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## The Thickness of Blood: Article I, Section 7, Law Enforcement, and Commercial DNA Databases

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# THE THICKNESS OF BLOOD: ARTICLE I, SECTION 7, LAW ENFORCEMENT, AND COMMERCIAL DNA DATABASES

Hannah Parman\*

*Abstract:* Law enforcement agencies increasingly use online commercial and open source DNA databases to identify suspects in cases that have long since gone cold. By uploading crime scene DNA to one of these websites, investigators can find family members who have used the website and build a family tree leading back to the owner of the original DNA. This is called “familial DNA searching.” The highest profile use of this investigative method to date occurred in California, but law enforcement in Washington State has been quick to begin utilizing the method as well. However, article I, section 7 of the Washington Constitution provides an enhanced privacy right to Washington residents when compared to the United States Constitution. This privacy right, which protects citizens’ private affairs from governmental intrusion without a warrant, is likely violated by law enforcement use of these databases in this manner. Washington courts should and will probably conclude that this investigative technique seriously threatens this crucial constitutional right. However, the Washington legislature should not wait for the courts to weigh in. Instead, lawmakers should pass legislation to ensure that this violation of citizens’ privacy is prohibited.

## INTRODUCTION

*So you see there is little danger of my forgetting them, and far less blood relations; for surely blood is thicker than water.*

—John Moore<sup>1</sup>

Between 1974 and 1986, an unknown man committed at least fifty rapes and twelve murders across multiple California counties.<sup>2</sup> For decades, the world would only know this man as the Golden State Killer.<sup>3</sup> Then in 2016, the Federal Bureau of Investigation (FBI) announced a

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\* J.D. Candidate, University of Washington School of Law, Class of 2021. I wish to thank Professor Hugh Spitzer for his suggestions on drafts of this Comment. I also thank the editorial staff of *Washington Law Review*, particularly Ian Walsh, Monica Romero, and Robert Morgan, for their dedication and hard work. Finally, I have the deepest gratitude for the constant support of my wife, Natasha Parman, without whom this law school adventure never would have happened.

1. 2 JOHN MOORE, *ZELUCO: VARIOUS VIEWS OF HUMAN NATURE, TAKEN FROM LIFE AND MANNERS, FOREIGN AND DOMESTIC* 217 (4th ed. 1797).

2. Aja Romano, *DNA Profiles from Ancestry Websites Helped Identify the Golden State Killer Suspect*, *VOX* (Apr. 27, 2018, 5:20 PM), <https://www.vox.com/2018/4/27/17290288/golden-state-killer-joseph-james-deangelo-dna-profile-match> [<https://perma.cc/SP79-ZFXX>].

3. *Id.*

renewed effort to solve what by that point was a very cold case.<sup>4</sup> Two years into this effort, police arrested a seventy-two-year-old former police officer named Joseph James DeAngelo and charged him with twelve counts of first-degree murder.<sup>5</sup> DeAngelo had been tracked down using familial DNA searching.<sup>6</sup> Investigators had obtained his DNA from a crime scene decades before, but it did not match any existing entry when they entered the DNA into the FBI's national DNA database.<sup>7</sup> However, with the recent increased popularity of commercial DNA databases like 23andMe and Ancestry.com, investigators no longer needed the Golden State Killer to contribute a sample to any government DNA database.<sup>8</sup> Instead, they simply checked crime scene DNA against GEDmatch, a free genealogy website with an extensive genomics database.<sup>9</sup> Although DeAngelo's DNA was not there, a distant relative's was, allowing investigators to narrow the suspect pool to a single family and eventually to DeAngelo himself.<sup>10</sup> Finally, nearly half a century after he committed his crimes, DeAngelo pled guilty to the Golden State Killer murders and kidnappings.<sup>11</sup>

Similar stories have played out in Washington State. In 1987, the body of a young Canadian woman named Tanya Van Cuylenborg was discovered in rural Skagit County.<sup>12</sup> She had been raped, shot in the head, and left in a ditch.<sup>13</sup> Two days later, the body of the boyfriend with whom

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4. *Cold Case Killer: Help Us Catch the East Area Rapist*, FBI: NEWS (June 15, 2016), <https://www.fbi.gov/news/stories/help-us-catch-the-east-area-rapist> [https://perma.cc/R8VC-HVUB].

5. Cheri Mossburg & Darran Simon, *Suspected Golden State Killer Now Charged in 12 Killings*, CNN (May 11, 2018, 5:00 AM), <https://www.cnn.com/2018/05/10/us/suspected-golden-state-killer-charges/index.html> [https://perma.cc/WD8D-FBSJ].

6. Avi Selk, *The Ingenious and 'Dystopian' DNA Technique Police Used to Hunt the 'Golden State Killer' Suspect*, WASH. POST (Apr. 28, 2018, 6:50 AM), <https://www.washingtonpost.com/news/true-crime/wp/2018/04/27/golden-state-killer-dna-website-gedmatch-was-used-to-identify-joseph-deangelo-as-suspect-police-say/> [https://perma.cc/C8F9-YLHR].

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Eliot C. McLaughlin & Stella Chan, *Hearing Details Ghastly Crimes of Golden State Killer as He Pleads Guilty to Killings*, CNN (June 29, 2020, 9:13 PM), <https://www.cnn.com/2020/06/29/us/golden-state-killer-plea-expected/index.html> [https://perma.cc/Z8WK-7EDN]. DeAngelo was not charged with the rapes due to the statute of limitations. *Id.*

12. Sara Jane Green, *Investigators Use DNA, Genealogy Database to ID Suspect in 1987 Double Homicide*, SEATTLE TIMES (May 18, 2018, 12:58 PM), <https://www.seattletimes.com/seattle-news/crime/investigators-use-dna-genealogy-database-to-id-suspect-in-1987-double-homicide/> [https://perma.cc/72Q6-MU7K].

13. *Id.*

she had been traveling, Jay Cook, was found under a bridge.<sup>14</sup> In 2018, Washington law enforcement arrested William Earl Talbott II after identifying his second cousins through GEDmatch and building a family tree from that information.<sup>15</sup> Law enforcement said that Talbott had never been on any list of suspects, and no tip about him had ever been provided.<sup>16</sup> Like DeAngelo, Talbott had not uploaded his DNA to a genealogy site.<sup>17</sup>

Use of public DNA databases in this manner by law enforcement in Washington seems to be picking up steam. Less than a month after Talbott's arrest, another man was arrested for the 1986 rape and murder of twelve-year-old Michella Welch in Tacoma following a search of commercial DNA databases.<sup>18</sup> More recently, in July 2020, the Snohomish County Sheriff's Office arrested a sixty-two-year-old Bothell man named Alan Edward Dean for the 1993 murder of fifteen-year-old Melissa Lee.<sup>19</sup> The sheriff's press release stated that Dean's arrest was the county's third involving assistance from Parabon NanoLabs, a DNA technology company.<sup>20</sup> Parabon used crime scene DNA to find Dean's relatives on a public genetic genealogy website, at which point detectives acquired Dean's DNA from an abandoned cigarette butt in order to confirm his identity as Lee's killer.<sup>21</sup>

This increasingly popular investigatory method, often called "familial DNA searching"<sup>22</sup> or "investigative genetic genealogy,"<sup>23</sup> has raised both privacy and due process concerns,<sup>24</sup> as well as other social and ethical

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14. *Id.*

15. *Id.*

16. *Id.*

17. Selk, *supra* note 6; Green, *supra* note 12.

18. Joshua Bessex, *DNA in a Genealogy Database and a Used Napkin Link Suspect to Michella Welch Murder*, THE NEWS TRIBUNE (June 22, 2018, 12:22 PM), <https://www.thenews-tribune.com/news/local/crime/article213651959.html> [<https://perma.cc/YY79-TP6D>].

19. Press Release, Snohomish Cnty. Sheriff's Off., Suspect Arrested in 1993 Homicide Cold Case (July 29, 2020) [hereinafter Snohomish Cnty. Sheriff's Off. Press Release], <https://snohomishcountywa.gov/Archive.aspx?ADID=6505> [<https://perma.cc/DG93-DAZ9>].

20. *Id.*

21. *Id.*

22. SARA DEBUS-SHERRILL & MICHAEL B. FIELD, UNDERSTANDING FAMILIAL DNA SEARCHING: POLICIES, PROCEDURES, AND POTENTIAL IMPACT 2 (2017), <https://www.ncjrs.gov/pdffiles1/nij/grants/251043.pdf> [<https://perma.cc/ET5Y-XUGW>].

23. Natalie Ram, *Investigative Genetic Genealogy and the Future of Genetic Privacy*, 16 SCITECH LAW. 18, 19 (2020).

24. Sarah Kellogg, *To Catch a Criminal: Ethics and Privacy in DNA Familial Searches*, 33 WASH. LAW. 29, 30–31 (2018).

issues.<sup>25</sup> As a University of Washington ethicist asked when being interviewed about the Golden State Killer case, “[DeAngelo] was a horrible man and it is good that he was identified, but does the end justify the means?”<sup>26</sup> As of 2018, Ancestry.com and 23andMe—two of the more popular commercial DNA databases—had the DNA of ten million and five million customers, respectively, in their systems.<sup>27</sup> Although *The New York Times* said in 2018 that “[i]t is unlikely that the apparent success of the method in the Golden State Killer case will spur a rush to use genealogy databases to solve crimes,”<sup>28</sup> it appears that rush has arrived. One news article from February 2020 describes the “dozens of cold cases” solved in this manner in the previous two years and goes on to list nine of those cases which were “very, very old.”<sup>29</sup> But the DNA hosted on these sites does not only belong to the individuals who have made the choice to upload it—their non-consenting siblings, parents, children, and cousins share some of that DNA as well.<sup>30</sup>

This investigative technique raises particular concern when used by law enforcement in Washington. It is “well settled that article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution.”<sup>31</sup> Unlike the Fourth Amendment, the privacy rights protected by the Washington Constitution “[are] not confined to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives.”<sup>32</sup> Although it is well established that the collection of DNA is a search under the Washington Constitution,<sup>33</sup> Washington courts have yet to address whether the use of

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25. See generally Erica Haimes, *Social and Ethical Issues in the Use of Familial Searching in Forensic Investigations: Insights from Family and Kinship Studies*, 34 J.L. MED. & ETHICS 263 (2006).

