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Compelled DNA Testing in Rape Cases: Illustrating the Necessity of an Exception to the Self-Incrimination Clause

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COMPELLED DNA TESTING IN RAPE CASES: ILLUSTRATING THE NECESSITY OF AN EXCEPTION TO THE SELF-INCRIMINATION CLAUSE

In our criminal justice system, rape crimes are often difficult to prosecute because identification of the perpetrator can be impossible. In the "classic rape" case, a stranger violently attacks a woman who often has a difficult time accurately identifying her assailant due to the severe trauma associated with this act.[1] In the last fifteen years, however, the process of DNA fingerprinting has helped to incriminate assailants and exculpate those falsely accused.[2] This DNA evidence has become an invaluable tool in assessing guilt in rape cases.[3] The most accurate identifying evidence available to date, technological advances may render DNA evidence practically foolproof.[4]

Considering the difficulty of achieving rape convictions,[5] the right to use DNA evidence, either for or against accused rapists, must be protected. As an invaluable asset in the positive identification of perpetrators, the use of DNA fingerprinting tests greatly improves the probability of a successful prosecution.[6] Often perpetrators will refuse to submit to DNA testing due to the fear of providing nearly irrefutable evidence against themselves. As a result, courts compel suspects to submit to the testing.[7] This Note will show that contrary to what courts currently hold, compelled DNA testing *does* raise Fifth Amendment issues. Despite the Supreme Court's holding in *Schmerber v. California*,[8] which held that acquiring certain types of physical evidence was constitutional, compelled DNA testing violates the self-incrimination clause. Given the difficult nature of rape prosecutions, however, compelled DNA tests serve the best interests of society and such interests outweigh the importance of protecting the rape defendant's right not to bear witness against himself. For this reason, an exception allowing compelled DNA testing should be made to the Fifth Amendment in

1. *See infra* notes 11-12 and accompanying text.
2. *See infra* notes 84-85 and accompanying text.
3. *See infra* notes 85-86 and accompanying text.
4. *See infra* note 87 and accompanying text.
5. *See infra* notes 30, 34-36 and accompanying text.
6. *See infra* note 86 and accompanying text.
7. *E.g.*, Shaffer v. Saffle, 148 F.3d 1180, 1182 (10th Cir. 1998); Boling v. Romer, 101 F.3d 1336, 1340-41 (10th Cir. 1996); *cf.* Lucero v. Gunter, 17 F.3d 1347, 1350-51 (10th Cir. 1994) (compelling suspect to submit to urinalysis).
8. 384 U.S. 757 (1966).

cases of rape even though its language does not specifically allow one.[9]

RAPE PROSECUTION IS A MAJOR SOCIETAL PROBLEM

The "Classic Rape"

There are various types of rape: date rape, gang rape and homosexual rape.[10] This Note focuses primarily on the "classic rape." Classic rape has been described as the stereotypical rape situation: a woman is suddenly and violently attacked by a stranger.[11] Identification of the perpetrator is usually a problem in this type of case, as opposed to a date rape situation where the victim knows her assailant.[12] A victim will be more likely to report a classic rape to authorities than other types of rape.[13] In fact, it has been hypothesized that before a woman will report a rape, she must first identify herself as a victim of a crime and then be confident that others will perceive her as a victim.[14] In addition, reporting can be better expected when the assailant is a stranger to the victim.[15] These conditions are usually met in classic rape situations, thus leading to higher reporting percentages.[16]

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9. Though an exception may, of course, include other violent crimes, this Note only addresses exceptions made in rape cases.

10. *See generally* LAWRENCE A. GREENFIELD, U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT (1997) (reporting statistics on all types of rape and sexual assault). "[In 1993, s]trangers accounted for nearly 20% of the victimizations involving a single offender [and] 76% of the victimizations involving multiple offenders. About 7% of all rape/sexual assault victimizations involved multiple offenders who were strangers to the victim." *Id.* at 4. The overwhelming majority of victims are female: In 1993-1995, an estimated ninety-one percent of the victims of rape and sexual assault were women. *Id.* at 2. Nearly ninety-nine percent of the offenders in single-victim incidents were male. *Id.* Though the vast majority of violent sex offenses involves males assaulting female victims, females account for a small percentage of known offenders and males for a small percentage of victims. *Id.* In a very small fraction of sexual assaults, the victim and offender are of the same sex. *Id.*

11. *See* Linda S. Williams, *The Classic Rape: When Do Victims Report?*, *in* RAPE AND THE CRIMINAL JUSTICE SYSTEM 51, 52 (Jennifer Temkin ed., 1995).

12. Often, an assailant in a date rape situation will not contest the fact that sexual intercourse occurred (especially when physical evidence exists), but will contest that there was a lack of consent. Thus, DNA evidence would not be necessary to prove identity in this type of a case.

13. *See* Williams, *supra* note 11, at 53 ("[A] woman is more likely to report her rape if it corresponds to the classic rape situation, and less likely to report if it deviates from the classic rape situation.").

14. *Id.*

15. *See id.*

16. *See id.*

Psychological Effects of Rape

Rape psychologically affects women in many different ways. Although every rape victim responds differently to the trauma of her attack, generalizations have been drawn:

> The rape victim usually goes through three stages: (1) an acute stage of shock and anxiety lasting a few days, (2) a pseudo adjustment period characterized by denial and suppression, and (3) a third stage, when symptoms may begin to reappear. It has been noted that many symptoms tend to increase during the few weeks following a rape.
>
> In addition to the psychiatric and psychological reactions, pregnancy, venereal disease, and financial loss may follow. If family, friends, and neighbors are aware of the rape, implications of wantonness and even ostracism may follow. If the rape was reported, the victim may still be involved with the criminal justice system many months later.[17]

Although this Note focuses on the female victim, it should be recognized that the traumatic effects of rape on males are no less significant than of that on females.[18] Male victims may describe their assailants as "angry, scornful or sadistic" who verbally and physically humiliate them.[19] Similar to female victims of rape, male victims "experience[] intense emotions of fear, unreality, anger, or revulsion during the attack" and may fear being killed by their attackers.[20] Furthermore, these feelings of fear and unreality often overwhelm both female and male victims to such a degree that they

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17. SEDELLE KATZ & MARY ANN MAZUR, M.D., UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS 230 (1979) (citation omitted).

18. *See* Michael B. King, *Male Sexual Assault in the Community*, *in* MALE VICTIMS OF SEXUAL ASSAULT 1 (Gillian C. Mezey & Michael B. King eds., 1992).

> There were striking similarities between the reactions of male victims and those reported for women who have been sexually assaulted. The behavioural, somatic, and psychological components of the rape trauma syndrome as it occurs in women who have been assaulted have been well described. Shock and disbelief occurring at the time of and soon after the attack are followed by humiliation, embarrassment, self-blame, behavioural changes, and rape-related phobias before final resolution. Many of these features occurred with men who were assaulted. The stigma for men may be even greater, however, in a society which expects its male members to be self-sufficient physically and psychologically.

Id. at 10 (citations omitted).

19. *Id.* at 5.

