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## COMMENTS

# SAY CHEESE! EXAMINING THE CONSTITUTIONALITY OF PHOTOSTOPS

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### INTRODUCTION

In the summer of 2002, squads of up to twenty police officers descended upon the toughest crime and drug-ridden street corners of Wilmington, Delaware, as a part of Operation Bold Eagle, a police initiative to combat a rash of shootings.<sup>1</sup> These “corner deployment units” or “jump-out squads”—as the residents referred to them—patrolled in unmarked vehicles until they established reasonable suspicion that crime was occurring.<sup>2</sup> Next, police confronted the individuals, frisking and photographing each person.<sup>3</sup> Some of these people were arrested, while others were simply asked to leave the area.<sup>4</sup>

1. See Lee Williams & Adam Taylor, *‘Jump Out’ Squads Seen as a Violation of Civil Rights*, NEWS J. (Wilmington, Del.), Feb. 21, 2005, at A7 (reporting that in two months the operation questioned 565 people, arrested 248 individuals and “seized 5.4 pounds of cocaine, 6.6 pounds of marijuana, 1.7 grams of heroin, three handguns and \$8952”).

2. See Nadya Labi, *Stop! And Say Cheese*, TIME, Sept. 23, 2002, at 53 (reporting police insistence that they establish individualized suspicion through surveillance before using the jump-out squad tactic); Ryan Lizza, *The Year in Ideas: Ghetto Profiling*, N.Y. TIMES, Dec. 15, 2002, § 6 (Magazine), at 94, 95 (describing the police practice and citing Wilmington officials’ statements that the detentions are justified by reasonable suspicion); Adam Taylor, *Police Out-Jump Dealers*, NEWS J. (Wilmington, Del.), Aug. 5, 2002, at A1 (quoting police officer’s statement that “[s]ometimes it’s tedious, like when we are waiting for the scout cars to tell us a drug buy has been made . . . [b]ut 15 minutes later, it’s like a paramilitary exercise, when we’re out of the van and on top of a crowd in seconds because we spotted something”).

3. See Tony Allen & Louis L. Redding, *Rules Against Searches Apply in the Hood Too*, NEWS J. (Wilmington, Del.), Aug. 30, 2002, at A15 (“Once the police assess that there is criminal activity in a location, they search everyone in the immediate area for drugs or guns.”); Adam Taylor, *Police Photo Squads Under Fire*, NEWS J. (Wilmington, Del.), Aug. 25, 2002, at A1 (reporting that police stop individuals, line them up against a wall, and frisk them for weapons).

4. See Lizza, *supra* note 2 (noting that officials claim that the “only faces added to the database are of individuals connected to the corner drug-dealing operation” and not innocent bystanders).

Those who were not arrested nevertheless had their photographs taken and their names and addresses recorded.<sup>5</sup> The photographs were used to establish a database of possible suspects to use in future criminal investigations.<sup>6</sup> These tactics brought nationwide attention to Wilmington, leading Mayor James M. Baker to staunchly defend police practices.<sup>7</sup> However, with scrutiny of the national media highlighting this practice, these “photostops”—as they have been called in other parts of the country<sup>8</sup>—ceased.<sup>9</sup>

This Comment examines the constitutionality of photostops in light of contemporary Fourth Amendment jurisprudence and the increasing use and judicial treatment of database technology. Specifically, this Comment argues that capturing and databasing a non-arrestee’s photograph for future criminal investigation violates the Fourth Amendment standard of reasonableness as articulated in *Terry v. Ohio*,<sup>10</sup> unless the photograph is reasonably related to the suspicion that initially justified the stop.

Part I examines the use of photostops nationally, proposes a classification system for the circumstances when police capture photographs, and explains the relevant transitions in Fourth Amendment jurisprudence, focusing on the recent tension in Supreme Court jurisprudence in *Hübel v. Sixth Judicial District Court of Nevada*<sup>11</sup> and *Illinois v. Caballes*.<sup>12</sup> Part II argues that photostops may violate an individual’s Fourth Amendment rights under the second prong of the *Terry* analysis, which requires that an investigative technique be “reasonably related” to the original suspicion that justified the stop. This section continues with an assessment of

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5. Steven Church, *Anti-Drug Operation is Defended*, NEWS J. (Wilmington, Del.), Aug. 30, 2002, at B3 (reporting that more than 117 people had been stopped and photographed without being charged).

6. See Taylor, *supra* note 3 (confirming Police Chief Michael Szczerba’s explanation that the photographs and personal information of the individuals stopped—primarily minority men—were being placed in a database to use in future photographic lineups).

7. See Lizza, *supra* note 2 (reporting Mayor Baker’s statement, “[u]ntil a court says otherwise, if I say it’s constitutional, it’s constitutional”); Taylor, *supra* note 3 (“Mayor James M. Baker said criticism of the photographing is ‘asinine and intellectually bankrupt’ and he will not stop the practice.”).

8. See Hong H. Tieu, *Picturing the Asian Gang Member Among Us*, 11 ASIAN PAC. AM. L.J. 41, 44 (2006) (describing similar tactics used in California and referring to the interaction as a photostop); *infra* Part I.A.2 (explaining the use of a similar tactics in California and Philadelphia).

9. See Williams & Taylor, *supra* note 1 (noting that after national criticism, the department stopped photographing individuals who were not arrested, but continued using however, the “jump-out” squads).

10. 392 U.S. 1, 16 (1968).

11. 542 U.S. 177 (2004).

12. 543 U.S. 405 (2005).

photostops under *Caballes*, the 2005 Supreme Court case which considered the use of a drug detection dog during a traffic stop, and argues that *Caballes* should be distinguished and not applied to the analysis of photostops. Finally, Part III examines the validity of the derivative use of evidence—databasing a photograph that has been legally captured—by drawing on the jurisprudence regarding deoxyribonucleic acid (DNA) databasing. Ultimately, this Comment concludes that the courts must limit the use of photostops and photographic databases because the legislature is politically inclined to sacrifice individual privacy rights in the name of crime prevention.

## I. BACKGROUND

### A. *Defining Photostops*

For more than twenty-five years, police have photographed suspected gang members to use the photographs in future criminal investigations.<sup>13</sup> This practice is referred to by different terms across the country and each police department that utilizes this technique does so in a unique way.<sup>14</sup> This Comment uses the term “photostop” to mean police capturing an individual’s photograph during an investigatory stop. “Capturing” a photograph refers to the act of recording an image. The term “databasing” describes the act of indexing a photograph in a searchable system that allows people to access the image.

#### 1. *“Mug books” and gang databases*

Typically, photostops are used to generate information about suspected gang members for future investigations.<sup>15</sup> Communities have used a broad range of policies to determine when to conduct photostops.<sup>16</sup> While initially these photographs and other

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13. See H.G. Reza, *Directive Orders Photographing of Youths by Police*, L.A. TIMES, Dec. 16, 1985, § 2 (San Diego County Ed.), at 1 (noting that San Diego police officers were asked in a 1982 directive to obtain photographs of suspected gang members and were advised that until the Court rules otherwise, the practice is legal).

14. See *infra* Part I.A.2 (exploring regional uses of photostops).

15. See, e.g., Mike Burge, *Careless Police Use of Camera is Assailed*, SAN DIEGO UNION, Dec. 15, 1991, at A1 (describing an incident where a fourteen-year-old boy was photographed when ticketed for riding his bicycle illegally and two days later police showed the youth’s photograph to a victim who claimed to have been raped by a gang member with the same first name); Lizza, *supra* note 2 (reporting Wilmington, Delaware police chief’s comment that photographs would be used to establish a database of potential suspects to aide investigations of future crime).

16. Compare *People v. Rodriguez*, 26 Cal. Rptr. 2d 600, 664 (Cal. Ct. App. 1993) (articulating one police department’s policy of stopping and photographing individuals that officers “believe may be involved in a gang”), with Labi, *supra* note 2

information obtained during field interviews were compiled into “mug books” or “gang books,” today the information is transferred into computerized databases.<sup>17</sup>

Increasingly, police departments and law enforcement agencies are using gang databases to combat gang violence.<sup>18</sup> These databases contain personal information about suspected gang members, including gang allegiance, street name, address, physical description, identifying marks, tattoos, and photographs.<sup>19</sup> Fourteen states currently use “GangNet,” an Internet-based networking and gang database, to track gang members and share information between agencies.<sup>20</sup> State and local agencies have varying standards for

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(noting that Wilmington, Delaware police report establishing individualized suspicion before conducting photostops).

17. See Tieu, *supra* note 8, at 44 (noting that California police departments “collect names, nicknames, gang insignia tattoos, car types, and photographs of gang members and their associates” to enter into “mug books” and that the CalGang database contains information taken from local police department’s mug books). Despite the name, many individuals whose photographs are included in a “mug book” have not been arrested. See *Rodriguez*, 26 Cal. Rptr. 2d at 664 (stating that it was the police department’s policy to take photographs of a suspected gang member for “gang books” “whether or not that individual is at that time involved in criminal activity”).

18. See, e.g., Jim Adams, *Officers Share Names to Battle Gangs*, STAR TRIB. (Minneapolis), Feb. 24, 1998, at B1 (reporting on a statewide database consisting of a list of gang members, increased rates of gang activity in the Twin Cities suburbs, and the arrest of four alleged gang members who burst into a high school to threaten students); Editorial, *‘GangNet’ Bears Watching*, DENV. POST, Sept. 28, 2002, at B23 (reporting on a database maintained by the Colorado Bureau of Investigation that supplies forty state agencies with a list of suspected gang members, cautioning that “just because a youth looks like a thug to some people doesn’t necessarily mean he is a thug”); Renae Merle, *Cornyn, Pery Tout New Laws Aimed at Gangs*, SAN ANTONIO EXPRESS-NEWS, June 30, 1999, at 7B (noting the creation of Texas’ statewide database). But see Elaine Aradillas, *Fewer Agencies Use State Gang Database*, ORLANDO SENTINEL, July 25, 2006, at B1 (describing declining use of gang database in Florida, with one-third of participating law-enforcement agencies dropping out of the system in one year because agencies refused to share intelligence and did not keep the information up to date).

19. See Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 34 LOY. L.A. L. REV. 747, 760 (2001) (listing the information that databases contain and remarking that police often obtain the information in the databases from the suspected gang members themselves, who answer questions and are photographed). Fear of retaliation from police or a lack of knowledge of the legal system are plausible reasons why individuals answer questions and agree to be photographed. See, e.g., *id.*; A. Morgan Baker, *Instant Photos Offer Gang Crime Fighters Compelling Evidence*, INT’L ASS’N OF CHIEFS OF POLICE, 1998, <http://www.iacptechnology.org/Library/GangPhotos.htm> (quoting Sergeant Dan K. McQueen of the Pinal County Sheriff’s Department and head of the local chapter of the Arizona State Gang Task Force, “[y]ou’d be surprised how often these kids—especially the younger, less sophisticated ones—are happy to throw their gang signs for you [to photograph]”); Jennifer Lin, *Police Photo Sweeps Anger Asians*, PHILA. INQUIRER, Oct. 25, 1992, at A1 (citing intimidation and unawareness that they could refuse as reasons why Asian refugees agreed to be photographed by police).

20. See Scott Shewfelt, *Maryland Begins Networking Street Gang Problem*, CAPITAL NEWS SERVICE, Mar. 16, 2007, <http://www.journalism.umd.edu/cns/wire/2007->

determining when an individual should be included in the gang database.<sup>21</sup> Gang databases allow police to monitor associations between gang members and individuals associated with gang members.<sup>22</sup>

Creating databases that contain photographs of suspected gang members poses serious problems because there are few safeguards to protect an individual from being falsely identified as a gang member, photographed, and entered into a gang database.<sup>23</sup> Photostop and database policies run the risks of condoning racial profiling,<sup>24</sup> increasing mistaken eyewitness identification,<sup>25</sup> and encouraging police deceit and intimidation to obtain consent,<sup>26</sup> yet communities continue to use photostops.<sup>27</sup>

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editions/03-March-editions/070316-Friday/GangNetMaryland\_CNS-UMCP.html (noting that Maryland, the District of Columbia, and Virginia were in the process of joining GangNet in 2007, bringing the total number of states using GangNet up to fourteen).

