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WEDNESDAY, JUNE 05, 2013

(When) Was Fingerprinting Unconstitutional?

One of my main items of business during this blogging stint is to write about this month's Supreme Court cases as the term wraps up. So the first order of business is Monday's cases. I fear I don't have anything interesting to say about Hillman v. Maretta, the group life insurance case that a friend described as "the most preempted law ever." And while a lot of people have written things about Maryland v. King, I thought I'd throw in my own thoughts.

I'm more sympathetic to the dissent's reasoning than I expected to be. When I first saw the case granted, I confidently predicted a reversal and I wasn't even sure there would be a dissent. But I do now see why the dissent thinks this is a questionable extension of the special needs doctrine. It's common ground that the police can't just go search your house or your off-site car or your gym locker without suspicion when you've been arrested, so it needs a story about why DNA is different. And the claim that the DNA searches are largely for identification purposes rather than crime-solving purposes seems implausible.

That said, I don't think Justice Scalia does a good job of distinguishing DNA from fingerprints. As I read it, the dissent actually trots out three different arguments about why its view doesn't forbid the routine fingerprinting of those who are arrested.

1. **Fingerprinting is not a search.** ("The Court does not actually say whether it believes that taking a person's fingerprints is a Fourth Amendment search, and our cases provide no ready answer to that question.") Possible, but Justice Scalia seems unwilling to actually commit to this argument, he just mentions it and moves on.

2. **Fingerprinting *really is* for identification purposes.** ("Fingerprints of arrestees are taken primarily to identify them (though that process sometimes solves crimes); the DNA of arrestees is taken to solve crimes (and nothing else).") Possible, but this argument relies heavily on computer databases that were only created in the late 1990s, and fingerprinting has been

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around for a lot longer than that.

3. **Fingerprinting was unconstitutional for a long time (and maybe still is?)**. ("The 'great expansion in fingerprinting came before the modern era of Fourth Amendment jurisprudence,' and so we were never asked to decidethe legitimacy of the practice ... but it is wrong to suggest that this was uncontroversial at the time, or that this Court blessed universal fingerprinting for 'generations' before it was possible to use it effectively for identification.") Justice Scalia's views about the IAFIS database would seem to imply that routine fingerprinting was unconstitutional until it became part of an identification system. But he is oddly non-commital. The Court didn't "bless" it, and it was not "uncontroversial," but was it actually *wrong?*

As best I can tell, the dissent's view is a combination of 2 and 3, with 1 mentioned but not seriously contended. If so, that's somewhat surprising. At the oral argument in Hollingsworth v. Perry, Justice Scalia pestered Ted Olson with the question: "When did it become unconstitutional to exclude homosexual couples from marriage?" and seemed incredulous that the constitutional answer could have changed more recently than the enactment of the 14th Amendment. It seems fair to ask him the same question about the constitutionality of fingerprinting.

[CORRECTION: I originally mistyped "affirmance" instead of "reversal" above.]

Posted by Will Baude on June 5, 2013 at 12:15 PM in Constitutional thoughts, Criminal Law | Permalink

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Scalia should have gone with #1, I think. Perhaps the harder problem is that fingerprinting will normally require a seizure -- controlling the person to get the prints -- which then raises the question of whether taking a cheek swab is a seizure, too. It gets complicated quickly, and the issue wasn't briefed, which may be why he didn't say much about the question.

Posted by: Orin Kerr | Jun 5, 2013 8:55:46 PM

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