20. *Id.*

are unable to mount any effective resistance to the rape.[21] In conjunction with the traumatic effects of rape, women and men fail to report rape because they are embarrassed by the attack and fear that they will not be believed.[22]

Psychological Importance of Rape Convictions

It is crucial for a rape victim to report an attack in order for it to be prosecuted. For 1994 and 1995, the percentage of rapes and sexual assaults reported to a law enforcement agency was estimated to be thirty-two percent.[23] The most common reason given by victims for reporting the crime to the police was to prevent further crimes by the offender against them.[24] Other reasons rape victims reported their assaults included wanting help or comfort, whether physical, emotional or medical, to punish the offender and to protect other women from being assaulted by the same rapist.[25] Knowing that her assailant has been incarcerated is likely to be quite therapeutic for a rape victim. Common psychological responses of rape victims include anger and a desire for revenge,[26] and the criminal justice system should work to accommodate these feelings in a satisfactory manner.[27] If a conviction can be achieved, the criminal justice system can have a positive effect on rape victims.[28] Likewise, it is important that potential rapists believe that the

21. *See id.* (quoting a male rape victim's description of the attack and noting the striking similarity it has to many females' descriptions). "He was much bigger. It was pure fright. I just wanted to protect myself. There was no way I could run out of the room. He had locked the door. . . . I thought if I gave in, it would be over quicker." *Id.*

22. *See id.*

23. *See* GREENFIELD, *supra* note 10, at 2.

24. *See id.* The most common reason cited by the victim for not reporting the crime to the police was that it was a personal matter. *Id.*; *see also* Williams, *supra* note 11, at 51 (listing a number of reasons rape victims do not report rapes to the police, including avoidance of the ill reputation and stigma attached to rape prosecution, inability to participate in criminal prosecution and lack of confidence in the ability of the criminal justice system to apprehend or punish her rapist).

25. *See* KATZ & MAZUR, *supra* note 17, at 186-87.

26. *See id.* at 219.

27. *See* T. HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 30 (1969) (discussing how punishment can be justified by the psychological benefit to the victims of crime, whose suffering is thought to have a special claim on the structuring of the criminal justice system); *see also* Jeffrie G. Murphy, *Getting Even: The Role of the Victim*, 7 SOC. PHIL. & POL'Y 209, 210 (1990) (pointing out that one of the many issues raised by the victims' rights movement is that hatred and desire for revenge have legitimacy as operative values in a system of criminal law).

28. *See generally* MIGAEL SCHERER, STILL LOVED BY THE SUN: A RAPE SURVIVOR'S JOURNAL (1992) (recording a rape victim's emotional mending process). The author's recovery process suggests that rape leaves a wake of trauma, fear and powerlessness that can last for a very long time. Witnessing the rapist apprehended and convicted was a necessary part of her healing process, even if painful at times. *Id.*

chance of being caught and convicted are high so that conviction becomes an effective deterrent.[29]

Problems with Current Rape Prosecution

The process of prosecuting a rapist can have a traumatic and devastating effect on a rape victim because, among other reasons, conviction is often difficult to achieve.[30] There are many psychological reasons victims choose not to prosecute. Often, the process is simply too emotionally traumatic to endure.[31] If a victim decides to prosecute and the jury does not find in her favor, she usually feels betrayed by a system that she believes should protect her.[32] Such a result often destroys any psychological progress the victim may have experienced after the rape.[33]

Apprehending a rapist is difficult; proper and accurate identification of him for prosecution is even harder.[34] Even when the police submit cases to a prosecuting attorney, it is doubtful there will be many convictions.[35] According to U.S. Department of Justice sex offense statistics, about one-half of rape defendants are released

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29. *See, e.g.*, Diana Scully & Joseph Marolla, *"Riding the Bull at Gilley's:" Convicted Rapists Describe the Rewards of Rape*, *in* CONFRONTING RAPE AND SEXUAL ASSAULT 124 (Mary E. Odem & Jody Clay-Warner eds., 1998).

> Significantly, the overwhelming majority of these rapists indicated they never thought they would go to prison for what they did. Some did not fear imprisonment because they did not define their behavior as rape. Others knew that women frequently do not report rape; and, of those cases that are reported, conviction rates are low, and therefore they felt secure. These men perceived rape as a rewarding, low-risk act.

Id.

30. *See* KATZ & MAZUR, *supra* note 17, at 199.

> The victim who goes to court often has high expectations that this will be the culmination of all her difficulties with the rape and expects to be able afterwards to "start a new life." Unfortunately, for most women this is not true. The low conviction rate on rape cases is notorious. . . . The gap between the victim's expectations and the reality of the situation makes later adjustment even more difficult.

Id. (citations omitted).

31. *See* CAROLYN J. HURSCH, THE TROUBLE WITH RAPE 110-14 (1977).

32. *See* JOHN PEKKANEN, VICTIMS: AN ACCOUNT OF A RAPE 278-87 (1976).

33. *See id.*

34. *See* HURSCH, *supra* note 31, at 115-16. "[I]t is obvious that the chance of a sex offender continuing to roam the streets even after the crime is reported is astonishingly large." *Id.* at 125.

35. *See id.* at 122-24.

> [S]ome cases will never go to court because the victim will drop the prosecution before the trial begins. Other cases will be plea bargained down to a lesser charge, and never go to trial for the sex offense. Still others will be tried and lost, the accused sex offender will be acquitted. Only a small percentage of the original [cases submitted to a prosecuting attorney] will result in convictions.

Id. at 122.

prior to trial.[36] If a conviction can be achieved despite the difficulties, the likelihood of a prison sentence is high.[37] Over two-thirds of convicted rape defendants receive prison sentences.[38] The average term imposed measures just under fourteen years with about two percent of convicted rapists receiving life sentences.[39] The problem, therefore, does not seem to be with the criminal justice system's ability to punish rapists, but with its ability to convict them.

Ineffectiveness of Current Reforms

In an effort to increase the number of rapes reported, states have enacted a broad range of rape law reforms. Designed to improve the treatment of rape victims and remove legal barriers to effective prosecution, the laws are intended to make both prosecution and conviction for rape more likely.[40] These reforms include changes in the definition of rape, including gender-neutral approaches, elimination of the requirements that rape victims resist their attackers and that their accounts be corroborated, and the enactment of rape shield laws restricting the admissibility of evidence relating to the rape victims' prior sexual history.[41]

Recent studies, however, revealed that the legal reforms did not produce the dramatic results anticipated by reformers.[42] In particular, jurors still rely on corroborating evidence to convict, although it is no longer required by statute.[43] Although this rule was subject to wide criticism,[44] it seems obvious that, for whatever reason, juries are still reluctant to convict rapists without corrobo-

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36. *See* GREENFIELD, *supra* note 10, at V.

37. *See id.*

38. *Id.*

39. *See id.*

40. *See, e.g.*, Mary E. Odem & Jody Clay-Warner, *Introduction* to CONFRONTING RAPE AND SEXUAL ASSAULT, xvii-xix (Mary E. Odem & Jody Clay-Warner eds., 1998).

> Feminist researchers and activists also have called for broad changes in the criminal justice system. [Historically, r]ape law and legal practice have tended to hold victims responsible for their assault and to make prosecution and conviction of rapists very difficult. As a result, many women felt they had been raped twice—first by the assailant and then by the criminal justice system.

Id.

41. *See* Julie Horney & Cassia Spohn, *Rape Law Reform and Instrumental Change in Six Urban Jurisdictions*, *in* RAPE AND THE CRIMINAL JUSTICE SYSTEM 327, 328 (Jennifer Temkin ed., 1995).

42. *See id.* at 348.

43. *See id.* at 349-50.