21. See Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. C.R. & C.L. 115, 125–26 (2005) (explaining that in Texas the criteria for documenting suspected gang members and databasing their information are established by statute and include using “criminal street gang dress, hand signals, tattoos, or symbols”); Anne-Marie O’Connor, *Massive Gang Member List Now Clouded by Rampart*, L.A. TIMES, Mar. 25, 2000, at A1 (reporting Los Angeles County Sheriff’s Department requirement that a suspect meet at least two “gang criteria”—professing to be a gang member, being deemed a gang member by a reliable source, having gang graffiti on personal property or clothing, using gang hand signals, “hang[ing] around with gang members,” being arrested with gang members, or identifying gang affiliation when brought to jail—before being included in the CalGang database).

22. See, e.g., Shewfelt, *supra* note 20 (describing GangNet’s link-diagram analysis that shows relationships between gang members).

23. See Beres & Griffith, *supra* note 19 (listing several of the problems with gang databases: lists are secret, individuals do not know if they have been placed on the list, officers do not need approval to place an entry in the database, and there are rarely mechanisms to have one’s name removed once it has been entered).

24. See, e.g., Carol Kreck, *Police to Share GangNet Database*, DENV. POST, Sept. 24, 2002, at B3 (noting the national attention Denver received when it was disclosed that the city’s gang list included two-thirds of the black men in the city and that more than ninety-three percent of the individuals on the list were African American or Latino); Paul Maryniak, *Cops to End Asian Photo Sweeps Bar Helps to Forge New Agreement*, PHILA. DAILY NEWS, Sept. 30, 1993, at 18 (explaining that the agreement reached in Philadelphia prohibits police from photographing individuals solely based race or ethnicity and ended the practice of photographing “suspicious looking” Asian Americans); O’Connor, *supra* note 21 (reporting that, according to the Los Angeles Sheriff’s Department CalGang coordinator Wes McBride, only 2000 of the 250,000 individuals in the Los Angeles database are white).

25. See, e.g., De Tran & Iris Yokoi, *O.C. Asians Say Police Photos are Harassment*, L.A. TIMES, Nov. 15, 1992, (Orange County Ed.), at A1 (reciting the story of Ted Nguyen, a Vietnamese construction worker in San Jose who spent three months in jail awaiting trial when he was accused of a violent gang crime because a victim chose his photograph from an “all-Asian mug book”).

26. See Beth Burkstrand, *Gang Files Under Fire*, OMAHA WORLD HERALD, Aug. 22, 1996, (Metro. Ed.), at 1 (reporting a police officer’s acknowledgement that he used deceit—telling youths the photos were taken in case they were ever missing—to obtain permission to take their photographs). *But see* Kreck, *supra* note 24 (noting

2. “Stops,” “sweeps,” and “raids”: Photostops nationally

Faced with increased gang violence, many large cities and urban areas have utilized photostops to generate profiles of suspected gang members to use in future criminal investigations.<sup>28</sup> However, the practice is also used in smaller cities, rural areas, and suburban communities not typically associated with gang violence.<sup>29</sup> This section highlights the practices in California and Philadelphia, Pennsylvania—two areas that have struggled with the permissibility of photostops.

a. Photostops in California

Since the 1980s, California police officers have been photographing gang members and suspected gang members and in turn using those photographs in future investigations.<sup>30</sup> In the late 1980s, California was the first state to make a computerized gang database.<sup>31</sup> California maintains the “CalGang” database, the largest and first of its type in the country, which has information on known and suspected gang members and individuals associated with gangs.<sup>32</sup>

Although California continues to utilize photostops to generate photographs and biographical information for the CalGang database,

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that the captain of Denver’s Gang Unit dismisses criticism, offering that the youths consent and they “give them copies [of the photographs]”).

27. See, e.g., David Bracken, *Teens Menace Knightdale*, NEWS & OBSERVER (Raleigh, N.C.), May 9, 2005, at B1 (reporting one North Carolina town’s practice of photographing predominantly African American teenagers suspected of being affiliated with gangs).

28. See, e.g., Baker, *supra* note 19 (articulating photostop techniques used in Atlanta, the Tucson/Phoenix metropolitan area, and Los Angeles); Kreck, *supra* note 24 (describing the Denver police practice of photographing youths in public—asking the youths to “lift their shirts to show tattoos and photograph them for their database”); Sharon McBreen, *Suit Hits Photos by Police*, ORLANDO SENTINEL, Nov. 7, 1993, at B-1 (writing about the police practice that has led to hundreds of individuals being photographed in Central Florida).

29. See, e.g., Burkstrand, *supra* note 26 (reporting on the Omaha police practice of taking Polaroid pictures of suspected gang members or people who associate with gang members and recording detailed personal information); Stephen Clutter, *Looking for Trouble*, SEATTLE TIMES, July 17, 1991, at F1 (explaining that the strategy of a Seattle suburb’s Gang Unit is “photographing kids associated with gangs” and that most youths agree to have their photographs taken); *Town Police to Hassle Youth Gang Members as Far as Law Allows*, BIRMINGHAM NEWS, Dec. 19, 1995, at B4 (describing one Alabama police chief’s instructions on identifying and photographing potential gang members).

30. See Reza, *supra* note 13 (reporting on the San Diego Police Department’s use of photostops in 1982). See generally Jin S. Choi & Ernest Kim, *The Constitutional Status of Photo Stops: The Implications of Terry and Its Progeny*, 2 ASIAN PAC. AM. L.J. 60 (1994) (describing the use of photostops in California in the early 1990s).

31. Tieu, *supra* note 8, at 44.

32. See *id.* (noting that the California Department of Justice estimates the number of individuals in the CalGang database at 250,000; however, some critics contend the database contains over 300,000 entries).

these practices have been criticized and there have been calls for reform.<sup>33</sup> California cities have been forced to answer lawsuits contesting the use of photostops.<sup>34</sup> For example, as the result of a settlement agreement to a class action lawsuit, one California city agreed to curtail its use of photostops that are not based on reasonable suspicion or consent.<sup>35</sup> The most recent suit arose from a 2002 police round-up of students at a Union City high school.<sup>36</sup> Police racially segregated sixty Asian American and Latino students into separate classrooms, searched them and their belongings, forced the students to provide personal information, and photographed the students without probable cause or reasonable suspicion.<sup>37</sup> In 2005, the parties reached a settlement agreement stipulating that the photographs be destroyed and new guidelines be implemented for local police photographing youth.<sup>38</sup>

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33. See, e.g., Shawn Hubler, *A Sobering Lesson in Guilt By Association*, L.A. TIMES, Mar. 27, 2000, at B1 (criticizing the secret nature of the publicly funded CalGang database and comparing it to police lists during the McCarthy era); George Ramos, *Youths Offered Way to Get Off State Database*, L.A. TIMES, July 25, 2000, at B1 (describing a gang intervention program that could potentially help youths remove their name from the CalGang database).

34. See, e.g., Burge, *supra* note 15 (recounting San Diego County's settlement of a case where a fourteen-year-old boy was photographed when ticketed for riding his bicycle illegally); Tran & Yokoi, *supra* note 25 (noting a suit filed against San Jose and the San Jose Police Department contending that the photostop and inclusion of the photograph in a mug book violated the individual's constitutional rights).

35. See Tieu, *supra* note 8, at 50 (explaining that the settlement in *Quyen Pham v. City of Garden Grove* provided the class with \$85,000, apology letters from the police department, removal of the plaintiffs' photographs from police files, and revision of the police department's policy). The settlement requires officers to establish reasonable suspicion that the detainee was engaged in criminal activity and record their reasoning for detaining gang suspects or to obtain written consent before photographing a detainee. Davan Maharaj, *Rights Suit Involving Police Photos is Settled*, L.A. TIMES, Dec. 12, 1995, at A1. In one incident giving rise to the suit, police officers stopped three Vietnamese teenagers who were gathered by a pay phone while waiting for a ride because the officers considered the girls' clothes—baggy pants and tight fitting shirts—to be gang attire and the area was frequented by gang members. *Id.*; Tieu, *supra* note 8, at 50. The officers questioned the girls, ordered the them to stand against a wall, photographed them with a Polaroid camera without their consent, and recorded their age, height, weight, eye color, hair color, home address, and the school they attended. Doreen Carvajal, *O.C. Girl Challenges Police Photo Policy: Attorneys Contend Youths' Attire, Race Made them Targets of Mug Shots for Gang File*, L.A. TIMES, May 20, 1994, at A1.

36. Press Release, ACLU of N. Cal., ACLU Challenges Unconstitutional Round Up of Union City High School Students (Jan. 30, 2003), [http://www.aclunc.org/news/press\\_releases/aclu\\_challenges\\_unconstitutional\\_roundup\\_of\\_union\\_city\\_high\\_school\\_students.shtml](http://www.aclunc.org/news/press_releases/aclu_challenges_unconstitutional_roundup_of_union_city_high_school_students.shtml) (describing the class-action lawsuit filed on behalf of three students).

37. See *Benitez v. Montoya*, No. C03-00392, 2004 WL 2370637, at \*1 (N.D. Cal. Oct. 20, 2004) (stipulating many of these facts in addressing the defendant's motion to dismiss); see also Tieu, *supra* note 8, at 51–52 (detailing the incident).

38. See Press Release, ACLU of N. Cal., Union City Students Reach Groundbreaking Settlement with Union City and School District (May 18, 2005), [http://www.aclunc.org/news/press\\_releases/union\\_city\\_students\\_reach\\_groundbre](http://www.aclunc.org/news/press_releases/union_city_students_reach_groundbre)

The California Court of Appeals expressly dealt with the photostop practice and suppressed a photograph that was taken during an investigatory stop of suspected gang members in *People v. Rodriguez*.<sup>39</sup> In *Rodriguez*, the police obtained the defendant's photograph and personal information for a gang book to investigate future crime, even though, according to the investigating officer, the defendant and four other youths were only "talking and socializing" outside an apartment known as a gathering place of gang members.<sup>40</sup> The police frisked them for weapons, ordered them to sit on the curb, then interviewed and photographed them individually.<sup>41</sup> Three days later a witness in a homicide case selected Rodriguez's photograph from a "gang book."<sup>42</sup> The court found that Rodriguez had been impermissibly detained without reasonable articulable suspicion; thus, the photograph was the result of an illegal detention.<sup>43</sup>

*b. Photo sweeps in Philadelphia*

Philadelphia police angered community leaders in the early 1990s when they conducted "photo sweeps" to photograph Asian Americans who had not been accused of any crime.<sup>44</sup> Police threatened that if they did not agree to have their pictures taken on the spot, they would be taken to the police station to be photographed.<sup>45</sup> Police then used the photographs to investigate subsequent criminal activity.<sup>46</sup>

After months of meetings between the Philadelphia Bar Association, the Philadelphia Police Department, and the Mayor's Commission on Asian/Pacific American Affairs, the parties created a

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aking\_settlement\_with\_union\_city\_and\_school\_district.shtml (describing the settlement agreement provisions, including the strict limits on when police can take photographs of students, unless the student consents). Before obtaining that consent, Union City police officers must tell the student how the photograph may be used, including whether it will be included in any kind of database or mug book. *Id.*

39. 26 Cal. Rptr. 2d 660 (Cal. Ct. App. 1993).