26. Gina Kolata & Heather Murphy, *The Golden State Killer Is Tracked Through a Thicket of DNA, and Experts Shudder*, N.Y. TIMES (Apr. 27, 2018), <https://www.nytimes.com/2018/04/27/health/dna-privacy-golden-state-killer-genealogy.html> [<https://perma.cc/2U4V-C533>].

27. *Id.*

28. *Id.*

29. Robert Gearty, *DNA, Genetic Genealogy Helping to Solve the Coldest of Cold Cases*, FOX NEWS (Feb. 5, 2020), <https://www.foxnews.com/us/dna-genetic-genealogy-helping-to-solve-the-coldest-of-cold-cases> [<https://perma.cc/2M58-PWJ7>].

30. *Id.*

31. *State v. Jones*, 146 Wash. 2d 328, 332, 45 P.3d 1062, 1064 (2002).

32. *State v. Myrick*, 102 Wash. 2d 506, 511, 688 P.2d 151, 154 (1984).

33. See Charles W. Johnson & Debra L. Stephens, *Survey of Washington Search and Seizure Law: 2019 Update*, 42 SEATTLE U. L. REV. 1293 (2019) (“[T]he taking of . . . DNA samples is considered a search within the meaning of both the Fourth Amendment and article I, section 7.”); see also *State*

crime scene DNA to search public databases for family relationships violates article I, section 7.

This Comment discusses law enforcement DNA usage and familial DNA searching under the Washington Constitution. Part I describes DNA and its historical use in crime scene investigations. It also discusses modern DNA use by Washington law enforcement in particular. Part II discusses specifics of the familial DNA searching process. Part III outlines the history and accepted interpretation of article I, section 7 of the Washington Constitution, particularly as it relates to DNA. Part IV evaluates law enforcement use of familial DNA searching within the framework of article I, section 7, concluding that this investigative method is likely a violation of the Washington Constitution. Finally, Part V argues that the threat to Washingtonians' privacy presented by this investigative technique is so great that lawmakers should not wait for the constitutional analysis to play out in court, but instead should take active steps to restrict Washington law enforcement's use of familial DNA searching.

## I. DNA AND THE HISTORY OF LAW ENFORCEMENT USE

### A. *What is DNA?*

Deoxyribonucleic acid, more commonly known as DNA, is the unique material found in almost all organisms.<sup>34</sup> The information contained within DNA is made up of four chemical bases, and 99% of human DNA is the same in all people.<sup>35</sup> All DNA is hereditary, meaning it is passed down to biological family members.<sup>36</sup> Paternal ancestry, passed by fathers to their male children, can be tracked through the Y chromosome.<sup>37</sup> Similarly, mothers pass mitochondrial DNA (mtDNA), found in the mitochondria of cells, to all their children.<sup>38</sup> Because mtDNA is passed in

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v. Athan, 160 Wash. 2d 354, 367–68, 158 P.3d 27, 34 (2007) (acknowledging that DNA's potential to expose personal information could make it a privacy interest "in some circumstances"); State v. Gregory, 158 Wash. 2d 759, 828–29, 147 P.3d 1201, 1238 (2006) (holding that the use of a DNA profile did not implicate article I, section 7 because the DNA was already in the government's possession), *overruled on other grounds by* State v. W.R., Jr., 181 Wash. 2d 757, 336 P.3d 1134 (2014).

34. *What Is DNA?*, NAT'L INST. OF HEALTH, U.S. NAT'L LIBR. OF MED.: MEDLINEPLUS (Feb. 11, 2019), <https://ghr.nlm.nih.gov/primer/basics/dna> [<https://perma.cc/9K4Z-7C4W>].

35. *Id.*

36. *Id.*

37. Rafi Letzter, *How Do DNA Ancestry Tests Really Work?*, LIVESCIENCE (June 4, 2018), <https://www.livescience.com/62690-how-dna-ancestry-23andme-tests-work.html> [<https://perma.cc/TSY9-DFN9>].

38. *Id.*; see *What Is DNA?*, *supra* note 34.

this manner, it can be used to create ancestral trees.<sup>39</sup> By obtaining access to a family member's DNA, one can have at least partial access to the DNA profile of many other members of that person's biological family, including immediate and extended family members.<sup>40</sup>

DNA has been a useful law enforcement tool since DNA profiling was discovered in 1984.<sup>41</sup> Forensic DNA profiling involves matching unique patterns in alleles (the variant forms of genes that create heritable traits)<sup>42</sup> and short tandem repeats (STRs).<sup>43</sup> In the United States, law enforcement searches match alleles at twenty specific loci, or locations on a person's genome, which are non-coding and as such cannot be connected to the person's observable characteristics.<sup>44</sup> Law enforcement agencies are able to perform high-stringency searches that require all alleles to match exactly at all loci.<sup>45</sup> This traditional version of DNA profiling finds exact matches between different crime scene samples, as well as matches with DNA taken from convicted offenders and arrestees.<sup>46</sup> Moderate and low stringency levels allow for partial matches, which can allow the identification of potential family relationships.<sup>47</sup> However, existing law enforcement software is not designed to identify familial matches,<sup>48</sup> causing some agencies to turn towards other technology that is designed for this purpose—technology like GEDmatch.<sup>49</sup>

### B. *The History of DNA "Fingerprinting"*

DNA was first used in a criminal investigation shortly after a geneticist at the University of Leicester in England discovered its potential for identifying unknown individuals.<sup>50</sup> The inventor of this "DNA fingerprinting," as it became known, assisted police in solving two

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39. A. JAMIE CUTICCHIA, *GENETICS: A HANDBOOK FOR LAWYERS* 98 (2d ed. 2018).

40. *Id.*

41. DEBUS-SHERRILL & FIELD, *supra* note 22, at 1.

42. CUTICCHIA, *supra* note 39, at 28.

43. DEBUS-SHERRILL & FIELD, *supra* note 22, at 1.

44. *Id.* at 2. Observable characteristics include race, gender, and health. *Id.*

45. *Id.* at 3.

46. *Id.*

47. *Id.* at 2.

48. For example, a search of CODIS, the national DNA database in which states participate, does not "statistically rank partial matches or take into consideration allele frequency." Joyce Kim, Danny Mammo, Marni B. Siegel & Sara H. Katsanis, *Policy Implications for Familial Searching*, 2 *INVESTIGATIVE GENETICS* 1, 3 (2011), <http://www.investigativegenetics.com/content/2/1/22> [https://perma.cc/W4T2-GN6U].

49. *Id.*

50. MICHAEL LYNCH, SIMON A. COLE, RUTH McNALLY & KATHLEEN JORDAN, *TRUTH MACHINE: THE CONTENTIOUS HISTORY OF DNA FINGERPRINTING* 49 (2008).

rape-murder cases called the Black Pad murders in 1986 and 1987.<sup>51</sup> Blood samples were taken from thousands of men in the local area as part of the investigation.<sup>52</sup> Finally, after law enforcement discovered one man had submitted a blood sample given to him by a friend in place of his own, the man was arrested, tested, and eventually convicted.<sup>53</sup>

DNA fingerprinting quickly migrated to the United States, where its popularity among investigators—and moreover, the public—boomed.<sup>54</sup> Proponents and the media lauded DNA as “the perfect fingerprint: unfakeable, unique, and running in families.”<sup>55</sup> The legitimacy and perceived perfection of DNA fingerprinting was only reinforced by early cases where challenges to the admissibility of the evidence were unsuccessful.<sup>56</sup> Throughout this time period, proponents and the media continued to use the term “DNA fingerprinting” when referring to forensic DNA use.<sup>57</sup> Soon the public developed a steadfast love affair with DNA in the criminal investigation and prosecution context, believing that it could be used to provide absolute identification every time.<sup>58</sup>

However, DNA evidence as it is used today is not infallible.<sup>59</sup> The first successful challenge to the admissibility of DNA evidence occurred in 1989, with the New York murder trial of José Castro.<sup>60</sup> Other successful challenges soon followed, focusing on three main areas: (1) technical problems with collection, handling, and analysis; (2) statistical issues with DNA “matches;” and (3) organizational and administrative complications.<sup>61</sup> Despite the potential for error, DNA’s place in our criminal justice system is deep-seated.<sup>62</sup> Jurors today expect DNA

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51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* DNA fingerprinting was first used in the 1987 Florida murder trial of Tommie Lee Andrews. *Id.*

55. *Id.* at 51 (quoting *Genetic Fingerprints: Cherchez la Gene*, *ECONOMIST*, Jan. 4, 1986, at 68–69).

56. See *Andrews v. State*, 533 So. 2d 841, 850 (Fla. Dist. Ct. App. 1988) (denying appeal based on use of DNA evidence); *New Jersey v. Williams*, 599 A.2d 960, 968 (N.J. Super. Ct. Law Div. 1991) (allowing use of DNA evidence for the first time in New Jersey). In both cases, the courts determined that DNA evidence was sufficiently reliable for use in trial. *Andrews*, 533 So. 2d at 849–51; *Williams*, 599 A.2d at 967–68.

57. LYNCH ET AL., *supra* note 50, at 51.

58. *Id.*

59. Naomi Elster, *How Forensic DNA Evidence Can Lead to Wrongful Convictions*, *JSTOR DAILY* (Dec. 6, 2017), <https://daily.jstor.org/forensic-dna-evidence-can-lead-wrongful-convictions> [<https://perma.cc/MPN3-DXJW>].

60. LYNCH ET AL., *supra* note 50, at 57.

61. *Id.* at 57–62.

62. *Id.*



evidence and it can play an important role in their decision to convict or acquit.<sup>63</sup> This reliance may have particularly serious implications for trials concerning cold cases, given that the weight of potentially unreliable DNA evidence may be overinflated when other evidence is no longer easily accessible.

C. *DNA is Commonly Used by Washington Law Enforcement Today*

Washington participates in the Combined DNA Index System (CODIS), the United States' national DNA database.<sup>64</sup> CODIS is “the generic term used to describe the FBI’s program of support for criminal justice DNA databases as well as the software used to run these databases.”<sup>65</sup> One part of CODIS is the FBI-sponsored National DNA Index System (NDIS), which contains DNA from federal, state, and local forensic laboratories.<sup>66</sup> All fifty states, the District of Columbia, the Army, and Puerto Rico submit DNA profiles to NDIS.<sup>67</sup> The Washington CODIS database includes samples from certain offenders, crime scenes, missing persons, biological relatives of missing persons, and unidentified recovered humans (both living and deceased).<sup>68</sup> Samples uploaded to the state CODIS database are automatically searched for matches.<sup>69</sup> There are three jurisdictional levels of CODIS (national, state, and local), each with different criteria for when DNA profiles may be included.<sup>70</sup>

Both the state and federal databases are heavily used.<sup>71</sup> As of November 2019, NDIS contains over fourteen million offender profiles, three million arrestee profiles, and nearly one million forensic profiles whereas Washington’s CODIS database contains nearly 300,000 offender profiles

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63. Matthew Shaer, *The False Promise of DNA Testing*, THE ATL. (June 2016), <https://www.theatlantic.com/magazine/archive/2016/06/a-reasonable-doubt/480747> [<https://perma.cc/J468-F9TG>] (“[S]exual-assault cases involving DNA evidence . . . were twice as likely to reach trial and 33 times as likely to result in a guilty verdict; homicide cases were 14 times as likely to reach trial and 23 times as likely to end in a guilty verdict.”).