44. For criticism of the corroborative evidence rule, see generally *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365 (1972).

rating evidence.[45] DNA provides a type of corroborating evidence to juries and should be allowed to help convict criminal defendants in rape cases.

DNA BACKGROUND INFORMATION

In all life forms, the basis for variation lies in the genetic material called DNA, which constitutes a chemical genetic blueprint.[46] The blueprint is identical in every cell of the same person.[47] No two people have the same DNA with the exception of identical twins.[48] The chromosomes in one human cell comprise six billion nucleotides.[49] Hundreds of thousands of nucleotides are linked together in a long chain of DNA in a specific sequence that combines with protein to become a chromosome, which carries human genetic material.[50] DNA is actually made up of two strands forming a double helix, with the bases pairing in a complementary manner.[51] Thus, if the sequence of one strand is known, then the sequence of the other strand can be determined. This is the basis of all DNA tests.[52]

Currently, scientists use a technique known as DNA fingerprinting, which identifies a person to a very high probability.[53] Scientists are unable to narrow the identification to simply one person because there is not a complete DNA database of the population against which to test samples.[54] However, the technology should soon be in place to accomplish this.[55] Advances in

45. *See* Odem & Clay-Warner, *supra* note 40, at xix. "Studies show that juries, judges, and other court officials continue to hold distorted assumptions and attitudes about rape, a factor that interferes with the effective legal response to this crime." *Id.* (citations omitted).

46. *See* Dale M. Moreau & P. David Bigbee, *Major Physical Evidence in Sexual Assault Investigations*, *in* PRACTICAL ASPECTS OF RAPE INVESTIGATION: A MULTIDISCIPLINARY APPROACH 75, 83 (Robert R. Hazelwood & Ann Wolbert Burgess eds., 1995). For purposes of this Note, only the rudimentary information necessary to understand DNA fingerprinting is included. For a more complete explanation of DNA and its make-up, see *id.*

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id.*

53. Ruth Hubbard & Elijah Wald, *DNA Fingerprinting Is Unreliable and Inaccurate*, *in* IS DNA FINGERPRINTING ACCURATE? 129, 130 (1996).

54. *See id.*

55. In 1990, the United States began the Human Genome Project, a multi-national project involving sixteen nations. The first goal of the project is to discover and map all 50,000 to 100,000 human genes, which together make up the human genome, and to make the genome itself accessible for biological study. The effort was expected to take about fifteen years to complete, but it is progressing ahead of schedule. For more information on the Project, see

recombinant DNA technology provide scientists with the ability to detect the minute variability that exists among individuals.[56] This technology promises to allow the forensic serologist to identify the complete sequence of DNA in a body fluid or tissue, thereby identifying one individual to the exclusion of all others.[57] In fact, law enforcement officials already are looking at DNA technology with the hope of developing a system that would allow for the positive identification of those guilty of crimes.[58]

DNA Typing

The two most common methods of DNA analysis are designated restriction fragment length polymorphisms (RFLP) and polymerase chain reaction (PCR).[59] Once these methods break down the DNA in an evidence sample, such as blood or semen stains, it is then compared to known DNA samples. A suspect can then be either conclusively matched or excluded as the evidence donor.[60]

If a rape suspect's DNA matches the DNA sample, a technician determines the frequency of the profile and calculates the probability of finding the same match at random.[61] Several states now are taking blood samples from convicted rapists and other violent criminals. Their DNA profiles will be stored in a data bank for use by police across the United States.[62] Until there are enough people in the worldwide DNA databank to absolutely prove that no two people have identical DNA, however, courts are only willing to allow expert testimony concerning the probability of a random match.[63] Ultimately, this DNA fingerprinting technique will be able to absolutely identify a suspect from any body fluid sample left at the scene of a crime.[64]

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the Human Genome Project web site at http://www.ornl.gov/hgmis.

56. *See* Moreau & Bigbee, *supra* note 46, at 82-83.

57. *See id.*

58. *See* Hubbard & Wald, *supra* note 53, at 130.

59. *See* Moreau & Bigbee, *supra* note 46, at 82-83.

60. *See id.* at 83-84.

61. *See* Hubbard & Wald, *supra* note 53, at 136. Depending on how rare or common the particular DNA fragments are throughout the population, the probability of a random match can range from very high, such as one in ten, to extremely low, such as one in ten billion. *See* Moreau & Bigbee, *supra* note 46, at 84.

62. Hubbard & Wald, *supra* note 53, at 136. In support of this practice, Earl Ubell writes: "Using DNA fingerprinting, for example, detectives could trace a rapist convicted in Utah who later rapes in Ohio by matching the DNA 'prints' on file with those in traces found on the victims." *Id.*

63. *See* Moreau & Bigbee, *supra* note 46, at 84.

64. *Id.*

Current Problems with DNA Testing and Analysis

Critics of DNA evidence claim that, although the technology exists to produce highly accurate identifications, the handling of this evidence in forensic laboratories often taints it to such a degree that it becomes unreliable. Currently, the government does not regulate the private laboratories that conduct the fingerprinting analyses.[65] The general sense, however, is that these problems will eventually be eliminated. Even those who oppose the use of DNA to incriminate suspects, simultaneously promote the validity of DNA tests when offered by the defense for purposes of exoneration.[66] The fact that the defendants criticize DNA only when it might be used against them suggests just how much they believe in its importance.

The Admissibility of DNA Evidence in a Courtroom

There are two primary tests the courts use to determine the admissibility of novel scientific evidence: the *Frye* test and the relevancy test. Under the *Frye* test, scientific evidence is admissible if it is based on a scientific technique generally accepted as reliable within the scientific community. [67] The relevancy test employs a two-pronged test using the Federal Rules of Evidence, including (1) whether experts' testimony reflects scientific knowledge, whether their findings are derived by the scientific method and whether their work product amounts to good science and (2) whether proposed expert testimony logically advances a material aspect of the proposing party's case.[68]

DNA evidence is admitted into court via expert witness testimony. Proponents of expert witness testimony must establish a proper chain of custody for the evidence sample before the witness may testify as to the DNA analysis results.[69] There are two objectives to the chain of custody requirement. The first is to lay a

65. *See* Lee Thaggard, Comment, *DNA Fingerprinting: Overview of the Impact of the Genetic Witness on the American System of Criminal Justice*, 61 MISS. L.J. 423, 442-44 (1991) (discussing the lack of regulation in the field of DNA testing as a major problem). In fact, experts contend that the possibility of false negatives poses the only real problem with DNA identifications. *See* William Tucker, *DNA Fingerprinting Is Reliable and Accurate*, *in* IS DNA FINGERPRINTING ACCURATE? 121, 126 (1996) ("The chances of an innocent person being implicated are next to nil, but the chance of a guilty person being falsely exonerated are reasonably high.").

66. *See* Tucker, *supra* note 65, at 127.

67. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

68. FED. R. EVID. 401, 403, 702; Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1315 (9th Cir. 1995).

69. LORNE T. KIRBY, DNA FINGERPRINTING: AN INTRODUCTION 202-03 (1990).

proper foundation connecting the evidence to the defendant or to a place or object relevant to the case, thus authenticating the relevance of the evidence.[70] The second purpose is to ensure that the object is what its proponent claims it to be.[71] This verification is accomplished by ruling out any tampering with, substantial alteration or substitution of the evidence.