40. *Id.* at 663. The police detective testified that it was the "department's policy to 'stop individuals who [officers] believe may be involved in a gang and take the field identification information, in addition to a photograph, and then place that into police files for potential later use regardless of whether or not that individual is at that time involved in criminal activity . . .'" *Id.* at 664.

41. *Id.* at 663.

42. *Id.* at 662.

43. *See id.* at 663-64 (holding that the photograph be suppressed as a product of the illegal detention).

44. *See Lin, supra* note 19 (recounting the details of photo sweeps that happened at a playground, at a pool hall, on the sidewalk, and at a video store's game room).

45. *See id.* (noting one teenager's response that "[t]here was no choice for us . . . One way or another, they were going to get our pictures").

46. *See id.* (reporting that the Philadelphia Police Department's organized-crime unit lends the "mug books" to other departments to investigate crimes).

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police policy that prohibited randomly stopping and photographing individuals based solely on race or “mere presence in a particular area.”<sup>47</sup> Under the new guidelines, a person is photographed only when “probable cause exists to believe that the individual may have committed the crime being investigated” and the photograph must be destroyed if the suspicion that motivated the photograph is dispelled.<sup>48</sup>

### 3. *Circumstances giving rise to photostops*

The circumstances under which suspects are photographed can be divided into five categories: (1) “Long-range Lens”—photographs obtained without investigatory detention; (2) “Mug Shot”—photographs obtained incident to arrest; (3) “Illegal Stop”—photographs obtained during a stop that was not originally justified by reasonable articulable suspicion; (4) “Unrelated Investigatory Stop”—photographs obtained during an investigatory stop originally justified by reasonable articulable suspicion, but the photographs are not related to the investigation of the suspicion that initially justified the stop, and; (5) “Related Investigatory Stop”—photographs obtained during an investigatory stop originally justified by reasonable articulable suspicion and the photographs are related to the investigation of the suspicion that initially justified the stop.

As defined previously, the term “photostop” refers to an individual being photographed during an investigatory stop. Illegal Stop, Unrelated Investigatory Stop, and Related Investigatory Stop photographs all occur during an investigatory detention and are the focus of this Comment. Obtaining Long-range Lens photographs does not require investigatory detentions and are not considered in this Comment.<sup>49</sup> Similarly, Mug Shot photographs are beyond the scope of this piece because their capture occurs once an individual has been arrested with probable cause.<sup>50</sup>

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47. Hank Grezlak, *Bar, Police Agree on 'Photo Sweeps'*, LEGAL INTELLIGENCER, Sept. 30, 1993, at 1 (stating that, under the agreement, police will photograph suspects on less than probable cause only under limited circumstances and when approved by the police commissioner).

48. *Id.* (explaining that if the suspicion is cleared, the police department must also inform the individual that his photograph was destroyed).

49. *See infra* notes 58–59 and accompanying text (establishing that photographing that which an individual knowingly exposes to the public does not fall within the scope of the Fourth Amendment’s protection).

50. *See infra* Part I.B.1 (explaining that it is accepted practice to photograph an arrestee).

*B. Protecting Privacy: Modern Fourth Amendment Jurisprudence*

Photostops potentially implicate the Fourth Amendment's protection against unreasonable searches and seizures. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."<sup>51</sup> The Supreme Court's decision in *Katz v. United States*,<sup>52</sup> considering an individual's manifest expectation of privacy while defining what constitutes a search, marked a turning point in Fourth Amendment jurisprudence.<sup>53</sup> Justice Harlan's concurrence established "that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"<sup>54</sup> This reasonable expectation of privacy standard balances the individual's privacy interests and the government's interest in crime detection.<sup>55</sup> While it appears as though *Katz* increased the protection of individual privacy, some scholars suggest that *Katz* actually increased the authority of law enforcement.<sup>56</sup>

*1. Judicial limitations on what qualifies as a search*

The Supreme Court has found that certain investigatory police techniques—from dog sniffs to aerial surveillance—are outside the scope of the Fourth Amendment because they do not constitute

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51. U.S. CONST. amend. IV.

52. 389 U.S. 347 (1967).

53. *Id.* at 351 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.") (internal citations omitted).

54. *Id.* at 361 (Harlan, J., concurring). *But see* *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) (warning that "[o]ur expectations . . . are in large part reflections of laws . . .").

55. *See* *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (citing *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)) ("[T]he permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'"); *see also* *INS v. Delgado*, 466 U.S. 210, 226 (1984) (Brennan, J., concurring in part and dissenting in part) (explaining the "inherent tension between our commitment to safeguarding the precious, and all too fragile, right to go about one's business free from unwarranted government interference, and our recognition that the police must be allowed some latitude in gathering information from those individuals who are willing to cooperate").

56. *See* Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 TEX. L. REV. 49, 58–59 (1995) (explaining that, in rejecting the property limitations of the Fourth Amendment, the Supreme Court afforded law enforcement the opportunity to search for any relevant item regardless of whether the individual had a superior property interest).

searches.<sup>57</sup> Police observation of that which individuals knowingly expose to the public is not considered a search.<sup>58</sup> This “public exposure” doctrine allows police to photograph individuals when they appear in public.<sup>59</sup> Under the same principle, some courts have held that obtaining voice exemplars does not constitute a search.<sup>60</sup> Additionally, even though fingerprints are not easy to observe, some courts exclude fingerprinting from Fourth Amendment protection, reasoning that fingerprints are exposed to the public and therefore not a search.<sup>61</sup>

However, there is some variation in how courts view the technologically enhanced scrutiny of publicly exposed information.<sup>62</sup> Although some courts hold that fingerprinting does not constitute a search under the public exposure doctrine, some courts find that the detailed structure of the prints is not common knowledge, and

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57. See, e.g., *Florida v. Riley*, 488 U.S. 445, 450 (1989) (holding that aerial surveillance from a helicopter is not a search); *United States v. Place*, 462 U.S. 696, 707 (1983) (finding that a dog sniff of a suitcase in an airport is not a search); *United States v. Knotts*, 460 U.S. 276, 284–85 (1983) (ruling that placing a tracking device in an item purchased by a suspect is not a search). But see *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (holding that the use of sense-enhancing technology, that is not in general public use, to obtain information about the interior of a home is a search).

58. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (requiring the individual to manifest the intent that the information be kept private).

59. See *North Carolina v. Williams*, 277 S.E.2d 434, 437 (N.C. 1981) (finding that a photograph taken by the police was admissible even if the defendant did not consent, because the “fourth amendment offers no shield for that which an individual knowingly exposes to public view”).

60. See *United States v. Dionisio*, 410 U.S. 1, 14 (1973).

The physical characteristics of a person’s voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man’s facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.

*Id.*

61. Compare *Palmer v. State*, 679 N.E.2d 887, 891 (Ind. 1997) (finding “fingerprints are an identifying factor readily available to the world at large” and fingerprinting without a warrant was not an illegal seizure), and *Hayes v. Florida*, 470 U.S. 811, 818 (1985) (“None of the foregoing implies that a brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause, is necessarily impermissible under the Fourth Amendment.”), with *Paulson v. Florida*, 360 F. Supp. 156, 161 (S.D. Fla. 1973) (finding that fingerprinting constitutes a search).

62. See, e.g., *United States v. Richardson*, 388 F.2d 842, 845 (6th Cir. 1968) (shining an ultraviolet light on the suspect’s hands is not a search); *State v. Holzapfel*, 748 P.2d 953, 957 (Mont. 1988) (same), overruled by *State v. Hardaway*, 36 P.3d 900 (Mont. 2001). But see *People v. Santistevan*, 715 P.2d 792, 795 (Colo. 1986) (holding that use of an ultraviolet light to “discover incriminating evidence not otherwise observable” constitutes a search).

extends past what is easy to observe.<sup>63</sup> Recognizing this discrepancy, courts have occasionally found that the scrutiny of evidence, legally seized, constitutes an additional search.<sup>64</sup>

Acknowledging the importance of identifying arrestees, courts have created an exception to the warrant requirement. Referred to as the “true identity” doctrine, it justifies searching an arrestee’s personal property and taking mug shots and fingerprints for identification purposes without a warrant.<sup>65</sup> In 1900, the Indiana Supreme Court held that a sheriff had the discretion to take an arrestee’s photograph and record his physical description if “he should deem it necessary to the safe-keeping of a prisoner and to prevent his escape, or to enable him the more readily to retake the prisoner if he should escape . . . .”<sup>66</sup> Case law clearly establishes that a person in lawful custody may be required to submit to photographing and fingerprinting for routine identification.<sup>67</sup>

## 2. *Seizures*

The Fourth Amendment’s prohibition against unreasonable seizures is also implicated when assessing photostops because the police typically have stopped or detained the individual who is photographed. While the standard for whether police action constitutes a seizure is clear at the two ends of the spectrum—

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63. See D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORNELL J.L. & PUB. POL’Y 455, 485 (2001) (explaining the broad use of the public exposure doctrine to remove fingerprinting from Fourth Amendment scrutiny).

64. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995) (ruling that urinalysis testing was a search, even though the sample was already in the government’s possession); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 616–17 (1989) (same); *Ross v. State*, 475 A.2d 481, 486–87 (Md. Ct. Spec. App. 1984) (ruling that watching video tape after it was legally obtained qualifies as an additional search); see also *Florida v. Wells*, 495 U.S. 1, 4 (1990) (finding that the legal seizure of a briefcase does not necessarily give police authority to analyze its contents).

65. See Kaye, *supra* note 63, at 485–86 (detailing the historic importance of identifying arrestees that has created an exception to the warrant requirement and considering its applicability to arrestee DNA collection).

66. *State ex rel. Bruns v. Clausmier*, 57 N.E. 541, 541–42 (Ind. 1900) (rejecting the arrestee’s claim for damages when the sheriff took his picture and placed the image in the “Rogues’ Gallery” and sent the image to other law enforcement officers, even though the arrestee had not had “any opportunity to prove his innocence of the charge” and was later acquitted).

67. See, e.g., *United States v. Krapf*, 285 F.2d 647, 650–51 (3d Cir. 1961) (classifying fingerprinting as a routine means of identification); *United States v. Amorosa*, 167 F.2d 596, 599 (3d Cir. 1948) (maintaining that photographs obtained lawfully for “routine identification” purposes upon arrest are permissible); *United States v. Kelly*, 55 F.2d 67, 70 (2d Cir. 1932) (upholding fingerprinting upon arrest for identification purposes); see also *Illinois v. LaFayette*, 462 U.S. 640, 646 (1983) (“[I]nspection of an arrestee’s personal property may assist the police in ascertaining or verifying his identity.”).

consensual police contact is not a seizure<sup>68</sup> and physical detention is a seizure<sup>69</sup>—the Supreme Court established in *United States v. Mendenhall*<sup>70</sup> the standard for seizures of persons for the less clear-cut cases. Under the *Mendenhall* test, if a reasonable person, given the totality of the circumstances, would not feel free to leave, he has been seized.<sup>71</sup> The Court refined the “free to leave” standard in *Florida v. Bostick*,<sup>72</sup> focusing on the coercive pressure that the police apply.<sup>73</sup> A seizure can occur whenever a person is detained “against his will,” including both a full-fledged arrest and an “investigatory detention.”<sup>74</sup>

C. *Terry v. Ohio: A Limited Intrusion Based on Reasonable Suspicion*

Recognizing that police need to be able to investigate imminent or on-going crime, the Supreme Court upheld a limited search for weapons and seizure of a person on less than probable cause in *Terry v. Ohio*.<sup>75</sup> The rationale of *Terry* focuses on the reasonableness analysis of the Fourth Amendment and attempts to balance individual rights and police interests.<sup>76</sup> For an investigative “*Terry*-stop” to be constitutional, the officer’s actions must satisfy two requirements: (1) the stop must be “justified at its inception,” and (2) the subsequent police action must be “reasonably related in scope to the circumstances which justified the interference in the first place.”<sup>77</sup> Reasonable articulable suspicion is the standard of proof

68. See *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (“[M]ere police questioning does not constitute a seizure.”).

