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DNA – Intimate Information or Trash for Public Consumption?

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"Surreptitious sampling" may be police officers' trump card in cracking otherwise unsolvable crimes as serious as murder, arson and rape. Law enforcement officers engage in surreptitious sampling when they covertly collect DNA[2] samples from unsuspecting people, who inadvertently leave behind hair, skin cells, saliva or other biological materials.[3] Surreptitious sampling is a terrific crime-resolution tool. It allows diligent law enforcement officers to collect proof-positive evidence of guilt or innocence without the hassle of obtaining a warrant and absent probable cause or reasonable suspicion to believe that the contributor of the biological evidence committed a crime. Provided an officer has the energy and savvy to gather a hair or other biological sample for testing, she can gather information with the potential to definitively link someone to a crime. Not even a hunch is necessary to justify the quest; yet, DNA processing technology "lets crime laboratories derive a full profile from a minute amount of biological material at relatively low cost."[4] Perhaps because of its effectiveness and the lack of legislative or judicial regulation of the practice, surreptitious sampling is growing in popularity. Recently, the *New York Times* highlighted this evidence-gathering method. According to the article, "Over the last few years, several hundred suspects have been implicated by the traces of DNA they unwittingly shed well after the crime was committed[.]"[5]

Although great for solving crime, some contend that surreptitious sampling is a tragedy for personal privacy and freedom because it threatens to expose significant amounts of intensely private information about citizens' health, gender, race and lineage to the government.[6] One federal district court judge remarked, "[T]he relative ease with which a DNA sample may be obtained renders questionable the ability to realistically protect any genetic privacy interest . . . ."[7]

This essay argues a middle position—that the well-established Fourth Amendment rule of "abandonment" can strike an appropriate, "reasonable" balance to serve law enforcement needs for surreptitious sampling, while simultaneously protecting citizen privacy.

I. The Query

Is surreptitious sampling constitutional? If so, are there any limits to restrict officers from capitalizing on the increasingly public nature of everyday living? Do officers act constitutionally if they blend into a crowd, bump me as I enjoy a public parade and, without my knowledge, pull several of my hairs for DNA processing? To protect our privacy, dignity and personal security from surreptitious sampling, must we live as secluded as the Unabomber?[8]

II. The Law

Although police frequently collect and use surreptitiously acquired DNA,[9] there are still few judicial opinions on the topic and even fewer legal articles analyzing the practice.[10] The Supreme Court has yet to decide under what circumstances surreptitious sampling may violate the Constitution. Thus, the handful of courts to confront challenges to evidence obtained by surreptitious sampling have usually turned to general Fourth Amendment[11] principles for guidance on whether or not to permit the prosecutor's use of such evidence.[12] One legal commentator contends that "[c]onstitutional law offers virtually no protection" for those targeted for surreptitious sampling and that "existing Fourth Amendment law is ill-suited to the facts of abandoned DNA collection[,]"[13] but this essay contends that courts are right to rely on basic Fourth Amendment concepts. Fourth Amendment principles can strike an appropriate balance, allowing the government to collect valuable evidence, while providing for reasonable boundaries to limit unduly intrusive DNA collection.[14] More specifically, courts can foster both law enforcement and privacy interests by applying the Fourth Amendment principles of voluntary abandonment vigorously. I dub this test the "patent abandonment standard."

The basic abandonment principle is found in *California v. Greenwood*, in which the Supreme Court explained that a person loses Fourth Amendment protection in his belongings by abandoning them.[15] There, the Court held that law enforcement officers do not implicate Fourth Amendment rights when they conduct a warrantless search of opaque garbage bags left on the curb in front of a suspect's home, reasoning that a warrantless search or seizure of "the garbage bags left at the curb outside the [suspect's] house would violate the Fourth Amendment only if [someone] manifested a subjective expectation of privacy in th[e] garbage that society accepts as objectively reasonable."[16] The Court concluded that any expectation of privacy in the contents of the opaque garbage bags at issue was not objectively reasonable because the bags were: 1) "readily accessible to animals, children, scavengers, snoops, and

other members of the public";[17] 2) placed at the curb "for the express purpose of conveying it to . . . the trash collector";[18] and 3) "particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it[.]"[19] In other words, when someone knowingly and intentionally leaves his garbage or his biological matter exposed to the public without exerting an effort to retain control of it, he loses all Fourth Amendment protection for that trash, biological or not.

Especially instructive to potential limits on surreptitious sampling is the Supreme Court's use of active verbs to describe a person's exposure of his belongings to the public. According to the Court, a person loses his expectation of privacy only by "le[aving]" the bags at the street to "convey[]" the refuse to the trash collector; by "deposit[ing]" the garbage in an area suited to public consumption;[20] by "knowingly expos[ing]" the bags to the public;[21] and by "'voluntarily turn[ing them] over to third parties.'"[22] In short, the Court has concentrated on the active, volitional, "patent" abandonment of materials. Accordingly, when law enforcement officers surreptitiously gather DNA from an unsuspecting person, who unwittingly turns over his or her biological material to a third party and fails to voluntarily or actively make it "readily accessible to animals, children, scavengers, snoops, and other members of the public," a strong argument can be made that officers exceed Fourth Amendment limits and violate reasonable expectations of privacy, unless they act with probable cause, reasonable suspicion and/or a warrant.