DNA EVIDENCE IN RAPE CASES

DNA evidence and typing procedures are uniquely useful in sexual assault cases because conventional analysis cannot differentiate between blood groups found in secretion stains containing both seminal and vaginal fluids.[72] Therefore, if the rapist and victim had the same blood type, the scientist would not be able to determine from whom the sample was derived.[73] DNA analysis eliminates this problem, as current technology can distinguish between the DNA from the victim's vaginal tract and the rapist's semen.[74]

Forensic scientists need only a small sample of tissue, such as a hair or a spot of dried blood or semen for DNA analysis.[75] To get a decisive match or exclusion, an expert makes a comparison of the DNA profile of the evidence sample with the profile of a blood sample taken from the suspect or victim.[76] In theory, DNA-based profiles are better absolute identifiers than fingerprints because they are subject to less deterioration or tampering and more likely to be retrieved as evidence.[77]

Seminal fluid itself does not contain DNA, but spermatozoa does. Because semen normally contains a large number of spermatozoa, there is a correspondingly large quantity of DNA available for analysis when a semen sample is available.[78] In seminal stains that lack spermatozoa, such as in the case of a sterile rapist, "it may still be possible to obtain a DNA type from epithelial tissue or white blood cells present in the stain."[79] Like seminal fluid, saliva does not contain DNA; again, there would likely be epithelial tissue or

70. *See id.*

71. *See id.* If the substance analyzed for the presence of DNA has been tampered with or altered in a significant way, it effectively becomes a different substance than the one originally seized and its relevance to the case disappears. *See id.*

72. *See* Moreau & Bigbee, *supra* note 46, at 84.

73. *See id.*

74. *See id.*

75. *See* Hubbard & Wald, *supra* note 53, at 130.

76. *See id.*

77. *See id.*

78. *See* Moreau & Bigbee, *supra* note 46, at 84.

79. *See id.*

white blood cells present which may be typed for DNA.[80] DNA can also be extracted from bloodstains via the white blood cells.[81]

DNA evidence is especially helpful in rape cases because it is often impossible to accurately identify a perpetrator.[82] DNA testing arguably provides proof of the perpetrator's identity. In fact, due to its accuracy, DNA has been touted as the most important advancement in defendant identification to date[83] and has helped exonerate or incriminate rape suspects.[84] One cannot overestimate the societal

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80. *See id.* at 84. Accurate DNA typing of saliva stains left on items such as stamps, envelopes, cigarette butts and chewing gum is possible. *Id.* at 85.

81. *See id.*

82. Victims often undergo severe trauma as a result of these assaults on their autonomy. Accordingly, identification of a perpetrator regularly cannot be made.

83. *E.g.*, H. Richard Uviller, *Self-Incrimination by Inference: Constitutional Restrictions on the Evidentiary Use of a Suspect's Refusal to Submit to a Search*, 81 J. CRIM. L. & CRIMINOLOGY 37, 37 (1990).

> When developed into a simple and reliable technique capable of pronouncing identity between some body tissue or fluid left by the criminal at the scene and an exemplar of genetic markings taken from the suspect, gene-printing will become the ultimate proof for the many crimes of physical violence or sexual assault in which the identity of the perpetrator is an issue.

Id.; *see also* Manning A. Connors, III, Comment, *DNA Databases: The Case for the Combined DNA Index System*, 29 WAKE FOREST L. REV. 889, 889 (1994).

> Experts are describing DNA analysis and typing as "the most important tool now available to confirm or reject an association between a suspect(s) and the victim." The use of DNA for investigatory purposes is perhaps the most discriminating and efficient prosecutorial device to be developed since the advent of fingerprinting.

Id. (quoting *Forensic DNA Analysis: Joint Hearing of H521-24 Before the House Comm. on the Judiciary, Subcomm. on Civil and Constitutional Rights, and the Senate Comm. on the Judiciary, Subcomm. on the Constitution*, 102d Cong., 2d Sess. 21 (1991) (statement of John W. Hicks, Assistant Dir., FBI Laboratory Div.)); Sheryl H. Love, Note, *Allowing New Technology to Erode Constitutional Protections: A Fourth Amendment Challenge to Non-Consensual DNA Testing of Prisoners*, 38 VILL. L. REV. 1617, 1619 n.2 (1993) ("'[DNA identification] technology could be the greatest single advance in the search for truth, conviction of the guilty, and acquittal of the innocent since the advent of cross-examination.'") (alteration in original) (quoting LORNE T. KIRBY, DNA FINGERPRINTING: AN INTRODUCTION xv (1990))); Sally E. Renskers, Note, *Trial by Certainty: Implications of Genetic "DNA Fingerprints,"* 39 EMORY L.J. 309, 330 (1990) ("DNA fingerprinting is the first absolutely positive identification tool."); *id.* at 309 ("'If you're a criminal, it's like leaving your name, address, and social security number at the scene of the crime. It's that precise.'") (quoting Lewis, *DNA Fingerprints: Witness for the Prosecution*, DISCOVER, June 1988, at 44, 52).

84. *See Cleared by DNA, Man Leaves N.Y. Prison*, RECORD (Hackensack, N.J.), Feb. 22, 1995, at A24, 1995 WL 3450299 (reporting the release of Terry Chalmers after the district attorney dismissed charges following DNA tests); Lisa W. Foderado, *DNA Frees Convicted Rapist After Nine Years*, N.Y. TIMES, July 31, 1991, at B1 (reporting that the rape conviction of Charles Dabbs was overturned following DNA tests); J. Michael Kennedy, *DNA Test Clears Man Convicted of Rape Counts*, L.A. TIMES, Jan. 16, 1994, at B1, 1994 WL 2125161 (chronicling the arrest and release of Mark Bravo after DNA tests proved he could not have committed the alleged rape); James Thorner, *DNA Test Frees Innocent Man*, GREENSBORO NEWS & REC., July 1, 1995, at A1, 1995 WL 2617444 (reporting the release of Ronald Cotton after DNA testing overturned a rape conviction); *see also* EDWARD CONNORS ET AL., NAT'L INST.

benefits of DNA testing:

> The collateral benefits of DNA analysis for the criminal justice system are also impressive. The likelihood that defendants will enter pleas of guilty when faced with DNA test results should increase, since in most cases there will be a corresponding increase in the weight of the government's case against the defendant. It has been reported that most rape defendants confronted with DNA test results implicating them have pled guilty. . . . As a corollary to the increase in guilty pleas because of overwhelming DNA evidence, victims may be more willing to report rapes to police. One deterrent to reporting is the additional trauma incurred by victims while testifying at a trial. The increased likelihood of guilty pleas generated by the DNA analysis may diminish that deterrent. Moreover, reports have indicated that rape victims are more likely to file a complaint if there is a high probability of conviction, and they are less likely to make a report when the probability is low. DNA testing

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OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1347 (1997).

> Quite recently, researchers at the National Institute of Justice ("NIJ") published a study of twenty-eight cases from fifteen jurisdictions in which an innocent person was freed as a result of DNA analysis after an average of seven years in prison. These were all cases of sexual assault or murder. In each case, evidence remained from the crime which permitted a DNA test to be conducted, and in each case, the test was able to exclude the defendant as the perpetrator. While these cases bear some resemblance to cases identified by earlier researchers, they differ in a significant respect—if they arose today it would be technologically feasible to demonstrate *before* trial that the defendant could not have committed the crime. Moreover, since most of these were not notorious cases upon which considerable defense energy was spent, it is also fair to conclude that, absent DNA testing, none of these false convictions would ever have been identified and rectified.