69. See *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (“It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”).

70. 446 U.S. 544 (1980).

71. *Id.* at 554.

72. 501 U.S. 429 (1991).

73. See *id.* at 431–32 (finding it significant that the officer informed the bus passenger that he could refuse to consent to the search and that the officer did not remove his gun from its pouch).

74. *Cupp v. Murphy*, 412 U.S. 291, 294 (1973) (citation omitted); see *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (“[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.”); *Davis v. Mississippi*, 394 U.S. 721, 726–27 (1969) (“Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed ‘arrests’ or ‘investigatory detentions.’”).

75. 392 U.S. 1, 20 (1968) (recognizing a police officer’s need to intervene when he observed two men behaving suspiciously—as though they were “casing” a store for robbery).

76. *Id.* at 21 (determining reasonableness “by balancing the need to search (or seize) against the invasion which the search (or seizure) entails”) (citation omitted).

77. *Id.* at 20.

necessary to justify a *Terry*-stop.<sup>78</sup> The decision in *Terry* allows police to freeze a situation in order to investigate, reflecting the government's interest in investigating and preventing crime.<sup>79</sup>

1. *Limits on a Terry-stop: The Caballes and Hiibel tension*

While a seizure is permissible when based on reasonable articulable suspicion, the Court has provided differing standards for what law enforcement officials are permitted to investigate once they have satisfied this standard of proof. In *Hiibel v. Sixth Judicial District Court of Nevada*, the Court suggested that an investigative technique must have an "immediate relation" to the circumstances that justified the initial stop and that police could not alter the nature of the stop.<sup>80</sup> The Court in *Hiibel* upheld the conviction of an individual who failed to identify himself upon the request of a police officer, as required under a state statute, because "[i]dentity may prove particularly important in cases such as this, where the police are investigating what appears to be a domestic assault."<sup>81</sup>

The following term, the Supreme Court did not apply the same standard in *Illinois v. Caballes*.<sup>82</sup> The Court found that it was permissible to use a drug detection dog where the sole justification for the initial stop was that the driver was speeding on a highway.<sup>83</sup> The Supreme Court of Illinois applied the second prong of the *Terry* analysis and ruled that the use of the dog "unjustifiably enlarg[ed]

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78. *Id.* at 21 ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").

79. *Id.* at 22 (recognizing the general governmental interest of "crime prevention and detection" can justify an investigation before there is probable cause to arrest).

80. *Hiibel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177, 188 (2004) (finding that police could constitutionally demand identification and arrest the defendant for failing to provide identification when there was a state statute requiring production of identification because verifying identification "has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop").

81. *Id.* at 186 (explaining that officers "need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim").

82. 543 U.S. 405 (2005); see 6 WAYNE LAFAVE, SEARCH AND SEIZURE § 9.3 (Supp. 2006) (criticizing the Court's failure to acknowledge the departure from established precedent).

83. *Caballes*, 543 U.S. at 406-407 (acknowledging that the defendant was stopped by a state trooper for driving six miles per hour over the posted speed limit on an interstate highway and assuming that this was the only information that a second officer who reported to the scene, without being requested to do so, had about the driver). The second officer walked his drug-detection dog around the car while the first officer completed the warning citation. "The dog alerted at the trunk" and a subsequent search discovered marijuana. *Id.* at 406.

the scope of a routine traffic stop into a drug investigation.”<sup>84</sup> The Supreme Court overturned that decision, holding that “conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner . . . .”<sup>85</sup> The Court did not apply the “reasonably related” standard articulated in *Terry* and applied in *Hiibel*; instead, it required only that the stop be reasonably executed and not prolonged beyond the time necessary to complete the investigation that originally justified the stop.<sup>86</sup> The majority opinion simply reiterated that the dog sniff was not a search, emphasizing that there is no privacy interest in contraband.<sup>87</sup>

## II. ANALYZING THE CONSTITUTIONALITY OF PHOTOSTOPS UNDER *TERRY* AND ITS PROGENY

The *Terry*-stop framework provides a strong claim against the legality of taking a detainee’s photograph during an investigatory detention. The first prong of a *Terry* analysis requires that the stop be lawful or valid from its inception.<sup>88</sup> This requirement renders all Illegal Stop photographs—photostops for the sole purpose of adding a person’s photo to a database or identification book—impermissible, as well as any stops that were illegal at their inception for any other

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84. *People v. Caballes*, 802 N.E.2d 202, 205 (Ill. 2003), *cert. granted*, 541 U.S. 972 (2004), *vacated*, 543 U.S. 405 (2005).

85. *Caballes*, 543 U.S. at 408.

86. *See id.* at 407 (“A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.”). Only the dissent explicitly recognized that the *Caballes* decision abandoned the investigatory means aspect of the second prong of the *Terry* analysis. *See id.* at 419 (Ginsberg, J., dissenting) (arguing that the majority’s decision, allowing a suspicionless drug-sniffing dog search during a routine traffic stop “diminishes the Fourth Amendment’s force by abandoning the second *Terry* inquiry” regarding the reasonable relationship between the scope of the search and the justification for the stop). Justice Ginsberg, joined by Justice Souter, maintained in her dissent that the use of a drug-detection dog is intimidating and that it “changes the character of the encounter between the police and the motorist. The stop becomes broader, more adversarial, and (in at least some cases) longer.” *Id.* at 421.

87. *See id.* at 411 (majority opinion) (explaining that a dog sniff can only detect the presence of items that do not have a legal use; therefore, the individual does not have a legitimate privacy interest and the sniff is not considered a search); *id.* at 410 (“A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.”). *But see id.* at 410–11 (Souter, J., dissenting) (arguing that dog sniffs are fallible and do not necessarily signal contraband, necessitating reconsideration of their treatment as a non-search).

88. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

reason.<sup>89</sup> The second prong of the *Terry* analysis that requires law enforcement action be “reasonably related in scope to the circumstances which justified the interference in the first place,” determines the legitimacy of any Unrelated Investigatory Stop or Related Investigatory Stop photographs—those where the initial stop is justified by reasonable suspicion

However, *Caballes*, if applied to photostops, changes the permissibility of Unrelated Investigatory Stop photostops.<sup>90</sup> Ultimately, *Caballes* should be distinguished and not applied to photostops because the extended life-span of a photograph in a database creates a greater privacy intrusion, and the level of suspicion present in *Caballes*—probable cause—is greater than the reasonable suspicion that is required for a photostop.<sup>91</sup>

A. *Initially “Lawful” or “Valid”: The First Prong of Terry*

The Supreme Court’s application of the first prong of the *Terry* standard to a variety of investigatory techniques, including those not considered a search, provides strong support for the proposition that photographs obtained during an illegal detention must be suppressed.<sup>92</sup> In *Hayes v. Florida*,<sup>93</sup> the Supreme Court held that transporting a suspect to the police station for fingerprinting, without a warrant, probable cause, or consent, violated the Fourth Amendment.<sup>94</sup> The Court suggested in dicta that a brief detention for fingerprinting could be constitutionally permissible if the detention was supported by reasonable suspicion.<sup>95</sup>

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89. See *People v. Rodriguez*, 26 Cal. Rptr. 2d 660, 663–64 (Cal. Ct. App. 1993) (suppressing a “gang book” photograph that was captured during an investigatory stop that was not justified by “specific and articulable facts”).

90. See *infra* Part II.C (explaining that *Caballes* Court did not apply the “reasonably related” prong of the *Terry* standard as stringently as in prior case law).

91. See *infra* Part II.D (explaining why *Caballes* is distinguishable on two separate grounds).

92. See *Davis v. Mississippi*, 394 U.S. 721, 727 (1969) (“Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment.”); see also *Bynum v. United States*, 262 F.2d 465, 467 (D.C. Cir. 1958) (finding the rules that govern statements during detention and personal articles seized should apply to fingerprinting, explaining, “all three [investigatory techniques] have the decisive common characteristic of being something of evidentiary value which the public authorities have caused an arrested person to yield to them during an illegal detention. If one such product of illegal detention is proscribed, by the same token all should be proscribed”). The Supreme Court agreed with this position and adopted it in *Davis v. Mississippi*, 394 U.S. 721, 724 (1969).

93. 470 U.S. 811 (1985).

94. See *id.* at 814–15 (relying on the precedent established in *Davis*).

95. See *id.* at 816 (“None of the foregoing implies that a brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not

An Illegal Stop photostop, one not supported by reasonable articulable suspicion, is impermissible under *Terry* because it is not “justified at its inception.”<sup>96</sup> Detaining an individual for the sole purpose of taking that individual’s photograph and adding it to a database or gang book is an illegal detention, requiring exclusion of the photograph.<sup>97</sup> This type of photostop is impermissible because it does not establish “specific and articulable facts” to justify the intrusion.<sup>98</sup>

*B. Scope and Duration: The Second Prong of Terry*

Under the second or “reasonably related” prong of *Terry*, a photograph captured during a photostop is impermissible if the police use it for a purpose beyond the scope of investigating the suspicion that justified the stop<sup>99</sup> or if taking the photograph unreasonably prolonged the stop.<sup>100</sup> This reasonably related prong of the *Terry* standard has been understood to contain both a scope and a duration component.<sup>101</sup>

From its 1968 decision in *Terry* through *Hübel* in 2004, the Court has consistently assessed both scope and duration when analyzing the reasonably related prong of the *Terry* standard.<sup>102</sup> In *United States v.*

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amounting to probable cause, is necessarily impermissible under the Fourth Amendment.”).

96. See *Terry v. Ohio*, 393 U.S. 1, 20 (1968).

97. See *People v. Pettis*, 298 N.E.2d 372, 376 (Ill. App. Ct. 1973) (“[I]t is our belief that the same reasoning should be applied to photographs as to fingerprints; i.e., a detention for the sole purpose of initiating or enlarging the defendant’s records held by the police will be subject to the prohibitions [of the Fourth Amendment].”); 6 WAYNE LAFAVE, *SEARCH AND SEIZURE* § 11.4(g) (4th ed. 2004) (suggesting that photos may still be used unless “the photograph was come by as a consequence of an arrest made for the purpose of adding the defendant’s picture to the police mug books”). But see *People v. Shaver*, 396 N.E.2d 643, 648 (Ill. App. Ct. 1979) (justifying the admissibility of a photograph that was obtained during an illegal detention for the sole purpose of capturing the defendant’s photo under the “inevitable discovery” doctrine).

98. See *Terry*, 393 U.S. at 21 (explaining that the police officer must establish detailed facts that when considered with “rational inferences” reasonably justify the stop).

99. See *infra* notes 119–22 and accompanying text (reviewing the scope aspect of the *Terry* standard).

100. See *infra* notes 108–11 and accompanying text (articulating the duration limit for a *Terry*-stop).

101. See *Florida v. Royer*, 460 U.S. 491, 500 (1983) (explaining “an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop” and “the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time”).