64. WASH. STATE PATROL, CODIS LABORATORY: THE COMBINED DNA INDEX SYSTEM (2017), [https://www.wsp.wa.gov/forensics/docs/crimelab/codis\\_brochure.pdf](https://www.wsp.wa.gov/forensics/docs/crimelab/codis_brochure.pdf) [<https://perma.cc/PY5V-T43U>].

65. *Frequently Asked Questions on CODIS and NDIS*, FBI: BIOMETRIC ANALYSIS, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet> [<https://perma.cc/CK79-MNL7>].

66. *Id.*

67. H.R. REP. NO. 1326, 66th Leg., Reg. Sess., at 2 (Wash. 2019).

68. *Id.*

69. *Id.*

70. DEBUS-SHERRILL & FIELD, *supra* note 22, at 3.

71. *See CODIS – NDIS Statistics*, FBI: BIOMETRIC ANALYSIS, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics> [<https://perma.cc/Y9YQ-N6ZM>].

and 11,000 forensic profiles.<sup>72</sup> In 2018, Washington State Patrol’s Crime Laboratory Division received 11,987 samples for CODIS resulting in 643 hits.<sup>73</sup>

State statutes regulate the collection and use of DNA by Washington law enforcement.<sup>74</sup> DNA samples may “be used only for purposes related to criminal investigation, identification of human remains or missing persons, or improving the operation of the system authorized under RCW 43.43.752 through 43.43.758.”<sup>75</sup> A state statute also mandates DNA collection from certain individuals, including anyone convicted of a felony or a variety of misdemeanors, many with sexual elements.<sup>76</sup> Unlike some states,<sup>77</sup> Washington does not collect DNA upon arrest, although the legislature has considered changing this multiple times.<sup>78</sup>

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72. *Id.*

73. WASH. STATE PATROL, 2018 ANNUAL REPORT 31 (2019).

74. *See* WASH. REV. CODE § 43.43.753 (2020).

75. *Id.*

76. *See id.* § 43.43.754.

(1) A biological sample must be collected for purposes of DNA identification analysis from:

(a) Every adult or juvenile individual convicted of a felony, or any of the following crimes (or equivalent juvenile offenses):

(i) Assault in the fourth degree where domestic violence as defined in RCW 9.94A.030 was pleaded or proven (RCW 9A.36.041, 9.94A.030);

(ii) Assault in the fourth degree with sexual motivation (RCW 9A.36.041, 9.94A.835);

(iii) Communication with a minor for immoral purposes (RCW 9.68A.090);

(iv) Custodial sexual misconduct in the second degree (RCW 9A.44.170);

(v) Failure to register (chapter 9A.44 RCW);

(vi) Harassment (RCW 9A.46.020);

(vii) Patronizing a prostitute (RCW 9A.88.110);

(viii) Sexual misconduct with a minor in the second degree (RCW 9A.44.096);

(ix) Stalking (RCW 9A.46.110);

(x) Indecent exposure (RCW 9A.88.010);

(xi) Violation of a sexual assault protection order granted under chapter 7.90 RCW; and

(b) every adult or juvenile individual who is required to register under RCW 9A.44.130.

*Id.*

77. *See* NAT’L CONF. OF STATE LEGISLATURES, DNA ARRESTEE LAWS 1 (2013), <https://www.ncsl.org/Documents/cj/ArresteeDNALaws.pdf> [https://perma.cc/9G8N-85N7]. Thirty states permit the collection and analysis of DNA samples from people who have been arrested or charged with certain crimes, a practice upheld by the United States Supreme Court in *Maryland v. King*, 569 U.S. 435 (2013). *Id.*

78. *See* Gene Johnson, *Washington Considers Collecting DNA Upon Arrest in Serious Crime*, SEATTLE TIMES (Feb. 5, 2012, 8:19 PM), <https://www.seattletimes.com/seattle-news/washington-considers-collecting-dna-upon-arrest-in-serious-crime/> [https://perma.cc/GZC2-K6PC] (discussing bills before the state legislature that would allow collection of DNA when someone is arrested for a felony or for violating a domestic-violence protection order); *see also* S. 6366, 64th Leg., Reg. Sess. (Wash. 2016) (amending state law to require DNA sample collection from “adults charged with a crime against persons, . . . residential burglary, or assault in the fourth degree”); S. 6314, 63rd Leg., Reg. Sess. (Wash. 2014) (amending state law to require DNA sample collection from “adults arrested for or charged with ranked felony offenses . . . and other crimes”).

## II. FAMILIAL DNA SEARCHING IS A NEW ADVANCEMENT AND LEGISLATURES HAVE ONLY RECENTLY BEGUN TO ADDRESS IT

Law enforcement use of DNA is not a new development, but familial DNA searching has only recently become relevant.<sup>79</sup> This Part discusses the intention and basic scientific parameters of familial DNA searching and the current legal status of law enforcement use of familial DNA searching in the United States.

### A. *Familial DNA Searching Background*

According to the FBI, familial DNA searching is “an intentional or deliberate search of the database . . . for the purpose of potentially identifying close biological relatives of the unknown forensic sample associated with the crime scene profile.”<sup>80</sup> Investigators using CODIS for familial DNA searching first run a low-stringency search to identify a relative of the perpetrator.<sup>81</sup> This can result in hundreds of matches, so a variety of additional measures—including additional testing and research—are used to narrow the field.<sup>82</sup>

The samples contained in commercial DNA databases are much less limiting.<sup>83</sup> Customers of sites like 23andMe or Ancestry.com may voluntarily submit the raw DNA data obtained from those sites to GEDmatch.<sup>84</sup> These profiles contain information about 600,000 locations within a customer’s genome.<sup>85</sup> These locations are identified by looking for single-nucleotide polymorphisms (SNPs).<sup>86</sup> SNPs are less variable (and more likely to produce incorrect matches) than the STRs stored in CODIS but lend themselves more readily to identifying distant relatives.<sup>87</sup>

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79. See Sarah Zhang, *How a Tiny Website Became the Police’s Go-To Genealogy Database*, THE ATL. (June 1, 2018), <https://www.theatlantic.com/science/archive/2018/06/gedmatch-police-genealogy-database/561695/> [<https://perma.cc/Z9WQ-T3V8>].

80. *Frequently Asked Questions on CODIS and NDIS*, *supra* note 65.

81. Kim et al., *supra* note 48, at 2.

82. *Id.* at 3–4. These additional measures are intended to eliminate matches which do not share a family relationship with the target DNA and are just coincidentally similar. *Id.* at 3. These measures include retesting Y-chromosome STR markers, analyzing mitochondrial DNA, inferring relationships based on the number of shared alleles, statistical analysis, retesting with a focus on shared alleles, and public records reviews. *Id.* at 3–4. However, none of these additional measures is a perfect fix for CODIS’s inherent familial search issues. *See id.*

83. Zhang, *supra* note 79.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

Because the databases owned by law enforcement are too outdated to contain SNP information, investigators have begun using open-source ancestry sites to solve cold cases through familial DNA searching.<sup>88</sup> As of 2019, this meant that law enforcement had the ability to search the genetic profiles of nearly one million GEDmatch users.<sup>89</sup>

Both the Golden State Killer and William Earl Talbott II, the suspect from the 1987 Seattle-area double homicide,<sup>90</sup> were identified using GEDmatch.<sup>91</sup> In both instances, investigators created a fake profile on the site and uploaded crime scene DNA.<sup>92</sup> At the time, nothing indicated to site users that law enforcement agencies may use their data in this manner.<sup>93</sup> GEDmatch has since updated its terms of service, which now expressly permit law enforcement use for certain violent crimes:

When you upload Raw Data to GEDmatch, you agree that the Raw Data is one of the following:

Your DNA;

DNA of a person for whom you are a legal guardian;

DNA of a person who has granted you specific authorization to upload their DNA to GEDmatch;

DNA of a person known by you to be deceased;

**DNA obtained and authorized by law enforcement to identify a perpetrator of a violent crime against another individual, where “violent crime” is defined as murder, nonnegligent manslaughter, aggravated rape, robbery, or aggravated assault;**

DNA obtained and authorized by law enforcement to identify remains of a deceased individual;

An artificial DNA kit (if and only if: (1) it is intended for research purposes; and (2) it is not used to identify anyone in the GEDmatch database); or

DNA obtained from an artifact (if and only if: (1) you have a reasonable belief that the Raw Data is DNA from a previous owner or user of the artifact rather than from a living individual; and (2) that previous owner or user of the artifact is known to

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88. *Id.*

89. Kashmir Hill & Heather Murphy, *Your DNA Profile Is Private? A Florida Judge Just Said Otherwise*, N.Y. TIMES (Nov. 5, 2019), <https://www.nytimes.com/2019/11/05/business/dna-database-search-warrant.html> [https://perma.cc/U9GS-CMF6].

90. *See supra* notes 12–16 and accompanying text.

91. *Id.*; Green, *supra* note 12.