Id. (footnotes omitted). DNA evidence can be used to exculpate suspects as well. *See* KIRBY, *supra* note 69, at 191. "Just as important as using DNA typing to inculpate a suspect is its use to exculpate a suspect. Although conclusive DNA test results will not always eliminate an individual as a suspect, . . . it can exonerate the defendant and allow the police to focus their investigative efforts elsewhere." *Id.*; Renskers, *supra* note 84, at 310.

> In the United States, state courts are gradually admitting DNA fingerprints into evidence. In addition, it appears that some prosecutors' offices are using DNA fingerprinting to exclude suspects or dismiss charges when test results are negative. Defendants and defense attorneys are beginning to perceive the value of requesting a DNA test when they are confident that such a test would exonerate the defendant. Conversely, many defendants have decided to plead guilty after learning the results of their DNA fingerprint tests.

Id.; Tucker, *supra* note 65, at 124-25 ("From its inception, DNA profiling has implicated the guilty and exonerated the innocent in a way that was previously unthinkable.").

should increase dramatically the convictions in nonacquaintance rape cases.[85]

In fact, the predicted future use of DNA evidence suggests that it will be refined into a nearly flawless technique.[86] As the accuracy of DNA testing and DNA identification evolves, DNA evidence should be used all the more to incriminate sex offenders,[87] as it presents victims of rape with a reliable method of identifying their offenders.[88]

CONSTITUTIONAL PROBLEMS WITH COMPELLED DNA TESTING

Compliance with the Fourth Amendment

As a foundational matter, the proponent of DNA identification evidence must satisfy the court that the physical evidence upon which the testing was conducted was obtained in accordance with the Fourth Amendment's[89] prohibition of unreasonable searches and seizures.[90] "Prior to arrest, samples may be collected from a suspect pursuant to a search warrant, based upon probable cause and issued by a magistrate. Post arrest, the prosecution may obtain either a warrant or a court order directing that the defendant submit to the taking of biological samples."[91]

However, in situations where police either do not have a suspect or lack sufficient evidence for probable cause, obtaining a warrant to acquire biological samples raises difficult Fourth Amendment issues.[92] In these cases, the police must resort to methods that are only justifiable under a lower standard of proof than traditionally required for a search warrant.[93] When this happens, concerns about privacy, harassment and misuse of DNA information arises.

85. KIRBY, *supra* note 69, at 190-91.

86. *See* Love, *supra* note 84, at 1619 n.2 (noting that, in principle, DNA testing may be perfected into a method of absolute identification); Thaggard, *supra* note 65, at 441-42 ("DNA fingerprinting will revolutionize the American system of criminal justice if it achieves the success that proponents predict for it."); *id.* at 444 ("If science fulfills the promise that many believe it holds, then the truth-seeking process of the American criminal justice system will be furthered as it has never been before.").

87. *See* KIRBY, *supra* note 69, at 190 ("[T]he forensic application of DNA typing should significantly increase the arrest and conviction rates.").

88. *See id.*

89. U.S. CONST. amend. IV.

90. *See supra* notes 69-71 and accompanying text.

91. *See* KIRBY, *supra* note 69, at 202. A defendant's refusal to voluntarily submit to a collection of specimens may be admissible at trial as circumstantial evidence of guilt. *Id.*

92. *Id.*

93. *See id.*

Commentators suggest that, when police have less than probable cause, "the unique informational aspect of DNA profiling adds a new dimension to the Fourth Amendment analysis of what is reasonable in the context of compulsory identification."[94] As a result, they feel that protection is necessary.[95] If heightened protection is given under the Fourth Amendment based on the uniqueness of evidence, an exception to the Fifth Amendment on the same basis also seems plausible.

Fifth Amendment Concerns

It stands to reason that sex offenders would not voluntarily submit to DNA testing when they are guilty of a criminal act.[96] Thus, the courts often must compel a rape defendant to submit to involuntary testing, usually involving a blood sample. The highly uncontroverted nature of DNA test results raises the question of whether compelled testing violates a criminal defendant's constitutional right against self-incrimination.[97] Presently, courts rely upon the Supreme Court's decision in *Schmerber v. California*,[98] which held that, under the particular facts of that case, a defendant's constitutional rights had not been violated by a compulsory blood alcohol test and the admission of the evidence thereof.[99]

Majority's Reasoning in Schmerber

In *Schmerber*, the Court held that evidence provided by an accused must be characterized as "testimonial" or "communicative"

94. *See id.* at 202-03.

95. *See id.* at 203.

96. *See* David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1095 (1986) (noting that a rule requiring factually guilty persons to provide evidence of their own crimes is "so contrary to the basic human instinct of self-preservation that very few of us could conform to it").

97. *Id.*

98. 384 U.S. 757 (1966).

99. *Id.* at 767; *see also* Shaffer v. Saffle, 148 F.3d 1180, 1181-82 (10th Cir. 1998). *Shaffer* involved a statute establishing a DNA Offender Database in which DNA samples from individuals convicted of specified offenses are collected and maintained for the purpose of identifying and prosecuting perpetrators of "sex-related crimes, violent crimes, or other crimes in which biological evidence is recovered." *Id.* The court rejected a Fifth Amendment self-incrimination claim because DNA samples are not testimonial in nature. *Id.*; Boling v. Romer, 101 F.3d 1336, 1340 (10th Cir. 1996) ("Plaintiff's Fifth Amendment claim, alleging that requiring DNA samples from inmates amounts to compulsory self-incrimination, fails because DNA samples are not testimonial in nature."); Lucero v. Gunter, 17 F.3d 1347, 1350 (10th Cir. 1994) ("Like blood testing for alcohol, we conclude urine samples used for drug testing constitute nontestimonial evidence and therefore do not implicate Plaintiff's Fifth Amendment right against self-incrimination.").

in nature to determine whether a violation of the self-incrimination clause had occurred.[100] Justice Brennan noted in the majority opinion that the self-incrimination "privilege reaches an accused's communications, whatever form they might take," including the "compulsion of responses which are also communications."[101] The majority acknowledged that the testimonial requirement may be at odds with the values protected by the self-incrimination privilege.[102] Until the beginning of the twentieth century, most courts addressing this issue were of the opinion that the right against self-incrimination encompassed a right to refuse to cooperate passively or actively with prosecutorial authorities.[103] Yet, the *Schmerber* Court claimed that a distinction has emerged both in state and federal courts that indicates that any "compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate" the privilege barring compelled "communications" or "testimony."[104]

Invalidity of Majority's Reasoning in Schmerber

The dissent expressed that the majority rested too "heavily for its very restrictive reading of the Fifth Amendment's privilege against self-incrimination on the words 'testimonial' and 'communicative.'"[105] The dissent was unable to "find precedent in the former opinions of [the] Court for using these particular words to limit the

100. *See Schmerber*, 384 U.S. at 761.

> We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.

Id.

101. *Id.* at 763-64 (relying on the Court's decision in *Boyd v. United States*, 116 U.S. 616, 638 (1886), which held that compliance with a subpoena to produce one's papers violates a defendant's constitutional right against self-incrimination).

102. *Id.* at 762. "If the scope of the privilege coincided with the complex of values it helps to protect, we might be obliged to conclude that the privilege was violated." *Id.*

103. *See* Charles Gardner Geyh, *The Testimonial Component of the Right Against Self-Incrimination*, 36 CATH. U. L. REV. 611, 621-22 (1987).