III. Application of the Law to Surreptitious Sampling

Because a persuasive argument can be made that the Fourth Amendment proscribes some surreptitious sampling, the government should be guided by a single dominant standard when it engages in the practice. Officers should collect biological evidence from a public place without probable cause or a warrant, only if and when someone actively, voluntarily and freely abandons the biological matter.[23] Such "patent abandonment" demonstrates that the person has relinquished any reasonable expectation of privacy he may have had in the biological and otherwise highly personal matter. Moreover, to strike the proper balance between law enforcement needs and privacy for the people, the terms "freely" and "voluntarily" must be interpreted to have their normal, colloquial meanings.[24] Using common-sense definitions of these terms should ensure that protection for citizens' private information is not inadvertently lost every time someone enters civilization to buy groceries, visit a friend or work.[25]

The government's ability to gather intimate, biological material from its citizens and use that material as evidence in a subsequent criminal proceeding should not reduce interactions between citizens and their government to a playground game of finders keepers, losers weepers. The issue should not be whether someone unwittingly lost his skin, hair or saliva. The more appropriate query is whether the person voluntarily left such materials behind—a "patent abandonment."

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2. Deoxyribonucleic Acid. *See* Black's Law Dictionary 516 (8th ed. 1999).[back]
3. *See* Amy Harmon, *Lawyers Fight DNA Samples Gained on Sly*, N.Y. Times, Apr. 3, 2008, at A1, *available at* http://www.nytimes.com/2008/04/03/science/03dna.html.[back]
4. *Id.*[back]
5. *Id. See also* State v. Athan, 160 Wash. 2d 354, 362, 158 P.3d 27, 31 (2007) (en banc) (explaining how officers on Seattle's cold-case squad used a DNA sample obtained in a ruse to solve the sexual assault and murder of a 13-year-old girl that had remained unsolved for twenty years).[back]
6. *See*, *e.g.*, Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 Nw. U. L. Rev. 857, 874 (2006) (arguing that surreptitious sampling "is a backdoor to population-wide data banking").[back]
7. United States v. Owens, No. 06-CR-72A, 2006 WL 3725547, at *6 (W.D.N.Y. Dec. 15, 2006) (unreported opinion); *see also id.* at *10 (noting "that physical media containing human DNA are, by their nature, regularly and involuntarily separated from the person"); California v. Ciraolo, 476 U.S. 207, 219 n.3 (1986) (Powell, J., dissenting) (noting that the privacy of a citizen is equally invaded by the type of physical entry "detested by our forbears" or by devices made feasible by science, which accomplish an intrusion from outside "private quarters"). [back]
8. Theodore J. Kaczynski, commonly called "the Unabomber," lived reclusively in a remote, 10-by-12 foot Montana cabin about 50 miles northwest of Helena, Montana, before he was arrested for mailing package bombs that killed three people and injured twenty-three more. David Johnston, *On the Unabomber Track: The Overview*, N.Y. Times, Apr. 4, 1996 at 1, *available at* http://query.nytimes.com/gst/fullpage.html?res=9A0DE2DE1339F937A35757C0A960958260. The cabin lacked both plumbing and electricity. *Id.* Kaczynski grew his own food and chopped his own wood for warmth. Richard Perez-Pena, *On the Unabomber's Track: The Suspect*, N.Y. Times, Apr. 5, 1996 at 25, *available at* http://query.nytimes.com /gst/fullpage.html?res=980CE2DE1339F937A35757C0A960958260. Kaczynski rarely entered civilization and did not pursue conversation when he did, taking care "to draw no attention to himself." *Id. See also* Edward J. Imwinkelried and D.H. Kaye, *DNA Typing: Emerging or Neglected Issues*, 76 Wash. L. Rev. 413, 437–38 (2001) ("The deposition of DNA in public places cannot be avoided unless one is a hermit or is fanatical in using extraordinary containment measures.").[back]
9. *See* Harmon, *supra* note 2.[back]
10. *See infra* note 11 (referencing some of the judicial decisions); Imwinkelried and Kaye, *supra* note 7, at 413 (noting that "courts have barely begun to focus on the legal limitations on the power of the police to obtain samples directly from suspects" and that "the permissibility of collecting DNA 'abandoned' in public places are being litigated for the first time."). *See generally* D.H. Kaye, *Science Fiction and Shed DNA*, 101 Nw. U. L. Rev. Colloquy 62 (2006), http://www.law.northwestern.edu/lawreview/colloquy/2006/7; Joh, *supra* note 5; D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 Cornell J.L.& Pub. Pol'y 455 (2001).[back]
11. The Fourth Amendment prohibits the government from conducting unreasonable searches and seizures. *See* U.S. Const. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."). Arguably, there are also due process limits on law enforcement officers' ability to surreptitiously sample. *See*, *e.g.*, State v. Christian, No. 04-0900, 2006 WL 2419031, at *3–7 (Iowa App. 2006) (unpublished decision) (analyzing on due process grounds motion to suppress DNA evidence obtained surreptitiously); People v. LaGuerre, 29 A.D.3d 820, 822–24 (N.Y. App. Div. 2006) (same). But, the due process limits are beyond the focus of this brief essay. [back]
12. *See* Commonwealth v. Bly, 862 N.E.2d 341, 349–57 & n.3 (Mass. 2007) (rejecting defendant's Fourth Amendment challenge prompted by officers' collection of three cigarette butts and a water bottle gathered from an interview room inside the Massachusetts Correctional Institution, where the defendant was incarcerated, one-half hour after the defendant left the room to call his mother, finding that defendant "fail[ed] to manifest any expectation of privacy in the items whatsoever"); State v. Athan, 158 P.3d 27, 31–34, 36 (Wash. 2007) (en banc) (rejecting a defendant's appeal of the denial of a motion to suppress DNA evidence obtained from his saliva, although detectives posed as a fictitious law firm and sent the defendant a letter inviting him to join a fictitious class action lawsuit by returning a response letter from which officers obtained a saliva sample for testing); *Christian*, 2006 WL 2419031, at *3–7 (rejecting defendant's motion to suppress DNA evidence collected by police from a water bottle and a fork the defendant "voluntarily abandoned" at the site of a job interview); Commonwealth v. Rice, 805 N.E.2d 26, 33 (Mass. 2004) (denying defendant's motion to suppress evidence collected without a warrant, cause, or consent from DNA on defendant's bed sheets, his inmate uniform and t-shirt collected by correction officers at the facility where defendant was held on unrelated charges, concluding that the defendant lacked a reasonable expectation of privacy in the bed sheets and uniform because they belonged to the county and that he abandoned any expectation of privacy in the t-shirt when he surrendered it for replacement by a less-worn shirt).[back]
13. Joh, *supra* note 5, at 863. *See also id.* at 880–82 (arguing that "greater restrictions than exist now on the collection of abandoned DNA are advisable").[back]
14. Professors Imwinkelried and Kaye appear to agree that the Fourth Amendment may protect society's interests against some surreptitious sampling. *See supra* note 7, at 438 ("A case can be constructed that [a reasonable] expectation [of privacy] exists" for DNA inevitably left in public.).[back]
15. 486 U.S. 35 (1988).[back]
16. *Id.* at 37–38, 40.[back]
17. *Id.* at 40 (footnotes omitted).[back]
18. *Id.*[back]
19. *Id.* at 40–41.[back]