102. See LAFAVE, *supra* note 82, § 9.3 (describing the Court’s application of the second prong of the *Terry* standard in a series of cases). But see Amy L. Vazquez, Comment, “Do You Have Any Drugs, Weapons, or Dead Bodies in Your Car?” *What Questions Can a Police Officer Ask During a Traffic Stop?*, 76 TUL. L. REV. 211, 222 (2001)

*Sharpe*,<sup>103</sup> *United States v. Hensley*,<sup>104</sup> and *Florida v. Royer*,<sup>105</sup> the Supreme Court examined both the length of the stops and intrusiveness of the investigations when applying *Terry*.<sup>106</sup> As one commentator explains, “[b]y separating scope and duration, the Court here clearly suggested that scope is something more than length of the detention. A reasonable inference can be made that the ‘something more’ should be, and is, the type of questioning and investigating.”<sup>107</sup>

### 1. Analyzing duration

If a photostop lasts any longer than is necessary to confirm or dispel the suspicion that justified the stop, then it violates the Fourth Amendment.<sup>108</sup> The Supreme Court has refused to set a specific time limit for a *Terry*-stop;<sup>109</sup> however, the police violate *Terry* if they do not diligently pursue dispelling or confirming their initial suspicion during a photostop.<sup>110</sup>

Even if the police are working to confirm or dispel their initial suspicion, the extended duration of a stop can make it unreasonable. The Supreme Court ruled in *United States v. Place*<sup>111</sup> that a ninety-minute delay was too significant of an invasion on an individual’s Fourth Amendment interests to be justified by reasonable suspicion.<sup>112</sup> However, the Court held in *Sharpe* that a detention of

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(describing a Federal Circuit split regarding whether officers may ask questions unrelated to the underlying justification for a traffic stop).

103. 470 U.S. 675 (1985).

104. 469 U.S. 221 (1985).

105. 460 U.S. 491 (1983).

106. See *Sharpe*, 470 U.S. at 676 (noting that in addition to duration, “courts must also consider the purposes to be served by the stop” when applying the second part of the *Terry* inquiry); *Hensley*, 469 U.S. at 235 (finding that both “the length and intrusiveness of the stop and detention” were reasonable when police officers stopped and questioned an individual because one of the officers recognized the individual from a “wanted flyer”); *Royer*, 460 U.S. at 500 (finding that “the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer’s suspicion”).

107. Vazquez, *supra* note 102, at 226.

108. See *Royer*, 460 U.S. at 500 (“[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.”).

109. See *United States v. Place*, 462 U.S. 696, 709–10 (1983) (rejecting adoption of an “outside time limitation for a permissible *Terry* stop,” but finding a ninety-minute delay for the arrival of a drug dog to be impermissible).

110. See *id.* at 709–10 (noting the importance of brevity to determine if a seizure can be justified on reasonable suspicion and considering whether “the police diligently pursue their investigation”). But see, e.g., *State v. De La Rosa*, 657 N.W.2d 683, 687 (S.D. 2003) (suggesting that the temporal limits of *Terry* can be expanded when “the State’s interest in drug interdiction is compelling”).

111. 462 U.S. 696 (1983).

112. See *id.* at 709–10 (emphasizing that police had enough information so as to have had a drug sniffing dog available immediately).

twenty minutes was reasonable for an investigatory stop when the officers involved were working diligently.<sup>113</sup>

During an Unrelated Investigatory Stop photostop, the police must diligently pursue confirming or dispelling their initial suspicion. Even under *Caballes*, it would be impermissible to delay a person so that a photographer or camera could arrive, when the photograph is unrelated to the suspicion that justified the stop.<sup>114</sup>

The Court has defined the durational boundaries of a delay during a Related Investigatory Stop photostop—a delay of twenty minutes will be permissible and ninety minutes will be impermissible.<sup>115</sup> However, it is less clear how the Court will deal with photostops of an intermediate duration. Unlike Unrelated Investigatory Stop photostops, Related Investigatory Stop photostops could be permissible even if the investigation was delayed by the officer's request for a photographer or a camera, because the photograph is related to confirming or dispelling the initial suspicion.<sup>116</sup> The police must act diligently, as the Court emphasized in *Place*, commenting that the police could have had a drug investigation unit ready and avoided the delay.<sup>117</sup> This suggests that the Court would expect officers to have cameras readily available when on patrol, as they are much less costly and easier to carry than drug detection dogs.<sup>118</sup>

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113. See *United States v. Sharpe*, 470 U.S. 675, 687–88 (1985) (noting that any delay was necessary to the investigation).

114. See *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (stating that a seizure for the sole purpose of issuing a driving citation “can become unlawful if it is prolonged beyond the time reasonably required to complete that mission”).

115. See *supra* notes 111–14 and accompanying text (establishing the Supreme Court precedent regarding the permissible duration of *Terry*-stops).

116. See, e.g., *United States v. Lebrun*, 261 F.3d 731, 734 (8th Cir. 2001) (finding a twenty-minute delay for the arrival of a drug dog was reasonable when the officer suspected the defendant was transporting drugs); *United States v. Gil*, 204 F.3d 1347, 1351 (11th Cir. 2000) (holding a seventy-five minute detention was reasonable because the suspect “was detained for only as long as it was necessary [for police] to complete their investigation”).

117. See *Place*, 462 U.S. at 710 (concluding police “went beyond the narrow authority [they] possessed . . . to detain briefly luggage reasonably suspected to contain narcotics”).

118. See, e.g., *United States v. Tavalacci*, 895 F.2d 1423, 1427 (D.C. Cir. 1990) (finding a ten to fifteen minute delay was reasonable to wait for a drug dog, “[a]lthough the dog would have been waiting on the platform in a world where the time of dogs and their handlers was cost-free”); ConsumerReports.org, Digital Cameras: More Fun and Features for Less, Nov. 2007, <http://www.consumerreports.org/cro/electronics-computers/cameras-photography/cameras-camcorders/digital-cameras/digital-cameras-11-07/overview/digital-cameras-ov.htm> (maintaining that digital camera prices have fallen and “you can now find respectable compact[] [cameras] with familiar brand names for less than \$200”).

## 2. *Assessing scope*

The scope aspect of the second prong of *Terry* allows investigative techniques only to the extent that they can confirm or dispel the officer's suspicion that first justified the encounter.<sup>119</sup> Fourth Amendment scholar Wayne R. LaFave explains, “[t]here are many other investigative techniques [in addition to interrogation] which are equally useful but which *ordinarily* cannot be utilized on a street corner, such as fingerprinting, photographing, obtaining handwriting exemplars, obtaining voice exemplars, and conducting a lineup.”<sup>120</sup> The Supreme Court's dicta in *Hayes v. Florida* is instructive and suggests that fingerprinting a suspect during a *Terry*-stop is permissible only to the extent that “there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch.”<sup>121</sup>

Applying this standard, photographs obtained during an Unrelated Investigatory Stop are unlawful because taking the photograph to investigate future crime is not reasonably related to the suspicion that validated the stop initially. A Related Investigatory Stop photostop—taking and using a photograph to investigate the circumstance that justified the initial stop—would be permissible and could be understood as a logical extension of a line of cases that allow the police to show the suspect to victims and witnesses of crimes.<sup>122</sup>

Several state court cases impliedly support the proposition that police photography during a *Terry*-stop is a legitimate means to

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119. *See, e.g.*, *Florida v. Royer*, 460 U.S. 491, 500 (1983) (“The scope of the detention must be carefully tailored to its underlying justification.”). If additional suspicion is aroused during the investigation of the initial suspicion, the scope and duration of the stop can be expanded to investigate the new suspicion. *See, e.g.*, *United States v. Soto-Cervantes*, 138 F.3d 1319, 1323 (10th Cir. 1998) (finding that a one-hour stop was permissible when the initial investigation of drug activity raised suspicion about the suspect's alien registration card and the officer had to wait for an INS officer to arrive); *United States v. Shareef*, 100 F.3d 1491, 1501 (10th Cir. 1996) (holding that the stop was permissibly extended for thirty minutes to investigate suspect's authority to drive when the suspect did not produce a license). If lawfully obtained facts provide reasonable suspicion of another offense then the police can reasonably pursue investigating that offense as well. *See, e.g.*, *Medrano v. State*, 914 P.2d 804, 808 (Wyo. 1996) (validating officer's inquiry into drug possession once reasonable suspicion developed, even though the initial suspicion for the stop was robbery).

120. LAFAVE, *supra* note 97, § 9.8 (emphasis added).

121. *Hayes v. Florida*, 470 U.S. 811, 817 (1985).

122. *See, e.g.*, *United States v. Dickson*, 58 F.3d 1258, 1263–64 (8th Cir. 1995) (approving a *Terry*-stop of three men for fifteen minutes while witnesses from a bank robbery arrived to possibly identify the robber); *State v. Mitchell*, 527 A.2d 1168, 1173 (Conn. 1987) (“We note that detaining a suspect to effectuate a viewing by witnesses to a crime has been deemed to be a permissible investigative technique.”).

investigate suspicious behavior.<sup>123</sup> For example, the Court of Special Appeals of Maryland ruled in *Flores v. State*<sup>124</sup> that “a brief detention to determine and immortalize an individual’s identity by photographing him, to ensure that the correct individual would later be arrested, was not unreasonable.”<sup>125</sup> However, not all photostops can be legitimized under this reasoning. Unrelated Investigatory Stop photostops are impermissible because they are not used to later confirm the identity of an individual whose behavior was being investigated already, but rather are used to investigate crimes wholly unrelated to those that justified the initial intrusion.<sup>126</sup>

Courts permit physical and photographic line-ups during a *Terry*-stop;<sup>127</sup> however, this provides no support for taking and using photographs during an Unrelated Investigatory Stop. Line-ups or show-ups, both physical and photographic, are used to investigate the crime that justified the stop initially and are used to investigate present and past, but not future criminal behavior.<sup>128</sup> In contrast, Unrelated Investigatory Stop photostops cannot be justified under the same rationale because they rely on databases to save the images for the future.<sup>129</sup>

The Supreme Court’s 2004 ruling in *Hibel* affirmed police officers’ ability to investigate to the extent justified by present suspicious

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123. See, e.g., *People v. Green*, 700 N.E.2d 1097, 1101–02 (Ill. App. Ct. 1998) (finding that “the use of photography to memorialize what has been seen by the naked eye” during a *Terry*-stop was permissible where the original stop was justified and the purpose for relying on the photograph was to not immediately give up an undercover agent’s identity); *State v. Wise*, 635 P.2d 1374, 1377 (Or. Ct. App. 1981) (stating in dicta that officers could take pictures during a *Terry*-stop without infringing on the defendant’s Fourth Amendment rights and then ruling that it was not an unlawful seizure when the defendant had to wait for the police photographer to arrive because he consented to having his photograph taken).

124. 706 A.2d 628 (Md. Ct. Spec. App. 1998).

125. *Id.* at 636–37. The police had probable cause to believe that the appellant had committed a crime—he had just sold crack cocaine to an undercover police officer; however, the police did not arrest him immediately after the commission of the crime because of an ongoing operation. *Id.* at 630, 636–37. The undercover officer then radioed the “stop team” and they stopped and obtained a photograph of the appellant. *Id.* at 630.

126. See *supra* notes 99–102 and accompanying text (maintaining that under the scope component of the *Terry* standard, it is impermissible to use a photograph for a purpose other than the one for which the suspect was originally being investigated).

127. See, e.g., *Finney v. State*, 420 So. 2d 639, 643 (Fla. Dist. Ct. App. 1982) (permitting taking suspect’s photograph and detaining the suspect while the photograph was taken to the hospital so that the victim could identify the perpetrator in a photographic line-up).

128. See *id.* (taking and using a suspect’s photograph to investigate a past crime).

129. See *supra* note 21 and accompanying text (explaining that in Texas suspected gang members have their photos databased along with their street address for future use by police).

activity.<sup>130</sup> The Court applied the standard from *Terry* and ultimately found that, in the context of a stop based on suspicion of domestic violence, requesting identification was “reasonably related in scope to the circumstances that justified the initial stop.”<sup>131</sup> The Court limited its holding to the confines of *Terry*, explaining that “an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop.”<sup>132</sup>

Under *Hüibel*, the legitimacy of the investigatory technique hinges upon the possibility of confirming or dispelling the officer’s original suspicion that justified the stop. This would mean that Related Investigatory Stop photostops are permissible, but Unrelated Investigatory Stop photostops are illegal.<sup>133</sup>

### C. Forgetting the Scope Requirement: Caballes

Although the standard applied from *Terry* through *Hüibel* seemed well-established, the Supreme Court did not apply this precedent in *Caballes*.<sup>134</sup> However, it is unclear whether the Supreme Court would find *Caballes* to be controlling if faced with the issue of the legitimacy of photostops.