> The principle underlying these decisions was relatively straightforward: the right against compelled self-incrimination prohibited the state from compelling a criminal defendant to "testify," to "be a witness," to "give evidence," or to "furnish evidence" against himself, and that meant that "the accused cannot be compelled to do or say anything that may tend to criminate him, and his refusal to do so cannot be proved as a circumstance against him." Compelling a defendant to "make evidence" against himself . . . was thus prohibited, for it compelled him to do something that might tend to be incriminating.

Id. (quoting Davis v. State, 31 So. 569, 571 (1902)).

104. *Schmerber*, 384 U.S. at 764.

105. *Id.* at 774 (Black, J., dissenting).

scope of the Fifth Amendment's protection."[106] Even if these terms could be used to limit the defendant's right against self-incrimination, the dissent points out that, in situations in which blood tests are used as evidence in a courtroom, such evidence, while not oral testimony, can be used to communicate guilt.[107]

The right of a criminal defendant not to bear witness against himself has been interpreted in a variety of ways, including not having to be a source of evidence, as well as not having to orally testify.[108] Scholars have argued that, contrary to the Supreme Court's holding in *Schmerber*, compelled DNA evidence does infringe upon a defendant's right against self-incrimination.[109] Furthermore, Justices Thomas and Scalia recently expressed a "willing[ness] to reconsider the scope and meaning of the Self-Incrimination Clause" to determine whether it should be applied on

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106. *Id.*

107. *Id.* at 775.

108. *See* Geyh, *supra* note 104, at 615.

> By its terms, the [F]ifth [A]mendment provides that no person shall be compelled in any criminal case "to be a witness against himself." Considered in a vacuum, the phrase "to be a witness" is susceptible of various meanings from the very broad to the very narrow. In perhaps the broadest sense of the phrase, to be a witness is to be a source of evidence. Alternatively, it is to assist in the disclosure of evidence. Narrower still, to be a witness is to testify, to attest to a fact or to communicate information. Narrowest of all, it is to appear in court and respond to questioning under oath. When the various meanings ascribable to the phrase "to be a witness" are evaluated in light of the purposes that the right as a whole is intended to serve, it should be possible, one might logically suppose, better to ascertain the most appropriate definition.

Id.

109. *See id.* at 613 (arguing that the "testimonial requirement [laid out by the *Schmerber* Court] cannot be reconciled with the purposes served by the right against self-incrimination"). Geyh defines the various purported purposes of the self-incrimination clause as protection of the innocent, detecting the guilty, encouragement of diligence and discouragement of cruelty by law enforcement authorities, preservation of the accusatorial system of justice in that the burden is always on the prosecution to establish the defendant's guilt without relying on compelled cooperation of the accused, and preserving a general right to privacy. *Id.* at 615-17; *see also* Dolinko, *supra* note 97, at 1083 (questioning whether the testimonial requirement of the Fifth Amendment furthers the purported goal of the privilege to impose upon the government the entire burden of proving guilt in a criminal case); William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1232-33 (1988).

> [T]he privilege does not protect physical evidence, but instead prohibits only compelled "testimonial" or "communicative" conduct. The state may, consistently with the [F]ifth [A]mendment, violate one's body by forcibly extracting blood samples . . . . No extended argument is necessary to show that these limitations are hard to square with the idea of a privacy-protective privilege. If by privacy one means seclusion . . . then compelled physical intrusions should surely be forbidden.

Id. "Arguing that personal autonomy, dignity or privacy are more deeply infringed by a straightforward question in court than by, say, forced surgery or a strip search seems at the very least counterintuitive." *Id.* at 1277.

a broader basis.[110] This may suggest a future willingness of the Court to expand self-incrimination protection to physical evidence, as well as non-testimonial evidence.

Compelling production of non-testimonial evidence is at odds with the values underlying the right against self-incrimination; therefore, one is inclined to wonder why the Court decided *Schmerber* the way it did. Legal scholars opine that this decision was justified by the practical need for governmental access to non-testimonial physical evidence.[111] This type of evidence is unquestionably indispensable to prosecutors.[112] If the Court had decided that non-testimonial physical evidence is protected by the Fifth Amendment, law enforcement officials would be greatly hindered in prosecuting criminal suspects. Thus, the testimonial component of the right against compelled self-incrimination, as defined in *Schmerber*, is a device designed to achieve a practical result: it allows the government to obtain vital physical evidence. The distinction between testimonial and non-testimonial evidence is an artificial one,[113] however, and as such, the *Schmerber* holding threatens the Court's legitimacy.

Nothwithstanding valid reasoning behind the *Schmerber* decision, it should not apply to DNA evidence. Blood alcohol tests can be distinguished from DNA tests, thereby rendering *Schmerber* inapplicable to cases that feature DNA evidence.[114] Although blood alcohol tests are used to determine whether an accused is intoxicated, other types of circumstantial evidence may be employed to prove intoxication. In contrast, DNA tests are often used to determine identification of the perpetrator when there is no other

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110. United States v. Hubbell, 530 U.S. 27, 49 (2000) (Thomas, J., concurring). *See id.* at 55-56 (noting that the current self-incrimination clause doctrine may be inconsistent with its original meaning in that it incorrectly focuses on the testimonial aspect).

111. Other types of non-testimonial physical evidence include blood alcohol tests, urine analysis and fingerprints.

112. *See* Geyh, *supra* note 104, at 626. "The emergence and eventual acceptance of the testimonial requirement closely parallels advances in forensic science, developed in response to the changing character of criminal conduct, which rendered 'nontestimonial' evidence (physical evidence obtained from the suspect's person) indispensable in crime detection." *Id.*

113. Geyh, *supra* note 104, at 642.

> The testimonial component of the right against compelled self-incrimination is a simple device designed to achieve a practical result. It establishes an artificial line enabling the government to obtain vital physical evidence, while leaving undisturbed the suspect's right to refuse to cooperate with more intrusive demands for incriminating testimonial communications.

Id.

114. *See* Thaggard, *supra* note 65, at 441 ("DNA fingerprinting is a good deal more accurate than traditional blood, hair, and semen tests."); Barry Steinhardt, *DNA Reveals Too Much Sensitive Information About a Person*, USA TODAY, Jan 2, 2001, at 10A.

effective way to prove identity.[115] It follows, then, that DNA evidence truly incriminates, and compelling a criminal defendant to involuntarily provide a DNA sample effectively forces him to incriminate himself in clear violation of the Fifth Amendment.

DNA evidence is also incriminatory because juries accept the result as conclusive. "Indeed, DNA fingerprinting is considered to be extremely convincing evidence to juries who have heard hours of expert testimony and statistics regarding the improbability of misidentification or other errors in the procedure."[116]

Furthermore, the *Schmerber* Court did not explicitly address DNA evidence, nor could the Court have conceived of a powerful identification technique such as DNA typing.[117] Therefore, it is inappropriate for lower courts to rely on a Supreme Court decision regarding blood alcohol tests to determine the outcomes of cases involving DNA evidence.