92. Zhang, *supra* note 79.

93. *Id.*

you to be deceased).<sup>94</sup>

After this policy change, existing users were required to read the updated terms of service in order to continue using the site.<sup>95</sup> GEDmatch also now allows users to opt-in or opt-out of comparison with “DNA kits identified as being uploaded for Law Enforcement purposes”—meaning, presumably, DNA uploaded by law enforcement in order to identify a perpetrator or the remains of an unknown decedent.<sup>96</sup> However, a judge in Florida recently granted a warrant that would override the GEDmatch opt-in requirement and allow a detective to search the full database.<sup>97</sup> Policy experts believe that this will likely encourage other law enforcement agencies to request similar warrants from the larger databases, such as 23andMe and Ancestry.com—raising questions about the efficacy of any policies the sites have restricting law enforcement searches.<sup>98</sup>

#### B. *Lawmakers Are Just Now Beginning to Regulate Familial DNA Searching*

Today, familial searches conducted by police using GEDmatch and other databases have little oversight.<sup>99</sup> Similar activity using CODIS, while more regulated, also lacks review because these searches are regulated by the individual states.<sup>100</sup> The patchwork of state and national policies governing familial DNA searching illustrates the sporadic regulation of this investigative technique.<sup>101</sup> Familial DNA searching is not performed at the national level, but Arkansas, California, Colorado, Florida, Michigan, Texas, Utah, Virginia, Wisconsin, and Wyoming perform this type of search on state-government DNA databases.<sup>102</sup> Maryland and the District of Columbia, on the other hand, have laws

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94. *Terms of Service and Privacy Policy*, GEDMATCH, <https://www.gedmatch.com/tos.htm> [<https://perma.cc/4AHW-GKYN>] (emphasis added).

95. Debbie Kennett, *Updates to the Terms of Service and Privacy Policy at GEDmatch*, CRUWYS NEWS BLOG (May 21, 2018, 4:29 PM), <https://cruwys.blogspot.com/2018/05/updates-to-terms-of-service-and-privacy.html> [<https://perma.cc/7FP3-3PHS>].

96. GEDMATCH, *supra* note 94.

97. Hill & Murphy, *supra* note 89.

98. *Id.*

99. Zhang, *supra* note 79.

100. *Id.*

101. See 34 U.S.C. § 40702; Sarah B. Berson, *Debating DNA Collection*, 264 NAT'L INST. JUST. J. 9, 10–11 (2009) (“States’ legislation requiring preconviction DNA collection varies . . . State laws also vary with regard to how samples may be used beyond law enforcement and quality control purposes.”).

102. *Frequently Asked Questions on CODIS and NDIS*, *supra* note 65.

specifically prohibiting familial searching of their statewide databases.<sup>103</sup> Maryland's law prohibits anyone from "perform[ing] 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."<sup>104</sup> The District of Columbia's law provides that DNA collected by an agency "shall not be searched for the purpose of identifying a family member related to the individual from whom the DNA sample was acquired."<sup>105</sup>

Legislators considering a regulatory framework around familial DNA searching have expressed broader concerns about the threats it may pose to privacy rights.<sup>106</sup> In fact, the sponsor of Maryland's bill was specifically concerned that use of DNA databases in this manner would be an unreasonable search and seizure.<sup>107</sup> As the same search technique becomes more commonly used in Washington,<sup>108</sup> the state constitutional implications become relevant as well.

### III. WASHINGTON'S ARTICLE I, SECTION 7 BROADLY PROTECTS PRIVACY INTERESTS

Where the legal status of DNA searching generally in Washington is concerned, it is well established that the collection of DNA samples is considered a search under article I, section 7 of the Washington Constitution.<sup>109</sup> However, once a DNA sample is lawfully in police possession, an additional warrant is not required to compare it to unrelated cases or to evidence from a new crime scene.<sup>110</sup> It is also a constitutional right of all persons to refuse to consent to warrantless sampling of their DNA.<sup>111</sup> As of 2020, the Washington State Patrol has a consent form

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103. *Id.*

104. MD. CODE ANN., PUB. SAFETY § 2-506 (LexisNexis 2020).

105. D.C. CODE ANN. § 22-4151 (2020).

106. Natalie Jones, *Maryland House Bill Seeks to Prohibit Using Familial DNA Databases to Solve Crime*, BALT. SUN (Feb. 20, 2019, 10:29 PM), <https://www.baltimoresun.com/politics/bs-md-maryland-house-bill-dna-databases-0221-story.html> [<https://perma.cc/7NAF-K5BC>] ("Because DNA is genetic and is shared between relatives, your privacy could be violated by someone other than you, and in many cases, this data could be used against you because the control of data about you is in other people's hands.")

107. *Id.* ("[S]earching through a DNA database seems to violate both the Fourth Amendment to the Constitution and the Maryland Declaration of Rights, which both protect individuals from unreasonable searches and seizures.")

108. *See* Green, *supra* note 12; Bessex, *supra* note 18; Snohomish Cnty. Sheriff's Off. Press Release, *supra* note 19.

109. Johnson & Stephens, *supra* note 33, at 1293.

110. *Id.* at 1365, 1402.

111. *State v. Gauthier*, 174 Wash. App. 257, 163, 298 P.3d 126, 130 (2013).

online to be used when collecting DNA from a family member in order to potentially identify a missing person.<sup>112</sup> But there is no such form for collecting DNA from a family member in order to identify a suspect or compare it to crime scene DNA.<sup>113</sup>

Although Washington does not have a statute that addresses familial DNA searching, residents of the state can still rely on article I, section 7 of the Washington Constitution. This Part reviews the existing article I, section 7 jurisprudence and the protections it offers, the courts' objective and adaptive applications of article I, section 7 to new technologies, and article I, section 7 cases related specifically to DNA.

*A. Washington Courts Have Long Maintained that Article I, Section 7 is More Protective than the Fourth Amendment*

Article I, section 7 of the Washington Constitution states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."<sup>114</sup> The Supreme Court of Washington has repeatedly held that "authority of law" can be provided by a warrant based on probable cause or one of the "few 'jealously and carefully drawn exceptions' to the warrant requirement."<sup>115</sup> These exceptions are: consent, searches incident to a valid arrest, inventory searches, plain view, investigative stops, and exigent circumstances.<sup>116</sup> The exigent circumstances exception applies when "obtaining a warrant . . . would compromise officer safety, facilitate escape or permit the destruction of evidence."<sup>117</sup>

The Supreme Court of Washington has held that article I, section 7 is more protective of individual privacy rights than the Fourth Amendment.<sup>118</sup> The 1889 State Constitutional Convention explicitly

112. WASH. STATE PATROL: CRIME LAB'Y DIV., CONSENT FOR FAMILY REFERENCE SAMPLE COLLECTION, TESTING, AND CODIS ENTRY (Dec. 2018), [https://wsp.wa.gov/forensics/docs/crimelab/consent\\_family\\_reference.docx](https://wsp.wa.gov/forensics/docs/crimelab/consent_family_reference.docx) [<https://perma.cc/TF3J-GZVY>] (form).

113. See generally *Crime Laboratory Division*, WASH. STATE PATROL, <http://www.wsp.wa.gov/forensics/crimlabs.htm> [<https://perma.cc/AW74-WGYH>].

114. WASH. CONST. art. I, § 7.

115. *State v. Witkowski*, 3 Wash. App. 2d 318, 336, 415 P.3d 639, 648 (2018); *State v. Houser*, 95 Wash. 2d 143, 149, 622 P.2d 1218, 1222 (1980) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759 (1979)).

116. *State v. Hendrikson*, 129 Wash. 2d 61, 71, 917 P.2d 563, 568 (1996).

117. *State v. Tibbles*, 169 Wash. 2d 364, 370, 236 P.3d 885, 888 (2010) (quoting *State v. Smith*, 165 Wash. 2d 511, 517, 199 P.3d 386, 389 (2009) (internal quotation marks omitted)).

118. *State v. Jones*, 146 Wash. 2d 328, 332, 45 P.3d 1062, 1064 (2002) ("[I]t is well settled that article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution."); see U.S. CONST. amend. IV

rejected a state provision identical to Fourth Amendment in favor of the broader version seen the Washington Constitution today, in part to ensure that “interests that were threatened by new technologies” would be protected.<sup>119</sup> This was likely due in part to the failure of the United States Supreme Court in *Boyd v. United States*<sup>120</sup> to extend the Fourth Amendment’s protections to broader privacy interests such as “personal security, personal liberty, and private property.”<sup>121</sup>

Two cases in particular elucidate the differences between the Fourth Amendment and article I, section 7. In one case, *State v. Boland*,<sup>122</sup> the Supreme Court of Washington considered the constitutionality of law enforcement searching a defendant’s curbside trash can without a warrant.<sup>123</sup> Just two years prior, the United States Supreme Court had held that there was no reasonable expectation of privacy under the Fourth Amendment in items discarded in curbside garbage.<sup>124</sup> Notwithstanding the United States Supreme Court’s decision, the Supreme Court of Washington found that law enforcement’s search of a trash can was an intrusion of a private affair and thus protected by article I, section 7.<sup>125</sup> Although acknowledging that it may not be unreasonable for a third party to search another’s trash, the Court’s majority stated that “average persons would find it reasonable to believe the garbage they place in their trash cans will be protected from warrantless *governmental* intrusion.”<sup>126</sup> In

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(“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

Washington courts previously utilized the six criteria established by the Supreme Court of Washington in *State v. Gunwall* to determine when the Washington constitution is more protective than the U.S. Constitution. 106 Wash. 2d 54, 66, 720 P.2d 808, 814–15 (1986). The six *Gunwall* criteria are: (1) “The textual language of the State Constitution”; (2) “Significant differences in the texts of parallel provisions in the federal and state constitutions”; (3) “State constitutional and common law history”; (4) “Preexisting state law”; (5) “Differences in structure between the federal and state constitutions”; and (6) “Matters of particular state interest or local concern.” *Id.* Because once the Court has done such an analysis on a specific legal issue it declines to do so again, Washington courts no longer perform this analysis on these two constitutional provisions where privacy rights are concerned. *State v. Ladson*, 138 Wash. 2d 343, 348, 979 P.2d 833, 837 (1999).

119. Charles W. Johnson & Scott P. Beetham, *The Origin of Article I, Section 7 of the Washington State Constitution*, 31 SEATTLE U. L. REV. 431, 446 (2008); *State v. Simpson*, 95 Wash. 2d 170, 178, 622 P.2d 1199, 1205 (1980).

120. 116 U.S. 616 (1886).

121. Johnson & Beetham, *supra* note 119, at 447 (quoting *Boyd*, 116 U.S. at 627).

122. 115 Wash. 2d 571, 800 P.2d 1112 (1990).

123. *Id.* at 574, 800 P.2d at 1113.

124. *California v. Greenwood*, 486 U.S. 35, 41 (1988).

125. *Boland*, 115 Wash. 2d at 578, 800 P.2d at 1116.

126. *Id.* (emphasis added).



sum, garbage in trash cans is protected from governmental intrusion by the Washington Constitution, but not its federal counterpart.