In *Caballes*, the Supreme Court held that an investigative technique does not violate the scope limitation unless the technique “itself infringed [the suspect’s] constitutionally protected interest in privacy.”<sup>135</sup> This language in *Caballes* suggests that the Court will first ask if the investigatory technique is a search, and if it is not, then it will be per se legitimate. Since photographing that which is exposed to the public is not a search,<sup>136</sup> the photostops would escape Fourth

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130. See *supra* notes 80–81 and accompanying text (describing the Court’s holding in *Hüibel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177 (2004)).

131. *Hüibel*, 542 U.S. at 188 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

132. *Id.*

133. See *id.* at 186 (finding that discerning Mr. Hüibel’s identity was a permissible investigative technique to confirm or dispel suspicion of domestic violence); see also *Carey v. Nev. Gaming Control Bd.*, 279 F.3d 873, 880 (9th Cir. 2002) (finding that asking the suspect for his identification made the detention illegal because the suspect’s name was irrelevant to determining if he had violated gaming laws); *infra* App. 1 (summarizing treatment of photostops under *Hüibel*).

134. See LAFAVE, *supra* note 83, § 9.3 (“Had the Supreme Court in *Caballes* been true to these precedents, the Court would have held that use of the drug dog, albeit no search, was unreasonable because it was beyond the scope limitation.”).

135. *Illinois v. Caballes*, 543 U.S. 405, 408 (2005).

136. See *supra* notes 58–59 and accompanying text (explaining that capturing one’s image is not considered a search because there is no reasonable expectation of privacy in that which one knowingly exposed to the public). But see Tracey Maclin, *Is Obtaining an Arrestee’s DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 33 J.L. MED. & ETHICS 102, 106 (2005) (arguing that DNA is technically constantly exposed to the public—“losing hair,

Amendment scrutiny and both Unrelated Investigatory stop and Related Investigatory Stop photostops would be permissible.

Commentators have been very critical of the Supreme Court's departure from its well-established precedent.<sup>137</sup> The Supreme Court's decision in *Caballes* implies that if an investigatory technique is a non-search, it cannot exceed the permissible scope of a *Terry*-stop. *Caballes* contradicts Supreme Court precedent in prior cases where the Court has repeatedly entertained challenges to *Terry*-stops when the police behavior was not a search.<sup>138</sup>

The *Caballes* decision has received criticism for its veiled departure from precedent and its descent toward suspicionless investigations.<sup>139</sup> Criticizing the Court's abrupt and unexplained departure from its own precedent, one commentator stated:

It is odd, to say the least, that the Supreme Court, in overturning the state court ruling, never even cited *Terry* or any of the post-*Terry* stop-and-frisk cases discussing those limitations, and, for that matter, *never cited any prior Supreme Court decision at all* to justify its holding!<sup>140</sup>

Justice Ginsburg warned in her dissenting opinion that the *Caballes* opinion "clears the way for suspicionless, dog-accompanied drug

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leaving saliva on a drinking glass at a restaurant, or shedding skin cells"—and its analysis should still be considered a search).

137. See LAFAVE, *supra* note 83, § 9.3 ("Just why the Supreme Court would engage in such adumbrated and oversimplified analysis is hard to comprehend, although admittedly it is easier to overrule a state court decision if the grounding of that decision in the Supreme Court's own precedents is kept totally out of sight.")

138. See, e.g., *Hibel*, 542 U.S. at 186 (considering how related the request for the suspect's name was to the purpose of the stop, even though asking someone's name is not a search); *Illinois v. McArthur*, 531 U.S. 326, 331 (2001) (analyzing first that the seizure was "limited in time and scope" before determining that the brief seizure—not letting the defendant go in his home unsupervised, pending issuance of a warrant—was permissible); *Hayes v. Florida*, 470 U.S. 811, 817 (1985) (suggesting that fingerprinting may be allowable incident to a *Terry*-stop, but only if there is "a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime"). *Hayes* applied the "reasonably related" standard even though prior Court precedent characterized investigative techniques that capture "physical characteristics . . . constantly exposed to the public" as non-searches. See, e.g., *United States v. Dionisio*, 410 U.S. 1, 14 (1973).

139. See, e.g., Aya Gruber, *Garbage Pails and Puppy Dog Tails: Is That What Katz is Made Of?*, 41 U.C. DAVIS L. REV. 781, 825 (2008) ("The *Caballes* Court puts a normative stamp of approval on a world in which police dogs sniff us at will, computers constantly inspect our communications, facial recognition machines scan our features, and contraband detection machines are directed at our homes, cars, and bodies."); Nina Paul & Will Trachman, *Fidos and Fi-don'ts: Why the Supreme Court Should Have Found a Search in Illinois v. Caballes*, 9 BOALT J. CRIM. L. 1, 17 (2005) ("In *Caballes*, . . . the Court improperly ignored the second aspect of the *Terry* inquiry").

140. LAFAVE, *supra* note 83, § 9.3.

sweeps of parked cars along sidewalks and in parking lots.”<sup>141</sup> Applying *Caballes* changes the outcome of the analysis of the constitutionality of Unrelated Investigatory Stop photostops, making them permissible.<sup>142</sup> However, it is unclear how broadly the Court will apply its holding from *Caballes* in a photostop case.

#### D. Distinguishing *Caballes*

*Caballes* can be distinguished from photostops on two grounds. First, a dog sniff reveals on-going activity at the time of the stop, while a photograph in a database can be accessed in the future.<sup>143</sup> Second, the stop in *Caballes* was based on probable cause, not reasonable suspicion.<sup>144</sup>

##### 1. Photographs in databases have a longer life-span

*Caballes* can be distinguished because it involved dog sniffs, an investigatory technique the Court has treated as unique due to the limited nature of the intrusion.<sup>145</sup> Dog sniffs were classified as non-searches because they reveal only contraband and individuals do not have a recognized privacy interest in illegal items.<sup>146</sup> The Supreme Court treated dog sniffs as unique because of their ability to provide limited information that correctly identifies criminality.<sup>147</sup> However,

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141. *Illinois v. Caballes*, 543 U.S. 405, 422 (2005) (Ginsburg, J., dissenting) (characterizing the majority opinion as undermining Fourth Amendment protection by allowing police to search for contraband without suspicion of criminality).

142. See *infra* App. 1 (summarizing the treatment of photostops under *Caballes*).

143. See *supra* notes 75–79 and accompanying text (discussing that the rationale supporting *Terry*-stops is to allow officers to investigate imminent or “on-going” criminal activity).

144. See *infra* notes 154–56 and accompanying text (explaining the different standards for each type of stop).

145. See *United States v. Place*, 462 U.S. 696, 707 (1983) (considering dog sniffs, the Court maintained “[w]e are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure”).

146. See *id.* (finding that a dog sniff “by a well-trained narcotics detection dog” is a limited intrusion and “does not expose noncontraband items that otherwise would remain hidden from public view”). This seems to suggest that only the innocent have privacy rights. *But see, e.g., Caballes*, 543 U.S. at 422 (Ginsburg, J., dissenting) (“The Court has never removed police action from Fourth Amendment control on the ground that the action is well calculated to apprehend the guilty.”); *United States v. Karo*, 468 U.S. 705, 717 (1984) (finding that the warrant requirement applies even if the investigatory technique “is likely to produce evidence of criminal activity”).

147. See *Place*, 462 U.S. at 707 (describing dog sniffs as *sui generis*). *But see Caballes*, 543 U.S. at 410, 411 (Souter, J., dissenting) (noting the high false positive error rates for dog sniffs, contending that “[t]he infallible dog, however, is a creature of legal fiction” and calling for reconsideration of the holding in *Place*). In *Caballes*, the government argued that the drug dog inspection was not a search and characterized it as a non-event. See Brief of Petitioner at 9, *Illinois v. Caballes*, 543 U.S. 405 (2005) (No. 03-923) (suggesting that it was no different than if the officer “when requesting respondent’s license and registration, had seen a bag of cocaine or a handgun on the

even if the dog sniff from *Caballes* is analogized to the capture of a suspect's image during a photostop, there is still a temporal difference between these investigatory techniques.

*Caballes* can also be distinguished because it validates investigation of current criminal behavior—the type of investigation contemplated in the traditional *Terry* analysis. This is dramatically different from the capture and databasing of photographs that are produced during photostops. A photograph in a database can have an infinite life, whereas a dog sniff investigates only the immediate circumstances.<sup>148</sup> While *Terry* initially justified investigation of on-going crime or crime that was “afoot,”<sup>149</sup> the Supreme Court later applied it to past criminal activity.<sup>150</sup>

*Terry* has been used to validate investigation of crimes happening in the future, but only when the crime is about to occur. In *United States v. Feliciano*,<sup>151</sup> the Seventh Circuit discussed how far in the future possible criminal activity could occur to justify a *Terry*-stop.<sup>152</sup> The court maintained:

[I]t can be argued that an articulable suspicion of a crime to be committed in the distant future would not justify a stop. The long incubation period of the crime would both attenuate the probability that the crime would actually be committed and give the police ample time by further investigation to obtain a better “fix” on that probability.<sup>153</sup>

Following this reasoning, the use of photostops to solve future crime is temporally too far removed from the initial stop and the police could use investigative techniques other than databasing photographs.

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passenger seat”). But dog sniffs are not truly “non-events.” See LAFAVE, *supra* note 82, § 9.3 (“use of the dog produces many unpleasant and adverse consequences even for the innocent driver”). This “non-event” fallacy is comparable to the fallacy that individuals consent to have their photograph taken because they expose themselves to the public.

148. See *infra* Part III.B (exploring the effect that future database searches could have on the reasonability of the original intrusion).

149. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

150. *United States v. Hensley*, 469 U.S. 221, 229 (1985) (“[I]f police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion.”).

151. 45 F.3d 1070 (7th Cir. 1995).

152. See *id.* at 1074 (finding that officers could stop two individuals who were suspected of attempting to lure a victim to mug him or her because they could potentially assault someone else later that evening).

153. *Id.*

2. *Photostops based on reasonable suspicion*

Further distinguishing photostops, the traffic stop in *Caballes* was based on probable cause, whereas a photostop may be based on only reasonable articulable suspicion.<sup>154</sup> The Court has held that *Terry* is relevant for both stops based on reasonable suspicion and traffic stops based on probable cause, opining that “the usual traffic stop is more analogous to a so-called ‘*Terry*-stop’ than to a formal arrest.”<sup>155</sup> The government in *Caballes* argued that a traffic stop based on probable cause is conceptually different than a *Terry*-stop based on reasonable suspicion.<sup>156</sup> However, the Court’s opinion in *Caballes* does not suggest the decision is unique to stops based on probable cause and there is established precedent that holds *Terry*-stops and traffic stops to the same standards.<sup>157</sup> Yet, the Court could use this difference to distinguish *Caballes*, should they wish to limit the impact *Caballes* has on weakening the reasonably related prong of the *Terry* inquiry.

The implications of extending *Caballes* beyond its facts are troublesome not only in reference to cases involving photostops, but also for broader issues in criminal procedure. With the advent of non-invasive DNA sampling techniques that could be classified as non-searches, *Caballes* allows for the possibility that DNA analysis could legitimately be conducted during any *Terry*-stop.<sup>158</sup>

Should *Caballes* apply to photostops it will change the constitutionality of Unrelated Investigatory Stop photostops—those where the photograph is not reasonably related to the underlying justification for the stop.<sup>159</sup> These photostops will be permissible, whereas under the Court’s pre-*Caballes* precedent they would have contravened the Fourth Amendment. While there is ample ground to distinguish *Caballes* from photostops, *Caballes* affects only the permissibility of Unrelated Investigatory Stop photostops. The likely

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154. See *United States v. Childs*, 277 F.3d 947, 952–54 (7th Cir. 2002) (explaining that the Fourth Amendment allows for a larger range of investigative tactics when a traffic stop is based on probable cause).

155. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (internal citation omitted).

156. See Brief for Petitioner, *supra* note 147, at 13–17 (arguing the Court never intended to limit traffic stops based on probable cause to the confines of *Terry*).

157. See LAFAVE, *supra* note 82, § 9.3 (“[W]hile the Court notes in passing that in [*Caballes*] the seizure ‘was based on probable cause,’ it is never even hinted that the point is that the *Terry* limits have no application when probable cause is present. . .”).

158. See Maclin, *supra* note 136, at 106 (explaining the public exposure doctrine and maintaining “[i]f one construes this rationale broadly, DNA could be considered a physical characteristic that is constantly exposed to the public”).

159. See *supra* notes 134–43 and accompanying text (analyzing the constitutionality of photostops under *Caballes*).

judicial treatment of the other types of photostops is much clearer: Illegal Stop photostops are impermissible and Related Investigatory Stop photostops are acceptable.<sup>160</sup>

In comparing *Caballes* and dog sniffs to photostops, the infinite lifespan of photographs in a database is particularly problematic.<sup>161</sup> The following section considers how the use of photograph databases changes the nature of the privacy intrusion and individual experiences.

### III. DATABASING AND DERIVATIVE USES OF EVIDENCE

Having explored whether it is permissible to conduct a photostop, a second question arises: if the photograph were permissibly taken (i.e., Related Investigatory Stop), can it be entered into a database even if the initial suspicion has been dispelled? This section examines the derivative use of evidence and the permissibility of databasing photographs legally captured, drawing comparisons to the expansion of DNA databases to include arrestees. While the Court has only hinted that the subsequent use of evidence could affect the Fourth Amendment balancing analysis, the Court should expand their consideration of derivative uses of evidence to account for the true privacy intrusion an individual experiences when his information is placed in a database.

#### A. *Expanding Who is Included*

With the advent of new investigatory techniques, from fingerprinting to DNA analysis, there have been calls to expand the number of individuals whose information is included in each database.<sup>162</sup> Photostops raise the issue of expanding who is included in photographic databases. Databasing suspects' or detainees' photographs would increase the breadth of permissible investigatory techniques and allow law enforcement officers to apply the standard accepted for arrestees to non-arrested individuals, who have a superior right to privacy.<sup>163</sup>

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160. See *supra* Parts II.A, II.B (analyzing the treatment of Illegal Stop and Related Investigatory Stop photostops).

161. See *supra* Part II.D.1 (establishing that the privacy incursion during a dog sniff is temporarily limited, whereas a photographic database can be accessed repeatedly).

162. See Simon A. Cole, *Fingerprint Identification and the Criminal Justice System: Historical Lessons for the DNA Debate*, in *DNA AND THE CRIMINAL JUSTICE SYSTEM* 63, 80–83 (David Lazer ed., 2004) (comparing the debate surrounding expansion of the fingerprint database to contemporary discussions about the scope of DNA databases).

163. See Amitai Etzioni, *DNA Tests and Databases in Criminal Justice: Individual Rights and the Common Good*, in *DNA AND THE CRIMINAL JUSTICE SYSTEM* 197, 208–09 (David

This dilemma is being played out with DNA databases. Most DNA databases include samples only from individuals convicted of predicate offenses and this has been upheld as reasonable under the Fourth Amendment.<sup>164</sup> However, some states have moved to collecting DNA from certain arrestees.<sup>165</sup> Scholars and courts are split on the constitutionality of this practice.<sup>166</sup>

Under the DNA Identification Act of 1994, the Combined DNA Identification System (CODIS), a federal database, cannot index an individual's DNA until he has been convicted of a crime.<sup>167</sup> Federal authorities cannot legally use CODIS to run searches comparing a suspect's DNA to DNA from open cases and is only legally allowed to do these broad searches once the person has been convicted.<sup>168</sup>

While some scholars worry about innocent individuals being subjected to DNA testing for an arrest-based database, others contend that the procedural safeguard of having probable cause to arrest an

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Lazer ed., 2004) (explaining that a suspect—"a person who has undergone some kind of legal process that makes it clear that he or she is suspected of having committed a crime—"has diminished privacy rights, compared to innocent people); *cf. Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995) (articulating that a warrant is not necessary to take a DNA sample from a prisoner because of his or her diminished privacy rights).

164. See Aaron P. Stevens, Note, *Arresting Crime: Expanding the Scope of DNA Databases in America*, 79 TEX. L. REV. 921, 940-41 (2001) (explaining that these databases have been upheld judicially by using three approaches: (1) standard Fourth Amendment analysis; (2) the "special needs" doctrine; and (3) the reduced expectation of privacy for prisoners); see also *United States v. Kincade*, 379 F.3d 813, 839 (9th Cir. 2004) (en banc) (holding that suspicionless DNA search of a convicted parolee was reasonable under the Fourth Amendment).

165. See Eric May, *Who's Next? The Continued Expansion of DNA Databases in United States v. Kincade*, 43 CRIM. L. BULL. 76, 79 n.20 (2007) (noting that Louisiana, Texas and Virginia require DNA samples from all adult felony arrestees); see also Steve Lash, *Maryland Senate OKs Bill on DNA Collection*, DAILY REC. (Balt., Md.), Mar. 26, 2008 (noting that the Maryland Senate passed legislation requiring that a person charged with a violent crime or breaking into an automobile submit a sample to the DNA database).

166. Compare *In re Welfare of C.T.L.*, 722 N.W.2d 484, 491 (Minn. Ct. App. 2006) (finding a Minnesota statute permitting blanket DNA sampling from all charged defendants unconstitutional on Fourth Amendment grounds), and May, *supra* note 165, at 104 (contending that unless the DNA is used solely to establish the identity of the arrestee at the time of the arrest, "[t]here are simply too few valid interests to warrant the search"), with Kaye, *supra* note 63, at 472 (opining that arrestee collection would only be unconstitutional if it were unreasonable, a warrant were required and officers failed to obtain one, there were no comparison sample from the crime for which the arrest was made, or the collection of the sample invaded privacy in another way).

167. See 42 U.S.C. § 14132(a)(4) (2000) (authorizing creation of an index of DNA from individuals convicted of crimes, crime scene evidence, unidentified human remains, and "samples voluntarily contributed from relatives of missing persons").

168. See Etzioni, *supra* note 163, at 209 (explaining that while the federal government cannot run these searches, states can do this type of comparison between suspect and unsolved case samples if they draw upon data from their own databases).

individual is sufficient.<sup>169</sup> The Minnesota Supreme Court in *In re Welfare of C.T.L.*<sup>170</sup> invalidated a statute authorizing DNA sampling from people who have been arrested and charged with a crime.<sup>171</sup> The court invalidated the statute because a provision of the statute provided for the destruction of samples from individuals that were acquitted, which suggests that the “state’s interest in collecting and storing DNA samples is outweighed by the privacy interest of a person who has not been convicted.”<sup>172</sup> The Court invalidated the statute because it treated someone charged and awaiting trial differently than someone who had been charged and acquitted, even though their privacy interests were the same.<sup>173</sup>

Allowing detainees to be photographed applies the standards acceptable for arrestees to individuals with greater privacy interests.<sup>174</sup> The reasoning used in *In re Welfare of C.T.L.* suggests that the procedures to expunge photographs from databases demonstrates an intent to protect the privacy interests of innocent individuals and highlights the problem that photostops treat detainees as though they had the diminished privacy rights of arrestees. However, this analysis requires the Court to first define the investigatory technique as a search and it is unlikely to be applied to photostops.<sup>175</sup>

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169. See Paul E. Tracy & Vincent Morgan, *Big Brother and His Science Kit: DNA Databases for 21st Century Crime Control?*, 90 J. CRIM. L. & CRIMINOLOGY 635, 672 (2000) (“The arrest-based systems are the current thresholds, but here, we have no assurance of guilt, only suspicion.”). *But see* Etzioni, *supra* note 163, at 209 (expressing confidence in procedural safeguards, maintaining “public authorities cannot indiscriminately declare as suspects anyone they wish to test”). A database of DNA samples from all members of society has been proposed as a possible alternative. See D.H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413, 415 (contending that a population-wide database is the most effective means of preserving privacy and social justice); *see also* Cole, *supra* note 162, at 72–73 (describing the failed movement for universal fingerprinting). Some civil libertarians worry that we are close to having a universal photographic database through drivers’ license photographs. See Adam Liptak, *Driver’s License Emerges as Crime-Fighting Tool, but Privacy Advocates Worry*, N.Y. TIMES, Feb. 17, 2007, at A10 (describing six states’ work to create databases of drivers’ license photos searchable with facial-recognition technology).

170. 722 N.W.2d 484, 491 (Minn. Ct. App. 2006).

171. *Id.*

172. *Id.*

173. *Id.*

174. See *supra* note 67 and accompanying text (noting that it is an accepted practice for arrestees to be photographed and fingerprinted).

175. See *supra* notes 58–59 and accompanying text (explaining that the “public exposure” doctrine allows police to photograph that which individuals knowingly expose to the public without it constituting a search).

*B. Effect of Future Database Searches*

When considering the reasonability of the privacy intrusion, the Supreme Court often fails to consider the continued use of evidence and focuses only on how the evidence is initially obtained.<sup>176</sup> The Court's reasoning is fallacious, suggesting that unlimited use of the evidence does not change the intrusion into an individual's privacy.<sup>177</sup> However, as technology has improved, many courts have acknowledged the difference between traditionally using photographs and fingerprints for identification, and using these same items in an evidentiary context.<sup>178</sup> The ability to preserve and store information in databases has blurred the lines between new and old investigative techniques.<sup>179</sup>

The government's ability to database evidence and use it to investigate future crimes changes the nature of the government's invasion of an individual's privacy.<sup>180</sup> The "public exposure doctrine"

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176. *See, e.g.*, *United States v. Dionisio*, 410 U.S. 1, 14 (1972) (finding no reasonable expectation of privacy in the sound of one's voice without considering the later use of the voice exemplar); *Davis v. Mississippi*, 394 U.S. 721, 727 (1969) (considering only the circumstances under which the fingerprint evidence was obtained and not the later use of the evidence).

177. *See* Krent, *supra* note 56, at 64 (arguing that "reasonableness cannot be assessed apart from consideration of the government's use of the items seized").

178. The "true identity" exception to the warrant requirement highlights this distinction between establishing a suspect's identity to investigate this crime versus investigating future criminal activity. Historically, arrestees' photographs and fingerprints were taken to identify them and an arrestee's identifying information would be returned to him if he were acquitted. *See, e.g.*, *United States v. Laub Baking Co.*, 283 F. Supp. 217, 222–25 (N.D. Ohio 1968) (explaining the difference between using fingerprints in the identification context versus the evidentiary context); *Itzkovitch v. Whitaker*, 42 So. 228, 229 (La. 1906) (validating an injunction ordering that photographic negatives and identifying measurements be removed from police records and returned because the individual had never been convicted).

179. *See* Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CAL. L. REV. 721, 728 (2007) (classifying first-generation techniques as reactive and self-contained in investigative scope and capable of supplying "only a narrow slice of information," whereas second-generation techniques are proactive and have a broad application). The Automated Fingerprint Identification System, a database of fingerprints, provides an example of how a database can convert a first-generation technique into a second-generation technique because it is searchable and used proactively for investigations. *See* Cole, *supra* note 162, at 83 (explaining the transition from an identification rationale to an investigative justification for databases); *see also* Kaye, *supra* note 63, at 508 ("DNA databases can do much more than discern an individual's true identity. They can associate individuals with crimes.").