20. *Id.* at 40.[back]
21. *Id.* at 41. [back]
22. *Id.* at 41 (quoting Smith v. Maryland, 442 U.S. 735, 743–44 (1979)).[back]
23. Arguably, private spaces like the home and curtilage would require a separate analysis. *See*, *e.g.*, Kyllo v. United States, 533 U.S. 27, 29 (2001) (addressing Fourth Amendment protections in the setting of scientific advancements in the form of a thermal imager that allowed law enforcement officers to collect information inside a home while remaining outside the home). In addition, while it is tempting to argue that someone must "knowingly" abandon his biological matter, it is doubtful that the average citizen knows that the government is currently using these practices; therefore, such a requirement probably tilts the balance too strongly against the government.[back]
24. "Freely" should be construed as "without restriction or interference" or "willingly and readily." Oxford American College Dictionary 534 (2002). Similarly, "voluntarily" will mean "given . . . of one's own free will[.]" *Id.* at 1582.[back]
25. Presuming that voluntary abandonment of biological material becomes "the" test for whether or not law enforcement officers act constitutionally when they surreptitiously collect biological material for testing, it will be imperative that courts remain objective when evaluating abandonment. In particularly heinous cases, the natural urge will always be to find abandonment. Therefore, to guard against subconscious leanings in favor of the government's efforts at crime resolution, judges should apply an "insurance/terrorist test." Specifically, judges should ask whether their notions of voluntary abandonment would change, if instead of government agents collecting evidence to solve a crime, an insurance company engaged in the same behavior to gather material to deny an insured's health-care coverage, or, to posit a more extreme example, if a known terrorist group collected the same biological material to identify a candidate's susceptibility to the group's influence. If the deciding court would reach the same result in all three settings and conclude that the biological matter was voluntarily and freely abandoned, then the court is ruling objectively, logically and, arguably, correctly.[back]

References: Constitutional Law, Criminal Law, Essays, Privacy Law

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