The second case established that article I, section 7 requires individualized suspicion to be present before a search.<sup>127</sup> In *City of Seattle v. Mesiani*,<sup>128</sup> a group of plaintiffs challenged a sobriety checkpoint program orchestrated by the city.<sup>129</sup> All motorists were stopped at the checkpoints, “without warrants or individualized suspicion of any criminal activity.”<sup>130</sup> Finding that the checkpoints involved seizures, the Court then determined that they did not fall within an exception to the warrant requirement.<sup>131</sup> Based on this, the Court held that the checkpoints were a violation of both article I, section 7 and the Fourth Amendment.<sup>132</sup> However, this ruling was in direct contrast to a United States Supreme Court case, two years after *Mesiani*, in which that Court held that a similar sobriety checkpoint program did not violate the Fourth Amendment.<sup>133</sup> Together, *Boland* and *Mesiani* illustrate how protective Washington courts are of individual privacy rights under article I, section 7. These cases also illustrate how this portion of the Washington Constitution is more protective than its federal counterpart when compared to similar cases involving the privacy interests protected by the Fourth Amendment.<sup>134</sup>

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127. See *City of Seattle v. Mesiani*, 110 Wash. 2d 454, 455, 755 P.2d 775, 776 (1988).

128. 110 Wash. 2d 454, 755 P.2d 775 (1988).

129. *Id.* at 455, 755 P.2d at 776.

130. *Id.*

131. *Id.* at 457, 755 P.2d at 777. The city argued that the searches were permitted under a previous Washington case. *Id.* at 458 n.1, 755 P.2d at 777 n.1 (citing *State v. Silvernail*, 25 Wash. App. 185, 605 P.2d 1279 (1980)). The Court rejected this argument, as that case was “limited to situations in which there was reliable information that a serious felony had recently been committed . . . far different from an inference from statistics that there are inebriated drivers in the area.” *Id.* (citation omitted).

132. *Id.* at 457–60, 755 P.2d at 777–78.

133. *Id.* at 460, 755 P.2d at 778; *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990). One Washington Court of Appeals stated that while *Sitz* “imperiled” the Fourth Amendment holding in *Mesiani*, “*Mesiani* . . . survive[s] since it rested primarily on [article I, section 7].” *City of Seattle v. Yeager*, 67 Wash. App. 41, 49 & n.4, 834 P.2d 73, 77 & n.4 (1992).

134. Compare *State v. Boland*, 115 Wash. 2d 571, 578, 800 P.2d 1112, 1116 (1990) (holding that a privacy right to trash on the curb was protected under article I, section 7), with *California v. Greenwood*, 486 U.S. 35, 37 (1988) (holding that a warrantless search of trash on the curb was permitted under the Fourth Amendment). Compare *Mesiani*, 110 Wash. 2d at 460, 755 P.2d at 778 (holding that a sobriety checkpoint program violated article I, section 7), with *Sitz*, 496 U.S. at 455 (holding that a sobriety checkpoint program was consistent with the Fourth Amendment).

*B. Private Affairs Are Objective and Guarded Against Technological Advancement*

Under article I, section 7, a search occurs when the State disturbs “those privacy interests which citizens of [Washington] have held, and should be entitled to hold, safe from governmental trespass absent a warrant.”<sup>135</sup> In determining whether something is a private affair, courts “look at the ‘nature and extent of the information which may be obtained as a result of the government conduct’ and at the historical treatment of the interest asserted.”<sup>136</sup> This “interest asserted”<sup>137</sup> encompasses all “private affairs,”<sup>138</sup> in contrast to the Fourth Amendment’s limited protection of “a person, his house, papers and effects,”<sup>139</sup> and has included land,<sup>140</sup> temporary lodgings,<sup>141</sup> driver’s records held by the government,<sup>142</sup> automobile trunks,<sup>143</sup> and DNA.<sup>144</sup> Voluntary exposure can negate an asserted privacy interest.<sup>145</sup>

Three cases exemplify how the courts weigh objective and actual expectations of privacy under article I, section 7. These cases show that individuals in Washington are entitled to privacy in more than just their possessions. In *State v. Jorden*,<sup>146</sup> law enforcement officers performed random warrant checks on the names in the guest registry at a motel, as was their practice.<sup>147</sup> Guests were asked for identification and told it would be kept on file, but were “not told of the possibility for random, suspicionless searches of the registry by law enforcement.”<sup>148</sup> Upon finding outstanding felony warrants for Timothy Jorden, officers entered

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135. *State v. Myrick*, 102 Wash. 2d 506, 511, 688 P.2d 151, 154 (1984).

136. *State v. Hinton*, 179 Wash. 2d 862, 869, 319 P.3d 9, 12 (2014) (quoting *State v. Miles*, 160 Wash. 2d 236, 244, 156 P.3d 864, 868 (2007)).

137. *Id.* at 869, 319 P.3d at 12.

138. *Id.* at 868, 319 P.3d at 12.

139. *Myrick*, 102 Wash. 2d at 513, 688 P.2d at 155.

140. *Id.*

141. *State v. Jorden*, 160 Wash. 2d 121, 126, 156 P.3d 893, 896 (2007).

142. *State v. McKinney*, 148 Wash. 2d 20, 29, 60 P.3d 46, 50 (2002).

143. *State v. White*, 135 Wash. 2d 761, 767, 958 P.2d 982, 985 (1998).

144. *State v. Athan*, 160 Wash. 2d 354, 367–68, 158 P.3d 27, 34 (2007).

145. *Id.* at 366, 158 P.3d at 33.

146. 160 Wash. 2d 121, 156 P.3d 893 (2007).

147. *Id.* at 123–24, 156 P.3d at 894–95. The program, called the “Lakewood Crime-Free Hotel Motel Program,” encouraged police to “review the guest registries of hotels and motels on a random basis and without individualized or particularized suspicion.” *Id.* This review included random criminal checks of names in the guest registries. *Id.*

148. *Id.* at 124, 156 P.3d at 895.

his motel room and found drug paraphernalia and crack cocaine.<sup>149</sup> Jorden then appealed his conviction for unlawful possession of a controlled substance.<sup>150</sup> In determining that Jorden's hotel room was indeed a "private affair" with article I, section 7 protection, one thing key to the Supreme Court of Washington's analysis was "the *nature* of the information sought—that is, whether the information obtained via the governmental trespass reveal[ed] intimate or discrete details of a person's life."<sup>151</sup> The Court reiterated its distaste for "fishing expedition[s]" without "an individualized or particularized suspicion about the search subject" in deeming the search of Jorden's room unconstitutional.<sup>152</sup>

Five years earlier, in *State v. McKinney*,<sup>153</sup> the Court addressed three consolidated cases concerning the arrest of three defendants after law enforcement encountered their vehicles in public and subsequently accessed their information, including vehicle registration and driver's records.<sup>154</sup> The Court's analysis afforded significance to the historical lack of "a constitutionally protected privacy interest in . . . drivers' records."<sup>155</sup> In fact, the Court noted, vehicle ownership information was originally available to the public "upon request for one dollar."<sup>156</sup> Although the historical analysis did not support article I, section 7 protection, the Court continued on to see if such protection was one Washington citizens "*should be entitled to hold*" in this particular area.<sup>157</sup> As a part of this expectation analysis, the Court considered "the extent to which the subject matter [was] voluntarily exposed to the public," as "generally, what is voluntarily exposed to the public is not considered to be a part of a person's private affairs."<sup>158</sup> Ultimately, the Court found "no protected privacy interest in the information contained in a DOL driver's record" because of the lack of historical privacy, "the fact that these records reveal little about a person's associations, financial dealings, or movements," and the government's existing ownership of the records.<sup>159</sup>

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149. *Id.* at 124–25, 156 P.3d at 895.

150. *Id.* at 125, 156 P.3d at 895.

151. *Id.* at 126, 156 P.3d at 896 (emphasis in original).

152. *Id.* at 130, 156 P.3d at 898.

153. 148 Wash. 2d 20, 60 P.3d 46 (2002).

154. *Id.* at 24–25, 60 P.3d at 47–48.

155. *Id.* at 27, 60 P.3d at 49.

156. *Id.*

157. *Id.* at 29, 60 P.3d at 50 (emphasis in original) (quoting *City of Seattle v. McCready*, 123 Wash. 2d 260, 270, 868 P.2d 134, 139 (1994)).

158. *Id.* at 29, 31, 60 P.3d at 50, 51.

159. *Id.* at 32, 60 P.3d at 52.

And finally, in *State v. White*,<sup>160</sup> the Court considered the opening of a locked car trunk by law enforcement during a warrantless inventory search.<sup>161</sup> In this case, the government argued that the existence of a trunk release button in the unlocked glove compartment made the search lawful.<sup>162</sup> In deciding that such a search was a violation of the defendant's article I, section 7 privacy rights, the Court stated: "The fact an automobile may have a trunk release mechanism does not diminish an individual's privacy interests."<sup>163</sup> The privacy interests created by the locked trunk were ultimately the most significant to the Court, as opposed to the method of access.<sup>164</sup> The Court reiterated that "[t]he analysis under article I, section 7 focuses, not on a defendant's actual or subjective expectation of privacy but, as we have previously established, on those privacy interests Washington citizens held in the past and are entitled to hold in the future."<sup>165</sup> These cases show that Washington courts have protected Washingtonians' privacy interests in parts of their lives that are far less personal than their family relationships and DNA.

Furthermore, Washington courts have been consistent in guarding privacy interests against technological advancement. For example, in *State v. Myrick*,<sup>166</sup> the Supreme Court of Washington illustrated the relationship between new technologies and article I, section 7.<sup>167</sup> "Merely because it is generally known that the technology exists to enable police to view private activities from an otherwise nonintrusive vantage point," the Court stated, "it does not follow that these activities are without protection."<sup>168</sup> The Court was considering whether law enforcement violated article I, section 7 when officers observed marijuana growing on a defendant's property, which was "heavily wooded and bordered by high ridges which precluded casual observation," from a plane flying 1,500 feet above ground level.<sup>169</sup> The State argued that because the open fields were in public view, they were not "private affairs" and as such were not protected.<sup>170</sup> The Court ultimately held that the warrant issued as a result

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160. 135 Wash. 2d 761, 958 P.2d 982 (1998).

161. *Id.* at 763–65, 958 P.2d at 983–84.

162. *Id.* at 766, 958 P.2d at 984.

163. *Id.* at 767, 958 P.2d at 985.

164. *Id.* at 767–68, 958 P.2d at 985.