Necessity for an Alternative to Schmerber

The courts should discontinue their reliance on *Schmerber* in light of its flawed reasoning or, at the least, its inapplicability to compelled DNA testing. A potential problem with disregarding *Schmerber*, however, is that it could limit the prosecutor's ability to gather DNA evidence, which could be used to incriminate or exonerate rape suspects. DNA evidence is undeniably necessary in those types of cases. Thus, it may be wise to create an official exception to the Fifth Amendment Self-Incrimination clause for DNA evidence. Such an exception would protect the gathering of invaluable evidence without undermining the suspects' constitutional rights or the courts' legitimacy.

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115. *See* Renskers, *supra* note 84, at 330.

> DNA fingerprints neither represent approximations of probabilities nor require highly interpretive readings of the test results. Other identification methods can supply only a probability of an identification match, and often require highly-skilled individuals to interpret test results. Additionally, all other blood tests can only exclude possibilities of matches, whereas DNA fingerprinting can specifically identify an individual's sample as matching another sample.

Id. at 330 n.144.

116. *Id.* at 320.

117. DNA analysis was first developed in 1985, while the *Schmerber* decision was reached in 1966. *See* Thaggard, *supra* note 65, at 425; *id.* at 431 (discussing the first criminal conviction in the world based on DNA profiling evidence in 1985).

MAKING A DNA EXCEPTION TO THE FIFTH AMENDMENT

Purposes of the Fifth Amendment Are Not Undermined by a DNA Exception

There are several purported purposes of the Fifth Amendment's Self-Incrimination Clause.[118] The Court has concluded that "absolute procedural safeguards [are] necessary to insure the freedom to exercise the fifth amendment right."[119] Moreover, it has even gone so far as to disallow a balancing of interests test in cases involving the Fifth Amendment.[120]

Underlying our constitutional system is the notion that the falsely-accused person is always presumed innocent, even if it means some undeserved rights will be bestowed on the guilty. This fundamental idea would not be undermined, however, by an exception for compelled DNA testing in cases of rape. DNA cannot inculpate the innocent.[121] Thus, the fundamental rights of one who is falsely accused cannot be jeopardized by a compelled DNA test. Instead, the falsely accused can only be helped by it, as it may eliminate him as a suspect. At worst, if a DNA test is administered incorrectly, it could only exculpate the guilty.

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118. *See supra* note 109 and accompanying text.

119. Jeffrey T. Shaw, New York v. Quarles: *The Public Safety Exception to* Miranda, 70 IOWA L. REV. 1075, 1078 (1985).

120. *See* New Jersey v. Portash, 440 U.S. 450, 459 (1979) ("[The Fifth Amendment provides] the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible."). *But see* Stuntz, *supra* note 110, at 1261-62 (discussing how this attitude may be changing to encompass a balancing approach).

> Twenty-five years ago, one could plausibly advance the thesis that [F]ifth [A]mendment doctrine was built around the concept of protected spheres. Where the privilege against self-incrimination applied, its protection seemed absolute. The largely open question was where it applied. The focus of academic attention was on defining the mix of autonomy and privacy values that in turn would define the sphere of life that the privilege protected.
>
> Modern [F]ifth [A]mendment doctrine, by contrast, is largely defined by two very different concepts or themes: choice and balancing. The Court currently tends to analyze the nature of the choice the defendant had to make in order to determine whether there was compelled self-incrimination. Often, application of the privilege begins and ends with this analysis, but occasionally opinions go on to balance the defendant's interest in avoiding making some kinds of choices against the interest of society in effective law enforcement. Not much attention has been paid to how the ideas of choice and balancing fit together in [F]ifth [A]mendment law or to what values they serve.

Id. (footnotes omitted).

121. *See supra* note 65 and accompanying text.

A DNA Exception Would Be in the Best Interest of Society

A balancing test is an appropriate means to determine the validity of an exception to the Self-Incrimination Clause allowing the use of DNA evidence in rape cases.[122] Effectively prosecuting and convicting rapists qualifies as a compelling state interest. DNA evidence aids prosecutors in the absolute identification of rapists, a component that is often difficult to prove in situations where a victim is unfamiliar with her attacker. Thus, an exception to the Fifth Amendment allowing compelled DNA testing is reasonably related to valid state concerns such as the health, peace, order, safety and welfare of society.

Once the reasonableness of the exception has been established,[123] the state interest must be balanced against the suspect's right against self-incrimination provided for in the Fifth Amendment. Given that compelled DNA testing would not undermine the purpose of the Fifth Amendment, it follows that the state's interest outweighs the defendants' interest.

Finally, any exception to a constitutional amendment should be narrowly tailored to the state interest so that it proves to be the least restrictive means available.[124] If a less intrusive but equally effective alternative exists, the exception at issue must be found to be overly restrictive. For defendant identification in rape cases, no alternative to DNA testing is as absolute; this makes DNA testing unique in that there is no comparable substitute.[125] Thus, a compelled DNA testing exception to the Fifth Amendment in cases

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122. Geyh, *supra* note 104, at 631.

> [C]ompelling an accused to assist in his own undoing is difficult to reconcile with the purposes the right is intended to serve, unless one simply concedes as much, but concludes that whatever [F]ifth [A]mendment interest the suspect has in refusing to provide nontestimonial evidence is outweighed by the government's practical need to obtain such evidence.

Id. *See* Stuntz, *supra* note 110, at 1236-37 (discussing the use of a balancing test in Fifth Amendment analysis).

123. *See* Gregory F. Monday, Cohen v. Cowless Media *Is Not a Promising Decision*, 1992 WIS. L. REV. 1243, 1247-48 (1992) (noting that a government regulation, including an exception to a constitutional amendment, is sufficiently justified if it furthers an important or substantial government interest and is the least restrictive means of doing so).

124. *See id.; see also* Thomas S. McGuire, Note, *First Amendment Prohibits Hate Crime Laws That Punish Only Fighting Words Based on Racial, Religious or Gender Animus*, 23 SETON HALL L. REV. 1067, 1089 (1993) (pointing out Justice White's contention in *Simon & Schuster, Inc. v. N.Y. Crime Victims Bd.*, 502 U.S. 105, 106 (1991), that legislation that seems facially violative of the Constitution can actually be constitutional if it is narrowly drawn to achieve a compelling state interest).

125. *See supra* note 116 and accompanying text.

of rape is narrowly tailored to serve the state's legitimate interests in that it is the least restrictive means available.

Proposed Exception Is Analogous to Exceptions Made to Other Amendments

Many instances exist in which exceptions have been made to constitutional amendments when they serve the best interests of society. The proposed exception is analogous to them. The First Amendment[126] may be limited in two ways.[127] The first is when speech falls outside the scope of constitutional protection;[128] the second is when a limitation is necessary to further a compelling state interest.[129] The Second Amendment,[130] as interpreted, incorporates the idea that it was originally intended to preserve the military rather than to afford individuals the right to own the dangerous weapons currently available.[131] More specific to the

126. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech or of the press . . .").

127. Other exceptions have been proposed to the First Amendment in the cases of flag burning, hate speech and election speech. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (addressing flag burning); Larry Alexander, *Banning Hate Speech and the Sticks and Stones Defense*, 13 CONST. COMMENT. 71 (1996) (addressing hate speech); Robert Post, *Regulating Election Speech Under the First Amendment*, 77 TEX. L. REV. 1837 (1999) (addressing election speech).