180. *See* Krent, *supra* note 56, at 60 (arguing that what the government does with the information affects the privacy intrusion). Krent explains:

Because the original seizure no longer extinguishes all property or privacy rights of the individual, governmental authorities violate the Fourth Amendment if they use the property or information unreasonably even when lawfully obtained. Particularly in light of new technology, privacy is threatened as much by what law enforcement authorities do with information as by the original acquisition itself.

assumes that if individuals allow a small incursion into their privacy they are consenting to all incursions.<sup>181</sup> Following this reasoning, because an individual appeared in public, his photograph can reasonably be placed in a searchable database with an infinite life.

The Court has hinted on occasion that not only the initial acquisition of evidence, but also the latter use of evidence can affect the reasonableness of the search and seizure.<sup>182</sup> In *Vernonia School District 47J v. Acton*,<sup>183</sup> the Court considered both the intrusiveness of compelling student athletes to produce urine samples and the subsequent privacy intrusion involved in analyzing the sample.<sup>184</sup> In *Ferguson v. City of Charleston*,<sup>185</sup> the Supreme Court held that if an individual voluntarily gives urine samples to hospital personnel but does not consent to drug testing, his Fourth Amendment rights would be violated if the hospital turned over the results of his drug tests to police.<sup>186</sup> The majority opinion disaggregated consent to take the sample, consent to test for drugs, and consent to turn the results over to the police.<sup>187</sup> *Vernonia* and *Ferguson* are examples of the Court considering the subsequent use of information or evidence when determining reasonability under the Fourth Amendment.<sup>188</sup>

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*Id.*; see also May, *supra* note 165, at 100 (explaining that DNA sampling from arrestees is used not only for identification purpose, but to investigate “every past and future crime” which results in a “significant intrusion into arrestees’ expectations of privacy”). Additionally, DNA evidence can have the effect of implicating the sample provider’s blood relatives. See Daniel J. Grimm, *The Demographics of Genetic Surveillance: Familial DNA Testing and the Hispanic Community*, 107 COLUM. L. REV. 1164, 1172 (2007) (explaining how familial DNA testing extends the scope of investigation beyond the known individual to all his or her “previously unknown” biological relatives).

181. See Sherry F. Colb, *What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 122 (2002) (articulating a conceptual flaw in Fourth Amendment jurisprudence that “treats exposure to a limited audience as morally equivalent to exposure to the whole world”).

182. See *id.* at 179 (suggesting that the Court has found in limited circumstance that “knowing exposure to a third party does not necessarily forfeit one’s privacy as against the rest of the world”).

183. 515 U.S. 646 (1995).

184. See *id.* at 658 (analyzing how the sample results were used, noting that the test was used only to detect drug use and that the results were disclosed only to school officials); see also Colb, *supra* note 181, at 179–80 (describing the Court’s reasoning in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995)).

185. 532 U.S. 67 (2001).

186. See *id.* at 70, 76 (noting that for purposes of the decision the Court assumed that there was not valid consent of the patients and ultimately remanded the case for a determination of the consent issue).

187. *Id.* at 94 & n.4 (Scalia, J., dissenting) (objecting to this departure from “established law”); see also Colb, *supra* note 181, at 171 (analyzing the Court’s treatment of the issue of consent).

188. See Colb, *supra* note 181, at 187 (“In addressing . . . perinatal cocaine testing, for example, the Court specifically refused to say that vulnerability to exposure is the equivalent of privacy forfeiture and left open the possibility that more robust doctrines . . . of partial exposure are in the offing.”).

Under *Vernonia* and *Ferguson*, searching the photographic database could be impermissible, even if initially taking the photograph was justified. *Vernonia* and *Ferguson* allow the consideration of the on-going intrusions that occur when a database is searched.<sup>189</sup> While the government interest in solving crime is strong, the reasonability of using databased photographs would decrease, considering on-going privacy intrusions and the high fallibility of eyewitness identification.<sup>190</sup> The similarity of the urine sample cases and photostops could be challenged because, unlike photographs, the collection of urine samples is considered a search.<sup>191</sup> However, the patients in *Ferguson* consented to producing the urine samples and the use of those samples still contravened the Fourth Amendment, suggesting that the use of a sample could be impermissible even if the initial acquisition was not a search.<sup>192</sup>

While the Supreme Court has not addressed DNA databasing, lower courts do not consider the effect that subsequent uses of a database have on an individual's privacy. In *United States v. Kincade*,<sup>193</sup> the Ninth Circuit did not consider each use of the DNA database to be an additional intrusion into the individual's privacy.<sup>194</sup> The analysis neglected to consider that every time the CODIS database is used, Mr. Kincade is considered a suspect.<sup>195</sup>

Applying the standard used in *Kincade*, the Court would not consider the privacy intrusion that occurs every time a photographic

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189. See *supra* notes 184–87 and accompanying text (describing the Court's consideration of the initial intrusion of procuring the evidence and the additional intrusion of analyzing the evidence in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001)).

190. See Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 FED. CTS. L. REV. 1, 2–4 (2007) (reciting the gross shortcomings of eyewitness identification); Innocence Project, *Eyewitness Misidentification*, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Jan. 11, 2008) (explaining that in more than seventy-five percent of convictions overturned with DNA evidence, eyewitness misidentification was a cause of the wrongful conviction); *supra* note 55 and accompanying text (explaining the Fourth Amendment reasonableness standard that balances the government's interests and individuals' rights).

191. See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 618 (1989) (finding the collection of urine samples to be a search under the Fourth Amendment).

192. See *Ferguson*, 532 U.S. at 95 (Scalia, J., dissenting) (“Until today, we have *never* held—or even suggested—that material which a person voluntarily entrusts to someone else cannot be given by that person to the police, and used for whatever evidence it may contain.”).

193. 379 F.3d 813 (9th Cir. 2004) (en banc).

194. See *id.* at 836–39 (considering only drawing the sample when addressing the constitutionality of parolee DNA searches).

195. See May, *supra* note 165, at 90, 92 (explaining that even when Mr. Kincade's supervised release is over and his expectation of privacy fully restored, his profile will still be in the CODIS database).

database is searched. In reality, every time a mug book is paged through or a gang database is searched, the individuals whose photographs are included are considered suspects.<sup>196</sup> The dissenting opinion in *Kincade* objects to the continued retention of Mr. Kincade's DNA sample once he completes his period of supervised release and "recovers his full Fourth Amendment rights."<sup>197</sup> The dissent's consideration of the retention of the sample suggests that subsequent uses can affect the reasonableness of the initial search.<sup>198</sup> However, there are still only hints that the Court would be willing to consider the subsequent uses of databased evidence in addressing the reasonableness of the privacy intrusion.<sup>199</sup>

Simply because the government legally obtains evidence does not guarantee unlimited derivative uses of that evidence.<sup>200</sup> Facing public criticism and the threat of litigation, at least one community where law enforcement officials were capturing photographs during investigatory stops has chosen to destroy or return the photographs once the original suspicion has been dispelled.<sup>201</sup> However, not all police departments are so willing to return evidence.<sup>202</sup>

While the *Kincade* plurality did not consider the subsequent use of the DNA database in their analysis,<sup>203</sup> compelling arguments can be made for judicial consideration of the use of evidence when considering the reasonability of its acquisition. So far the Court has only hinted that the subsequent use of evidence could affect the

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196. See *supra* notes 15–22 and accompanying text (describing how "mug books" and the GangNet database function).

197. *United States v. Kincade*, 379 F.3d 813, 872 (9th Cir. 2004) (en banc) (Kozinski, J., dissenting).

198. See *May*, *supra* note 165, at 91 n.122 (noting that the dissenting judges in *Kincade* would have found the DNA act more reasonable if it provided for removing samples after the government's interests lapse, suggesting that the later use and treatment of the sample affects the reasonableness of the capture).

199. Cf. *Colb*, *supra* note 181, at 184 (noting that "[t]he Court has . . . set out some of the ingredients for a more robust Fourth Amendment protection").

200. See *supra* note 64 (detailing cases where courts have classified the analysis of legally obtained evidence as a search).

201. See *supra* note 48 and accompanying text (describing the agreement the Philadelphia Police Department reached stipulating that once an individual is cleared of suspicion his photograph will be destroyed).

202. See Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 WAKE FOREST L. REV. 767, 810 (1999) (explaining that not all states expunge the DNA of wrongly convicted and exonerated individuals); *Murphy*, *supra* note 179, at 738 n.72 (describing police "dragnets" where individuals have voluntarily provided DNA samples, then were forced to file motions for the sample to be returned to them once the case was closed).

203. See *United States v. Kincade*, 379 F.3d 813, 836–39 (9th Cir. 2004) (en banc) (assessing only drawing the initial blood sample in evaluating the search and rejecting the argument that the subsequent retention of the DNA affects the Fourth Amendment analysis).

Fourth Amendment balancing analysis. The Court should expand their consideration of derivative uses of evidence to account for the true privacy intrusion an individual experiences when his information is placed in a database.

#### CONCLUSION

While Illegal Stop photostops are constitutionally impermissible and Related Investigatory Stop photostops are permissible, the constitutionality of Unrelated Investigatory Stop photostops hangs on the applicability of *Caballes*. Under the two-pronged test established in *Terry* and cited with approval through *Hiibel*, Unrelated Investigatory Stop photostops are constitutionally impermissible because the photographs produced are not a means of investigation reasonably related to confirming or dispelling the suspicion that originally justified the investigatory stop. However, the legitimacy of Unrelated Investigatory Stop photostops now depends on how broadly the Court chooses to apply the newly established standard from *Caballes*. Failing to distinguish *Caballes*, Unrelated Investigatory Stop photostops will be considered constitutional under the Fourth Amendment.

Ultimately, the Court should acknowledge the repeated privacy intrusions that occur when a database is searched. Databases produce a troubling “laundering effect,” in that by entering an individual into a database, the taint of a racial, economic and geographically biased and imperfect judicial system is removed and their profile in the database is reduced to “objective information.”<sup>204</sup> The legislature is unlikely to limit the use of photostops and photographic databases because of the political perception that they affect the privacy rights of only criminals and gang members.<sup>205</sup> Therefore, it is up to the courts to carefully apply *Terry* and its progeny, move towards a broader application of the derivative use rationales of *Ferguson* and *Vernonia* and safeguard individuals’ Fourth Amendment rights.

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204. See Cole, *supra* note 162, at 83 (explaining this “effect” in the context of DNA databases).

205. Cf. May, *supra* note 165, at 104 (maintaining that “[b]ecause legislatures rarely consider the privacy interests of arrestees and former criminals, the courts must defend the Fourth Amendment’s protections” when considering DNA databases); Lash, *supra* note 165 (reporting, before the Maryland Senate approved legislation authorizing a DNA database of individuals charged with a violent crimes or an auto break in, one senator stated “I firmly believe in the presumption of innocence,’ . . . . But he added that ‘crime is just too high’ in Baltimore”).

## APPENDIX I. SUMMARIZING PHOTOSTOPS

<i>Circumstance producing photograph</i>	<i>Is it an investigatory stop?</i>	<i>Reasonable articulable suspicion for stop?</i>	<i>Photograph related to original justification for stop?</i>	<i>Is capture legal under Terry?</i>	<i>Is capture legal under Caballes?</i>
<i>“Long-range Lenses”</i>	No	No stop occurs	No stop occurs	Legal	Legal
<i>“Mug Shot”</i>	Yes	Yes—probable cause to arrest	Does not matter	Legal	Legal
<i>“Illegal Stop”</i>	Yes	No	No	Illegal	Illegal
<i>“Unrelated Investigatory Stop”</i>	Yes	Yes	No	Illegal	Legal
<i>“Related Investigatory Stop”</i>	Yes	Yes	Yes	Legal	Legal