165. *Id.* at 768, 958 P.2d at 985 (citing *State v. Myrick*, 102 Wash. 2d 506, 510–11, 688 P.2d 151, 153–54 (1984)).

166. 102 Wash. 2d 506, 688 P.2d 151 (1984).

167. *Id.* at 508, 688 P.2d at 152.

168. *Id.* at 513, 688 P.2d at 155.

169. *Id.* at 508, 688 P.2d at 152.

170. *Id.* at 510, 688 P.2d at 153.

of this unconstitutional search was harmless error, but not before expressly rejecting an analysis that “rests solely on the legitimacy of a defendant’s subjective expectations of privacy.”<sup>171</sup> *Myrick* shows that the protections provided by article I, section 7 are not subjective and do not diminish as technology reduces citizens’ expectations of privacy.<sup>172</sup> This stands in contrast to the Fourth Amendment’s “subjective and reasonable expectation of privacy” standard.<sup>173</sup>

Text messages are also a private affair, even if the phone is in police custody at the time the messages are received.<sup>174</sup> In *State v. Hinton*,<sup>175</sup> a person’s phone was receiving calls and messages while he was in police custody.<sup>176</sup> An officer used the phone to respond to a text from Shawn Hinton, arranged a drug transaction, and arrested Hinton upon his arrival.<sup>177</sup> The Court found it significant that “[t]ext messages can encompass the same intimate subjects as phone calls, sealed letters, and other traditional forms of communication that have historically been strongly protected under Washington law.”<sup>178</sup> The government argued that Hinton lost his privacy interest over his phone, although he had no control over his receipt of a text message, but the Court stated: “Given the realities of modern life, the mere fact that an individual shares information with another party and does not control the area from which that information is accessed does not place it outside the realm of article I, section 7’s protection.”<sup>179</sup> The interests the Court protects under this section are those that *should* be protected where the government is concerned, not those that are actually protected from the broader public as a result of technical advancement.

C. *The Supreme Court of Washington Has Considered the Use of DNA by Law Enforcement Under Article I, Section 7 Multiple Times*

Although the Court has not addressed the article I, section 7 implications of using DNA for familial DNA searching directly, it has

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171. *Id.* at 513, 515, 688 P.2d at 155, 156.

172. *Id.* at 513, 688 P.2d at 155.

173. *State v. Hinton*, 179 Wash. 2d 862, 868, 319 P.3d 9, 12 (2014) (citing *Katz v. United States*, 389 U.S. 347, 351–52 (1967)).

174. *Id.* at 877–78, 319 P.3d at 16–17.

175. 179 Wash. 2d 862, 319 P.3d 9 (2014).

176. *Id.* at 865–66, 319 P.3d at 11.

177. *Id.* at 866, 319 P.3d at 11.

178. *Id.* at 869–70, 319 P.3d at 13.

179. *Id.* at 873, 319 P.3d at 15.

previously established that there is a privacy interest in the human body and bodily functions.<sup>180</sup> However, the privacy interest in a person's DNA depends in large part on how that DNA was obtained.<sup>181</sup> The earliest discussion of DNA evidence in Washington can be found in cases starting in the mid-1990s.<sup>182</sup> Since then, the Supreme Court of Washington has considered DNA use and collection numerous times.<sup>183</sup> The analysis it applied in considering other DNA privacy issues, including mandatory collection of certain groups' DNA<sup>184</sup> and the testing of DNA that is already in law enforcement possession,<sup>185</sup> illustrates the framework and relevant factors to consider when analyzing the constitutionality of familial DNA searching.

First, in *State v. Olivas*,<sup>186</sup> the defendants entered guilty pleas for various violent and sexual offenses.<sup>187</sup> Each defendant challenged subsequent orders authorizing the State to perform DNA blood tests, despite their guilty pleas, as authorized by state statute.<sup>188</sup> Although the defendants argued that the DNA tests were unconstitutional under both the federal and state constitutions, the Court declined to address the state constitutional claims on procedural grounds.<sup>189</sup> Under the Fourth Amendment, however, the Court upheld the statute as constitutional based on a special needs analysis, balancing "the general privacy right of persons . . . against the 'special needs beyond normal law enforcement' of the government."<sup>190</sup> In a concurring opinion, Justice Utter instead

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180. *Robinson v. City of Seattle*, 102 Wash. App. 795, 819, 10 P.3d 452, 465 (2000) ("[T]he privacy interest in the body and bodily functions is one Washington citizens have held, and should be entitled to hold, safe from governmental trespass.").

181. *See State v. Athan*, 160 Wash. 2d 354, 367, 158 P.3d 27, 33 (2007) ("Certainly the nonconsensual collection of blood or urine samples in some circumstances . . . invokes privacy concerns; however, obtaining the saliva sample in this case did not involve an invasive or involuntary procedure.").

182. *See State v. Russell*, 125 Wash. 2d 24, 37, 882 P.2d 747, 759 (1994); *State v. Olivas*, 122 Wash. 2d 73, 76, 856 P.2d 1076, 1077 (1993); *State v. Kalakosky*, 121 Wash. 2d 525, 538, 852 P.2d 1064, 1071 (1993).

183. *See Athan*, 160 Wash. 2d at 365–75, 158 P.3d at 32–38; *State v. Surge*, 160 Wash. 2d 65, 72–82, 156 P.3d 208, 211–16 (2007); *State v. Gregory*, 158 Wash. 2d 759, 820–29, 147 P.3d 1201, 1234–39 (2006), *overruled on other grounds* by *State v. W.R., Jr.*, 181 Wash. 2d 757, 336 P.3d 1134 (2014).

184. *Surge*, 160 Wash. 2d at 74, 156 P.3d at 212; *Olivas*, 122 Wash. 2d at 76, 856 P.2d at 1077.

185. *Gregory*, 158 Wash. 2d at 825, 147 P.3d at 1236; *Athan*, 160 Wash. 2d at 365–75, 158 P.3d at 32–38.

186. 122 Wash. 2d 73, 856 P.2d 1076 (1993).

187. *Id.* at 76–80, 856 P.2d at 1077–79.

188. *Id.* at 76, 856 P.2d at 1077; *see* WASH. REV. CODE § 43.43.754 (2020).

189. *Olivas*, 122 Wash. 2d at 81–82, 856 P.2d at 1080 (finding the defendants failed to brief the "six nonexclusive [*Gunwall*] factors [that] must be briefed before this court will consider an independent state constitutional claim").

190. *Id.* at 97–98, 856 P.2d at 1088–89.

advocated for a minimally intrusive search test where courts would “balance the government’s interest in conducting the search, the degree to which the search actually advances that interest, and the gravity of the intrusion upon personal privacy.”<sup>191</sup>

The same question was raised fourteen years later, in *State v. Surge*.<sup>192</sup> Six defendants were convicted of felonies and challenged the same state DNA statute<sup>193</sup> considered in *Olivas*.<sup>194</sup> In its state constitutional analysis, the Court focused specifically on “the narrow class of individuals who ha[d] been convicted of the listed crimes” in the statute as opposed to “the privacy interests of the ordinary citizen.”<sup>195</sup> The Court held that no private affair had been disturbed and also compared the collection of felons’ DNA to the “well established practice of government to collect fingerprints from convicted felons for identification purposes.”<sup>196</sup> The Court afforded significance to the fact that the statute only required DNA collection for identification, which the Court did not consider “a disturbance of [the defendants’] private affairs.”<sup>197</sup> Since the defendants had been convicted, they no longer had privacy interest in their identity and the Court viewed the DNA collected as just another component of that identity.<sup>198</sup>

In 2006, the Court in *State v. Gregory*<sup>199</sup> addressed the question of what privacy rights a defendant has when the State already possesses the person’s DNA profile.<sup>200</sup> Allen Gregory was found guilty of three counts of rape in the first degree for a 1998 rape.<sup>201</sup> Law enforcement had previously suspected Gregory of the 1996 murder of a neighbor, but had no way to definitively connect him.<sup>202</sup> While he was incarcerated and awaiting trial for the 1998 rape, DNA analysis of semen found at the 1996 scene was compared to blood samples obtained in the 1998 rape.<sup>203</sup> Finding a match, the State charged Gregory with the 1996 murder, for which the jury found him guilty and sentenced him to death.<sup>204</sup> On appeal,

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191. *Id.* at 104, 856 P.2d at 1092 (Utter, J., concurring).

192. 160 Wash. 2d 65, 156 P.3d 208 (2007).

193. *See* WASH. REV. CODE § 43.43.754.

194. *State v. Surge*, 160 Wash. 2d 65, 69–70, 156 P.3d 208, 210 (2007).

195. *Id.* at 72, 156 P.3d at 211.

196. *Id.* at 74, 156 P.3d at 212.

197. *Id.* at 74, 156 P.3d at 212–13.

198. *Id.* at 75, 156 P.3d at 213.

199. 158 Wash. 2d 759, 147 P.3d 1201 (2006).

200. *Id.* at 822, 147 P.3d at 1234.

201. *Id.* at 778, 147 P.3d at 1212.

202. *Id.* at 812, 147 P.3d at 1229.

203. *Id.*

204. *Id.* at 812, 147 P.3d at 1229–30.

Gregory asserted that he had “an expectation of privacy in the information contained in his blood . . . and a separate probable cause determination was required to support its comparison with the semen collected from the [1996] crime scene.”<sup>205</sup> The Court concluded that article I, section 7 was not implicated “because no additional search occurs when a defendant’s DNA profile already in the State’s possession is compared against evidence taken from a new crime scene.”<sup>206</sup>

The Court examined the constitutional implications of covert DNA collection procedures in *State v. Athan*.<sup>207</sup> Police suspected, but were unable to charge, John Nicholas Athan in the 1982 murder of thirteen-year-old Kristen Sumstad, whose nude body was found with semen in her vagina and on her leg.<sup>208</sup> Twenty years later, cold case detectives tested preserved DNA from the crime scene against state and federal databases without success and decided to locate Athan in order to compare his DNA to that from the crime scene.<sup>209</sup> Because Athan now lived in New Jersey, detectives posed as a law firm and “sent Athan a letter inviting him to join a fictitious class action lawsuit concerning parking tickets.”<sup>210</sup> The State then obtained DNA from saliva on the envelope containing Athan’s reply, compared it to the semen found on Sumstad’s body, and arrested Athan based on the match between the two.<sup>211</sup> The Court began its analysis by finding “no inherent privacy interest in saliva.”<sup>212</sup> Because Athan willingly licked the envelope, the Court compared it “to a person spitting on the sidewalk or leaving a cigarette butt in an ashtray.”<sup>213</sup> However, the Court limited this analysis to the facts present in the case, where the DNA was used for identification only.<sup>214</sup> Although it acknowledged in its article I, section 7 analysis that “DNA has the potential to reveal a vast amount of personal information, including medical conditions and familial relations,” the Court pointed out that once Athan sent the letter, what was done with it—including DNA testing—was outside of his control.<sup>215</sup>

DNA and its use by law enforcement fall within the purview of article I,

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205. *Id.* at 825, 147 P.3d at 1236.

