is clearly no reasonable expectation of privacy in genetic material deliberately surrendered to law enforcement agencies. Instead, these cases raise questions about who can be forced to contribute genetic material, whether individuals should be willing to voluntarily provide their DNA to law enforcement to winnow suspect pools, and what can be done with this information once the case at hand has been solved or the individual exonerated.

The police tools in these cases are DNA dragnets, databanks, and databases. Dragnets generally involve warrantless searches in which masses of individuals consent to provide their genetic material to investigators to help solve a specific crime. Consent to search under the Fourth Amendment framework focuses singularly on lack of coercion; individuals need not be informed by investigators of their right to refuse consent, unlike informed consent in the medical context.7 The physical material obtained in these dragnets may eventually be destroyed, or it may be placed in a databank along with material gathered from people on a non-voluntary basis, namely, those who have been arrested or convicted and are statutorily required to provide DNA samples.

The final destination for this information may be a DNA database, which includes the genetic profile obtained from the sample and usually exists in a searchable format that remains anonymous until a match is found.

The United Kingdom already has a massive forensic database—the largest in the world—and has recently proposed a universal DNA database containing information on all residents, criminal and law-abiding alike.8 Proponents of this approach argue that it is one way to avoid the specter of discrimination.9 In 1998, Germany tested more than 16,000 people in the investigation of the rape and murder of an eleven-year-old girl.10 While the United States is behind Europe in its use of DNA dragnets, it has employed them on a smaller scale. However, these American dragnets have been generally unsuccessful in identifying the perpetrator and unpopular due to concerns about constitutional violations. In Louisiana, an important class action lawsuit has arisen out of a recent murder investigation in which an individual was asked to come in for questioning after being assured that he was not in any trouble.11 After stating that he wanted to speak to his lawyer first, the individual, who was not made a suspect, claims to have been handcuffed, taken in for questioning, interrogated, and coerced into providing a DNA sample.12

While this scenario seems clearly to be a case of police overreaching rather than standard protocol, the implications are profound. Proponents of properly conducted DNA dragnets make comparisons to drunk driving roadblocks and the widespread fingerprinting of all people present at or near a crime scene; they claim that when samples are freely provided, there is no Fourth Amendment violation.13 On the other hand, even roadblocks may not be constitutionally sound, and critics hold that when the police make a request of even the most law-abiding person, true consent may not be possible. People may worry that refusing to provide the sample will raise suspicions that they were involved in the crime under investigation. They may also feel it is their duty to help locate the perpetrator even if they think the request is unconstitutional, or they may simply not be aware of their rights.14 The Louisiana class action suit seeks to address an existing gap in the legislative scheme, which provides safeguards and procedures to regulate the use of samples in DNA databanks (samples statutorily required of all convicted criminals) but fails to provide guidance.

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for samples obtained through dragnets that occurred outside the present system.15 This case could lay the legal groundwork for the collection and maintenance of DNA from those who have not yet been, and possibly never will be, convicted of a crime.16

Another worry associated with widespread use of DNA sampling by law enforcement is that the samples could be tested for genetic propensities to disease or used for discriminatory purposes. These concerns may be premature, given recent protective legislation and the tremendous backlog of genetic material to be tested for law enforcement purposes alone, but some states do have vague laws allowing the use of DNA samples for “humanitarian purposes,” which conceivably could allow the release of this material to private researchers.17 If someone is merely a suspect and could in fact be innocent of any wrongdoing, it may be difficult to reconcile constitutional privacy protections with policies that could place his genetic information indefinitely in a state or national database.18 Ironically, suspect databanks created through dragnets may provide less protection for those who voluntarily provide genetic material than for those who are actually indicted but then acquitted, since in many states the law requires the destruction of DNA evidence once a person is exonerated but leaves dragnet databases completely unregulated.19

Ultimately, such extensive use of genetic material might be avoided by limiting the scope of consent. For example, a person voluntarily providing genetic material during the course of a DNA dragnet could consent specifically to have his DNA used in that investigation, but could refuse consent to be included in a DNA database once the investigation at hand is complete. But while this approach sounds promising, the fact that investigators attempting to gain consent for a warrantless search are not required to inform individuals of their right to refuse compounds the problem. Limiting the scope of consent would only be effective if citizens understand their right to consent to all, some, or no use of their genetic material. Further, the policy of partial consent is subject to abuse, since once the genetic material has been obtained, the onus is on the investigators to use it only within the scope of the consent. In other words, once the genie is out of the bottle, through any consent at all, how the sample is ultimately used may be difficult to control, especially if an unconsented use could help solve a gruesome crime.

Where Do We Go From Here?

New ethical and constitutional questions raised by the use of genetic material for law enforcement purposes abound. How can we strike a balance between the constantly competing goals of effectively fighting crime and safeguarding civil liberties? In a democratic society that values and fights for freedom, it would appear hypocritical to cede our prized liberty to law enforcement, but in light of the fear instigated by the “war on terror,” more and more Americans may be willing to do so.

Some view the genetic code as no more than a fingerprint, the use of which may be satisfactorily governed by existing laws. In fact, DNA provides far more information about an individual and those related to him than mere identification, and it therefore requires a more thoughtful legislative and judicial approach. Clearly, several issues regarding the use of genetic technology in law enforcement must be resolved by courts and legislatures on a state and federal level; but before this resolution can successfully occur, we must initiate an informed social debate about where we want these technologies to take us.

Acknowledgement

I thank Arthur Caplan for his continued guidance and for letting me in on this exciting issue, and Greg Kaebnick for his patience and assistance.

4. Ibid.
13. Ibid.
14. Ibid.
15. Ibid.