128. *See* Monday, *supra* note 124, at 1246. "Categories of unprotected speech include libel, slander, misrepresentation, obscenity, perjury, solicitation of crime, and copyright infringement." *Id.*; *see also* Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (holding that "fighting words" or those that are incitements to imminent lawless action are not protected speech and are thereby punishable); Konigsberg v. State Bar of Cal., 366 U.S. 36, 49-50 (1961) (recognizing that freedom of speech is not absolute despite a literal reading of the First Amendment); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (recognizing that the freedom of speech is not absolute when the benefit of protecting certain types of speech is "clearly outweighed by the social interest in order and morality").

129. *See* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987); United States v. O'Brien, 391 U.S. 367, 377 (1968).

130. U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

131. *See* Robertson v. City and County of Denver, 874 P.2d 325, 335 (Colo. 1994) (en banc) (upholding Denver's restrictions on certain types of semi-automatic rifles); Arnold v. City of Cleveland, 616 N.E.2d 163, 175 (Ohio 1993) (holding that a total ban on possession and sale of assault weapons, with the exception of current owners who registered, was not constitutionally adverse to the fundamental individual right to bear arms); Or. State Shooting Ass'n v. Multnomah County, 858 P.2d 1315, 1321-22 (Or. Ct. App. 1993) (in banc) (holding Oregon's constitutional right to arms inapplicable to certain assault weapons); *see also* Roland H. Beason, Comment, Printz *Punts on the Palladium of Right: It Is Time to Protect the Right of the Individual to Keep and Bear Arms*, 50 ALA. L. REV. 561, 577-78 (1999). Citing *Printz v. United States*, 521 U.S. 898 (1997), and *United States v. Lopez*, 514 U.S. 549 (1995), which overturned the Gun-Free School Zones Act of 1990 and the Brady Handgun Violence Prevention Act, respectively, Beason maintains that the Court did not actually affirm the Second Amendment, although it found restrictions on the right to bear arms unconstitutional;

exception proposed in this Note, exceptions to the Fourth Amendment[132] have been made so as not to thwart the criminal justice system from effectively operating.[133] In this sense, it is very similar to the proposed Fifth Amendment exception. Finally, exceptions have already been made to the Fifth Amendment on the grounds of public safety.[134] Also, an exception effectively exists to the double jeopardy clause of the Fifth Amendment[135] through the "Dual Sovereignty" doctrine whenever independent governmental interests justify successive federal or state prosecutions.[136] Additionally, exceptions have been proposed to both the Sixth[137] and

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these cases were decided as they were because they were found to be violative of the Tenth Amendment and the Commerce Clause. *Id.* Thus, exceptions to the Second Amendment would still be allowed provided they do not violate any other portion of the Constitution.

132. U.S. CONST. amend. IV.

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

Id.

133. *See, e.g.*, United States v. Leon, 468 U.S. 897, 926 (1984) (holding that the Fourth Amendment exclusionary rule should not be applied so as to bar the use, in the prosecution's case in chief, of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid for lack of probable cause).

134. *See* New York v. Quarles, 467 U.S. 649, 656 (1984) (holding that in situations where a police officer asks a suspect in custody a question reasonably prompted by a concern for public safety, any incriminating evidence thereby obtained is admissible at trial, regardless of whether *Miranda* warnings were provided).

135. U.S. CONST. amend. V ("No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . .").

136. *See generally* Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception,"* 41 UCLA L. REV. 649, 655 (1994) (arguing that the dual sovereignty doctrine exception to the double jeopardy clause of the Fifth Amendment is appropriate because the "federal authority to enforce the federal criminal civil rights statutes . . . should not be circumscribed by the results of prior state criminal proceedings") (footnote omitted). *But see* Robert Matz, Note, *Dual Sovereignty and the Double Jeopardy Clause: If at First You Don't Convict, Try, Try Again*, 24 FORDHAM URB. L.J. 353, 355, 359-66 (1997) (arguing that "application of the principle of dual sovereignty violates the Constitution and derogates the integrity of the American criminal justice system").

137. U.S. CONST. amend. VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.

Seventh[138] Amendments because they serve the best interests of society.[139]

CONCLUSION

Rape suspects and defendants naturally decline to voluntarily submit to DNA testing because they do not want to incriminate themselves. As a result, courts must often compel DNA testing. Currently, courts find that compelled DNA testing does not violate the Fifth Amendment's prohibition against self-incrimination because, relying on *Schmerber*, they maintain that it is not "testimonial" or "communicative" in nature.[140]

This reasoning is flawed, however, because DNA evidence does, in fact, incriminate defendants to an almost absolute degree. The Court most likely recognized this, but nevertheless decided as it did so as to not hinder the prosecutions of criminal defendants. Although it is easy to empathize with the Court's reasons for drawing the arbitrary distinction between testimonial and physical evidence, the decision undermines the legitimacy of the Court, which must not adopt faulty reasoning merely to achieve desirable results.[141]

Rape prosecution currently constitutes a major societal problem due to its severe ineffectiveness.[142] Many of the legal reforms recently enacted to fix this problem have failed to make any real difference.[143] DNA evidence, on the other hand, *does* make a difference.[144] Identification of perpetrators can often be difficult or impossible, but advances in DNA fingerprinting analysis provide a

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138. *See* U.S. CONST. amend. VII.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Id.

139. *See, e.g.*, Joseph A. Miron, *The Constitutionality of a Complexity Exception to the Seventh Amendment*, 73 CHI.-KENT. L. REV. 865, 886-92 (1998) (arguing that the Supreme Court has opened the door to a complexity exception to the Seventh Amendment in situations where the right to a jury trial should not be granted because the average jury will not be able to understand the complexities of certain types of cases with its reasoning in prior cases); William A. Davis, Note, *The Impeachment Exception to the Sixth Amendment Exclusionary Rule*, 87 COLUM. L. REV. 176 (1987) (discussing the current controversy over whether an impeachment exception to the Sixth Amendment exists).

140. *See supra* notes 100-01 and accompanying text.

141. *See* text accompanying *supra* notes 101-18.

142. *See supra* notes 30-39 and accompanying text.

143. *See supra* notes 40-45 and accompanying text.

144. *See supra* notes 72-89 and accompanying text.

way to identify perpetrators to a level of accuracy previously unavailable. In fact, experts anticipate that the process should be perfected into an absolute method in the near future.[145] Thus, the importance of DNA testing to increased numbers of rape prosecutions is undeniable.

The issue, therefore, is how to allow DNA evidence to be used in rape prosecutions, and simultaneously recognize that it implicates the Fifth Amendment right against self-incrimination. An exception to the Fifth Amendment allowing compelled DNA evidence in rape prosecutions would serve the best interests of society without undermining the purpose of the Fifth Amendment: to protect an innocent person from being compelled to provide evidence against himself.[146] This proposed exception is analogous to other exceptions that have been made to constitutional amendments.[147] An exception to the Fifth Amendment compelling rape suspects and defendants to submit to DNA testing should be initiated by the courts as it is doubtful that the purpose of the Fifth Amendment was to exclude this type of evidence.

Furthermore, the benefits of the proposed exception to society significantly outweigh the possibility of violating one's right against self-incrimination. This exception gives law enforcement officials a necessary tool for obtaining arrests and convictions of rapists that would otherwise be impossible. Because compulsory submission to DNA analysis of rape suspects and defendants is narrowly tailored to serve a compelling state interest, it should be adopted.

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145. *See supra* notes 84, 87 and accompanying text.
146. *See* text accompanying *supra* notes 122-25.
147. *See* text accompanying *supra* notes 127-40.