206. *Id.* at 828, 147 P.3d at 1238.

207. 160 Wash. 2d 354, 158 P.3d 27 (2007).

208. *Id.* at 362–63, 158 P.3d at 31.

209. *Id.* at 363, 158 P.3d at 31.

210. *Id.*

211. *Id.* at 363–64, 158 P.3d at 32.

212. *Id.* at 367, 158 P.3d at 33.

213. *Id.* at 367, 158 P.3d at 33–34.

214. *Id.* at 368, 158 P.3d at 34.

215. *Id.* at 367–68, 158 P.3d at 34.



section 7;<sup>216</sup> thus, courts will need to consider the factors identified as important by the Supreme Court of Washington in the cases above. It is necessary to consider this new investigative method under the existing article I, section 7 framework because this provision of the Washington Constitution is specifically intended to guard privacy rights from threats created by “technological advancements.”<sup>217</sup> Because familial DNA searching has advanced, it is now ripe for consideration.

#### IV. THE CONNECTIONS FOUND THROUGH FAMILIAL DNA SEARCHING ARE A PRIVATE AFFAIR AND SHOULD BE PROTECTED UNDER ARTICLE I, SECTION 7

The accepted framework for an article I, section 7 analysis considers: (1) the nature and extent of the information which may be obtained; (2) the historical treatment of the interest asserted; and (3) the existence of authority of law in the form of a warrant or exception to the warrant requirement.<sup>218</sup> Applying this framework to familial DNA searching as currently practiced using commercial DNA databases like GEDmatch shows that it is very likely unconstitutional.

##### A. *The Nature and Extent of the Information that May Be Obtained by Familial DNA Searching Supports Article I, Section 7 Protections*

The first question in an article I, section 7 analysis is the “nature and extent of the information which may be obtained as a result of the governmental conduct.”<sup>219</sup> When considering the privacy implications of third parties revealing sensitive information about others, Washington courts consider the method by which the information is obtained as well as the “personal details” revealed by the information itself.<sup>220</sup> In cases involving familial DNA searching, although law enforcement utilizes the DNA collected at the crime scene in order to perform the search, the information at issue is the family connections and relationships made available through the search. Indeed, if the issue was only the DNA itself, under *Athan* there is little question that a court would find no privacy

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216. *See id.* at 365–68, 158 P.3d at 33–34.

217. *See State v. Hinton*, 179 Wash. 2d 862, 877–78, 319 P.3d 9, 17 (2014) (“Article I, section 7 protects Washington citizens from governmental intrusion into affairs that they should be entitled to hold safe from governmental trespass, regardless of technological advancements.”).

218. *Id.* at 868–69, 319 P.3d at 12 (citing *State v. Miles*, 160 Wash. 2d 236, 244, 156 P.3d 864, 868 (2007)); *State v. Witkowski*, 3 Wash. App. 2d 318, 336, 415 P.3d 639, 648 (2018).

219. *State v. Muhammad*, 194 Wash. 2d 577, 586, 451 P.3d 1060, 1069 (2019) (quoting *Miles*, 160 Wash. 2d at 244, 156 P.3d at 868).

220. *Id.* at 586–87, 451 P.3d at 1069.

interest inherent in it.<sup>221</sup>

In cases involving familial DNA searching, however, law enforcement departs from the realm of simple DNA identification and enters that of the “vast amount of personal information, including . . . familial relations” acknowledged by the *Athan* Court.<sup>222</sup> In identifying a suspect through familial DNA searching, the government implicates the personal information of at least two individuals—the suspect themselves and the family member (or members) who uploaded their information to the commercial database—as well as the connection between them.<sup>223</sup>

The method through which law enforcement obtains the familial connections through familial DNA searching demonstrates that these connections are a “private affair.” Like GPS devices and infrared thermal devices, these websites do not “merely augment [an] officer[’s] senses.”<sup>224</sup> Although an officer can arguably identify family relationships through context and official documents, an officer cannot build a family tree based on DNA out to a third or fourth cousin relationship without this technology. Familial DNA searching enables law enforcement to replace traditional senses and investigatory techniques with a “technological substitute.”<sup>225</sup> This enhancement is evidenced by the use of this new technology to solve cold cases, where traditional investigatory methods have failed for years.<sup>226</sup> The Golden State Killer crimes, the Michella Welch murder, and the murders of Jay Cook and Tanya van Cuylenberg all took place in the 1970s and 1980s—but none of the men eventually arrested decades later were ever suspects prior to being identified by familial DNA searching.<sup>227</sup> Because familial DNA searching is not merely an augmentation of existing senses, the genetic family relationships are a private affair that would not be identified without the technology.

The Supreme Court of Washington has already indicated that the type of personal information identified through familial DNA searching may be indicative of a private affair.<sup>228</sup> Given that the potential for text

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221. See *Athan*, 160 Wash. 2d at 367, 158 P.3d at 33 (finding no inherent privacy interest in saliva).

222. *Id.* at 367–68, 158 P.3d at 34.

223. See *supra* section II.A.

224. *State v. Jackson*, 150 Wash. 2d 251, 262, 76 P.3d 217, 223 (2003); see *State v. Young*, 123 Wash. 2d 173, 182–84, 867 P.2d 593, 597–98 (1994).

225. *Jackson*, 150 Wash. 2d at 262, 76 P.3d at 223.

226. Romano, *supra* note 2; Clare McGrane, Patricia Murphy & Alec Cowan, *This Horrific Cold Case Could Be Solved by Tracing the Murderer’s Family Tree*, KUOW (June 25, 2019 10:05 PM), <https://www.kuow.org/stories/the-horrific-cold-case-that-might-be-solved-by-tracing-the-suspect-s-family-tree> [https://perma.cc/3YL7-2VKK].

227. See Romano, *supra* note 2; McGrane et al., *supra* note 226; Bessex, *supra* note 18.

228. *State v. Athan*, 160 Wash. 2d 354, 367–68, 158 P.3d 27, 34 (2007) (declining to consider the

messages to reveal details about familial associations has weighed in favor of article I, section 7 protection,<sup>229</sup> the detailed family tree that can be created based on DNA surely weighs in favor of this same protection. Even assuming that a person's readily visible family relationships are easy to identify, genetic family relationships will not always be the same, nor will they be readily identifiable.<sup>230</sup> Thus, the nature and extent of private information that a family tree based on DNA can provide is expansive.

*B. The Historical Treatment of the Privacy Interest Asserted in DNA, Identity, and Family Relationships Supports Article I, Section 7 Protections*

The historical treatment of three different privacy interests are relevant to an article I, section 7 analysis of familial DNA searches: DNA,<sup>231</sup> identity,<sup>232</sup> and family relationships.<sup>233</sup> The historical treatment of DNA is mixed and highly dependent on how the DNA was obtained.<sup>234</sup> The crime scene DNA does not in and of itself implicate article I, section 7, because it is already in the government's possession.<sup>235</sup> That DNA in these cases would present a nearly identical analysis to that of the DNA contained in the defendant's semen in *Gregory*.<sup>236</sup> However, unlike the DNA hosted on the commercial DNA databases, Gregory's comparison sample was already in the government's possession.<sup>237</sup> The DNA of the family member who used the database, in contrast, was not. Thus, the privacy interest in the comparison DNA is no different than the interest any other Washington resident has in theirs, meaning it is protected.

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potential for DNA to reveal medical conditions and familial relations in that particular case, but calling the concerns themselves valid).

229. *State v. Hinton*, 179 Wash. 2d 862, 868–70, 319 P.3d 9, 12–13 (2014).

230. See FED. INTERAGENCY F. ON CHILD & FAM. STATS., AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING, 2019, at 2–3 (2019), [https://www.childstats.gov/pdf/ac2019/ac\\_19.pdf](https://www.childstats.gov/pdf/ac2019/ac_19.pdf) [<https://perma.cc/Y2NJ-XP2J>] (finding that 3.1 million children did not live with a parent in 2018, 25% of which lived with nonrelatives).

231. See *Athan*, 160 Wash. 2d at 366–67, 158 P.3d at 33; *State v. Surge*, 160 Wash. 2d 65, 72–74, 156 P.3d 208, 211–12 (2007); *State v. Gregory*, 158 Wash. 2d 759, 828, 147 P.3d 1201, 1237–38 (2006), *overruled on other grounds by State v. W.R., Jr.*, 181 Wash. 2d 757, 336 P.3d 1134 (2014); *State v. Olivas*, 122 Wash. 2d 73, 92–93, 856 P.2d 1076, 1086 (1993).

232. See *Surge*, 160 Wash. 2d at 72–73, 156 P.3d at 211–12.

233. See *Athan*, 160 Wash. 2d at 367–68, 158 P.3d at 34.

234. Compare *Gregory*, 158 Wash. 2d at 828, 147 P.3d at 1238 (holding defendant had no privacy interest in DNA already in the State's possession), with *Surge*, 160 Wash. 2d at 72–74, 156 P.3d at 211–12 (suggesting that ordinary citizens would have a privacy interest in their identity if faced with mandatory DNA sampling).

235. *Gregory*, 158 Wash. 2d at 828, 147 P.3d at 1238.

236. *Id.*

237. *Id.* at 812, 147 P.3d at 1229.

There are strong indicators of a historical privacy interest in their identity for the suspects who did not willingly participate in the database. Washington courts have previously recognized a right to privacy in one's identity.<sup>238</sup> This interest has previously been overcome when those asserting it are incarcerated felons<sup>239</sup> or the subject of a Public Records Act<sup>240</sup> request,<sup>241</sup> but even the family members who voluntarily put their DNA information in an online database have not completely removed their privacy interests from the protection of article I, section 7.<sup>242</sup> Historically, courts are protective of identity absent a clear surrender of this interest. Here, it is unlikely that the defendants would be able to challenge the violation of their contributing family member's constitutional rights.<sup>243</sup> However, the defendant may be able to bring a constitutional challenge because of the privacy interest in their own *identity*, which is necessarily linked to the family member's DNA in the database.<sup>244</sup>

Two (or more) parties could assert a privacy interest in the implicated family connections—the owner of the crime scene DNA and any family member whose DNA is in the commercial database.<sup>245</sup> Because the suspect at the time of the search has presumably not been convicted of anything, their privacy interest in their family connections and identity is that of an ordinary citizen and this same analysis applies to all members of the family.<sup>246</sup> The difference, in fact, is between the members of the

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238. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wash. 2d 398, 414, 259 P.3d 190, 198 (2011) (holding that a police officer maintains his right to privacy in his identity despite media coverage); *Bellevue John Does 1–11 v. Bellevue Sch. Dist. No. 405*, 164 Wash. 2d 199, 205, 212, 189 P.3d 139, 142, 146 (2008) (holding that teachers facing unsubstantiated allegations of abuse have a right to privacy in their identities).

239. *See Surge*, 160 Wash. 2d at 72, 156 P.3d at 211.

240. WASH. REV. CODE § 42.56 (2020).

241. *See Wash. Pub. Emps. Ass'n v. Wash. State Ctr. for Childhood Deafness & Hearing Loss*, 194 Wash. 2d 484, 502, 450 P.3d 601, 610 (2019) (holding that birth dates of state employees are not exempt from disclosure).

242. *State v. Hinton*, 179 Wash. 2d 862, 873, 319 P.3d 9, 15 (2014) (“[T]he mere fact that an individual shares information with another party and does not control the area from which that information is accessed does not place it outside the realm of article I, section 7’s protection.”).

243. *See id.* at 869 n.2, 319 P.3d at 12 n.2 (“Generally, article I, section 7 rights may be enforced by exclusion of evidence only at the instance of one whose own privacy rights were infringed by government action.”).

244. *Id.* (“Hinton had standing to challenge the search of Lee’s phone if the search disturbed a privacy interest he had in his text messages to Lee.”).

245. *See supra* section II.A.

246. *State v. Surge*, 160 Wash. 2d 65, 72, 156 P.3d 208, 211 (2007) (“In this case, the ‘private affairs’ inquiry focuses on a convicted felon’s asserted privacy interest in his or her identity, not on the privacy interests of the ordinary citizen. The distinction is important to our inquiry because the

family who chose to put their DNA into the commercial database, and those, including the suspect, who did not.

Washington courts have previously acknowledged a privacy interest in family relationships. In determining that cell-site location information is a private affair, the Supreme Court of Washington considered that this data “can expose personal details about *family*, politics, religion, and sexual associations.”<sup>247</sup> The Court, although declining to adopt an evidentiary privilege for parent-child communications, also stated in dicta that there is a “familial right to privacy . . . [which] extends to fundamental personal rights.”<sup>248</sup> This assertion is supported on the federal level by the series of United States Supreme Court cases that have protected family privacy and autonomy.<sup>249</sup>

Thus, when viewing the intersection of genetic identity and privacy at the heart of the issue, the historical treatment of both weighs in favor of protection under article I, section 7. Since familial DNA searching is unconstitutional, it cannot support a search warrant to confirm a suspect’s DNA match with the original crime scene DNA.<sup>250</sup> Any taking of the suspect’s DNA to determine a match with the crime scene DNA, therefore, would need to rest on other grounds or fall within one of the narrow exceptions to the warrant requirement.<sup>251</sup>

## V. THE CASE FOR LEGISLATIVE ACTION

Washingtonians like their privacy. In January 2020, ten privacy-related bills, including a new version of the Washington Privacy Act,<sup>252</sup> were introduced in the state legislative session.<sup>253</sup> The Washington Privacy Act itself states, “Washingtonians cherish privacy as an element of their individual freedom,” and “Washington is a technology leader on a

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statute involved in this case applies only to the narrow class of individuals who have been convicted of the listed crimes, and the focus must be on their rights.”).

247. *State v. Muhammad*, 194 Wash. 2d 577, 589, 451 P.3d 1060, 1070 (2019) (emphasis added).

248. *State v. Maxon*, 110 Wash. 2d 564, 570, 756 P.2d 1297, 1300 (1988).

249. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (contraception); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541–42 (1942) (procreation).

250. *See State v. Ross*, 141 Wash. 2d 304, 311–12, 4 P.3d 130, 135 (2000) (laying out the consequences of a search violating article I, section 7).

251. *Id.* at 312, 4 P.3d at 135.

252. S. 5376, 66th Leg., Reg. Sess. (Wash. 2019) (Second Substitute Senate Bill 5376).

253. Pollyanna Sanderson, Katelyn Ringrose & Stacey Gray, *It’s Raining Privacy Bills: An Overview of the Washington State Privacy Act and Other Introduced Bills*, FUTURE OF PRIV. F. (Jan. 13, 2020), <https://fpf.org/2020/01/13/its-raining-privacy-bills-an-overview-of-the-washington-state-privacy-act-and-other-introduced-bills/> [https://perma.cc/C3A4-TTCR].

national and global level.”<sup>254</sup> Despite this, the Washington Privacy Act does not mention DNA,<sup>255</sup> nor do nine other privacy bills from the session.<sup>256</sup>

The only current bill that addresses DNA privacy is still in committee review as of November 2020 and falls far short of what Washington residents need.<sup>257</sup> This bill specifically concerns the “collection, use, and disclosure of genetic data by direct-to-consumer genetic testing companies” and lays out a series of requirements for these entities when handling consumer genetic data.<sup>258</sup> However, when it comes to law enforcement involvement, the bill merely demands “valid legal process for disclosing genetic data to law enforcement without a consumer’s express consent.”<sup>259</sup> This requirement is insufficient to adequately protect privacy rights. First, following a valid legal process will not absolve familial DNA searching of the sin of violating Washingtonians’ privacy rights. Second, the consumer’s consent does not mean that the consumer’s family, also implicated in these searches, has consented.<sup>260</sup>

If Washington truly aspires to protect its residents’ highly valued privacy, it should follow the lead of Maryland and the District of Columbia and institute a law prohibiting familial DNA searching, but then go further to prohibit law enforcement searches of this type on both government *and* commercial DNA databases.<sup>261</sup> Although a court would likely find that this type of investigative method is unconstitutional under the Washington Constitution,<sup>262</sup> there is no need for the legislature to wait for this to play out in the courts. The legislature can move more quickly and act to adequately protect the privacy interests of all Washington residents in their DNA and the information it contains.

And so the legislature should. Whatever the constitutional implications, permitting such law enforcement use of this technology is no different than permitting distant family members to give consent for a blood draw on behalf of one another. Washington does not allow the collection of

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254. S. 5376, 66th Leg., Reg. Sess., at § 2(a)–(b) (Wash. 2019) (Second Substitute Senate Bill 5376).

255. *See id.*

256. *See* Sanderson et al., *supra* note 253.

257. *See* H.R. 2485, 66th Leg., Reg. Sess. (Wash. 2020).

258. *Id.* at 1.

259. *Id.* § 2(1)(c).

260. *See supra* section IV.A.

261. *See supra* section I.B.

262. *See supra* Part IV.

arrestee DNA,<sup>263</sup> and allowing law enforcement to obtain the DNA of citizens in this backdoor manner violates the privacy that citizens of the state so cherish. Although familial DNA searching is likely unconstitutional,<sup>264</sup> it may take some time for the courts to reach this issue. Securing this important privacy right through the legislative process will send a clear message to law enforcement that such use of these websites is unacceptable to Washingtonians. Given the potential for permanent harm to individual and family privacy, the legislature will be failing present and future constituents by sitting idly by.

## CONCLUSION

The use of familial DNA searching to solve crimes is increasing.<sup>265</sup> In Washington, one county alone has used this technique to solve three cold murder cases in the past year.<sup>266</sup> When doing these searches, law enforcement checks crime scene DNA against commercial and open source DNA databases that very likely contain samples uploaded without the consumer knowing they could be used in this manner.<sup>267</sup> These are not small databases—they contain millions of samples and can be used to identify the majority of the American public.<sup>268</sup>

This leaves Washington with a difficult constitutional problem: even if such searches are acceptable under the Fourth Amendment, is this not one of the technological advancements from which article I, section 7 protects Washingtonians' privacy?<sup>269</sup> This Comment argues that this is such an advancement and that genetic information and family connections are "private affairs" protected by the Washington Constitution. The highly personal information that can be uncovered through our DNA, coupled

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263. See WASH. REV. CODE § 43.43.754(1)(a) (2020) (mandating collection of biological samples from "[e]very adult or juvenile individual convicted of a felony, or any of the following crimes" (emphasis added)).

264. See *supra* Part IV.

265. Aaron Mak, *We May Be Entering a New Era for Using Consumer Genetic Information to Solve Crime*, SLATE (Nov. 8, 2019, 4:01 PM), <https://slate.com/technology/2019/11/gedmatch-warrant-dna-ancestry-23andme.html> [<https://perma.cc/X9HX-ZY95>] (explaining that GEDmatch had been used to identify at least fifty-nine suspects as of April 2019).

266. Snohomish Cnty. Sheriff's Off. Press Release, *supra* note 19.

267. See *supra* section II.A; Selk, *supra* note 6.

268. Kolata & Murphy, *supra* note 26; Heather Murphy, *Most White Americans' DNA Can Be Identified Through Genealogy Databases*, N.Y. TIMES (Oct. 11, 2018), <https://www.nytimes.com/2018/10/11/science/science-genetic-genealogy-study.html> [<https://perma.cc/TMG3-V3SS>].

269. See *State v. Hinton*, 179 Wash. 2d 862, 877–78, 319 P.3d 9, 17 (2014) ("Article I, section 7 protects Washington citizens from governmental intrusion into affairs that they should be entitled to hold safe from governmental trespass, regardless of technological advancements.").

with Washington courts' historically protective treatment of citizens' privacy interests in DNA, identity, and familial relationships, brings this interest well within the protective purview of article I, section 7.<sup>270</sup> As a result, when presented with this issue Washington's courts should take care to protect these interests.

Ultimately, however, the privacy interests at play here are too precious and the risks too great to wait for this to work its way through the court system. Washington's legislature should thus follow Maryland and the District of Columbia to secure such privacy to Washington citizens by passing legislation that forbids familial DNA searching by Washington law enforcement, in both state and commercial DNA databases.<sup>271</sup>

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270. *See supra* Part IV.

271. *See supra* Part V.



