

FOREWORD:

PRIVACY RIGHTS AND PROACTIVE INVESTIGATIONS:
EMERGING CONSTITUTIONAL ISSUES
IN LAW ENFORCEMENTThiru Vignarajah[†]

A single breakthrough—scientific, scholarly, technological—can radically reshape the landscape of criminal law. It was once fingerprints and wiretaps that transformed the gumshoe detective work of yesteryear into a sophisticated modern enterprise. Today, DNA databases and GPS location tracking have expanded the capacity of police to unearth clues and identify suspects; wholesale investigations that were previously too cumbersome to execute, too expensive to justify, or too fanciful to imagine are now routine. And these vanguard innovations arrive just as another round of concerns about the frailties of human memory gains traction, making it harder than ever to rely solely on eyewitnesses.

Thus, the decision of the *University of Baltimore Law Review* to sponsor a symposium at the intersection of these issues—“Privacy Rights and Proactive Investigations: Emerging Constitutional Issues in Law Enforcement”—could not have come at a better time. And a public-minded law school at the heart of Baltimore City could not have been a better host. Indeed, at the time of the symposium in March 2013, the Supreme Court was considering the constitutionality of Maryland’s DNA database law; the City had recently named a new police commissioner who was reviewing the department’s policies on how witnesses identify suspects; and the Maryland General Assembly had just months earlier contemplated statutory safeguards on when police could monitor the movements of individuals with the aid of GPS tracking devices.

Against this timely backdrop, it is no surprise that the scholarship contained in this issue is as rich as it is relevant—and the debate and discussion on the day of the symposium was as spirited as it was substantive. To accomplish this was no small feat. For each of three

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topics, the *University of Baltimore Law Review* secured written submissions and active participation from scholars and scientists, from agency lawyers and defense attorneys, from policy advocates, prosecutors, and police. Assembling this mosaic of perspectives is exactly what law schools and law reviews should be endeavoring to do, not just for the sake of the students but also to enliven and inform public discourse on these important matters.

The first triad of articles centers on the legality of tracking the location of citizens in light of the Supreme Court's decision in *United States v. Jones*,¹ which addressed whether the strictures of the Fourth Amendment apply to the placement of a GPS device on a vehicle to follow its movements. In her piece, Nancy Forster, former Public Defender of Maryland, questions whether the Court's revival of the trespass doctrine in *Jones* is adequate to address the inexorable forward march of technology.² Also concerned about the legacy of *Jones*, Jason Medinger, a federal prosecutor in Maryland, examines the spread of questions left unanswered by the Court and illustrates how lower courts have retreated and found refuge in longstanding principles that predate *Jones*.³ Nancy Oliver, Counsel for ATF's Baltimore Field Division, invites state legislatures and the courts to provide guidance but urges gradualism in order to avoid a sudden, premature leap to potentially cumbersome restrictions.⁴ Joining these contributors on the live panel was Ann O'Connell, Assistant to the Solicitor General, who aided with the government's brief in *Jones*.

On the second topic of how witnesses identify suspects, some might expect a sharp contrast between Baltimore's former police commissioner, Frederick Bealefeld, and two policy leaders at the Innocence Project, Rebecca Brown and Stephen Saloom. What has surfaced instead is growing consensus: both articles converge on the checkered history leading to the use of "six pack" photo arrays in Baltimore.⁵ And the new commissioner, Anthony Batts, made news at the symposium, announcing plans to rely on sequential photo

1. United States v. Jones, 132 S. Ct. 945 (2012).
2. Nancy Forster, *Back to the Future: United States v. Jones Resuscitates Property Law Concepts in Fourth Amendment Jurisprudence*, 42 U. BALT. L. REV. 445 (2013).
3. Jason D. Medinger, *Post-Jones: How District Courts are Answering the Myriad of Questions Raised by the Supreme Court's Decision in United States v. Jones*, 42 U. BALT. L. REV. 395 (2013).
4. Nancy Oliver, *Location, Location, Location: Balancing Crime Fighting Needs and Privacy Rights*, 42 U. BALT. L. REV. 485 (2013).
5. Frederick H. Bealefeld III, *Research and Reality: Better Understanding the Debate Between Sequential and Simultaneous Photo Arrays*, 42 U. BALT. L. REV. 513 (2013); Rebecca Brown and Stephen Saloom, *The Imperative of Eyewitness Identification Reform and the Role of Police Leadership*, 42 U. BALT. L. REV. 535 (2013).

arrays to investigate crime, as the State's Attorney for Baltimore City, Gregg L. Bernstein, and Michele Nethercott, Director of Maryland's Innocence Project, joined the discussion.⁶ Commissioner Batts has since made good on his pledge as the department began using double-blind sequential photo arrays in late October 2013.⁷ This sequence of events illustrates what a student journal can achieve: a fascinating symposium sponsored by the *University of Baltimore Law Review* served as a catalytic agent for constructive debate, which soon laid the foundation for institutional reform.

The final pairing of pieces pits an academic against a DNA analyst, with commentary during the symposium from the State's Attorney for Baltimore County, Scott Shellenberger, the chief attorney for the Forensics Division of the Maryland Office of the Public Defender, Stephen B. Mercer, and the Chief Deputy Attorney General of Maryland, Katherine Winfree, who successfully defended Maryland's DNA law before the Supreme Court. For her part, Jessica Gabel, an associate professor at Georgia State University School of Law, challenges the common comparison between DNA and fingerprints, emphasizing the distinct risks of abuse and misuse that accompany warehousing DNA samples.⁸ Rana Santos, who leads the DNA lab at the Baltimore Police Department, responds with the crime-fighting impact of a large pool of suspect samples and reminds us of the strict rules and regulations that govern DNA privacy and the professionals entrusted with these specimens.⁹ Even with the Court's decision upholding Maryland's statute, debate as to the future of DNA as a police tool will no doubt continue.

This is hardly the first (or last) time that the idiosyncrasies of new technologies and the insights of emerging science will raise vexing questions on matters of criminal justice and constitutional law. Part of the trick then is to appreciate where the latest edition falls on the spectrum of precedent and to assess whether the innovation of the moment amounts to a difference in degree or a distinction in kind.

6. Ian Duncan, *City Police Planning New Suspect Identification Process*, BALTIMORE SUN, March 28, 2013, available at http://articles.baltimoresun.com/2013-03-28/news/bs-md-ci-eyewitness-identification-20130328_1_batts-homicide-case-bernstein.
7. Edward Ericson, Jr., *Police Alter Photo Array Procedure*, CITY PAPER, Oct. 28, 2013, available at <http://blogs.citypaper.com/index.php/the-news-hole/police-alter-photo-array-procedure/>.
8. Jessica D. Gabel, *Indecent Exposure: Genes Are More Than a Brand Name Label in the DNA Database Debate*, 42 U. BALT. L. REV. 561 (2013).
9. Rana Santos, *Why DNA Databasing Is Good for Maryland: A DNA Analyst's Perspective*, 42 U. BALT. L. REV. 591 (2013).

The important articles and discussion generated by this symposium will help many make those judgments. Indeed, to gather together such a diverse and distinguished array of participants to debate in good faith significant issues of the day is worthy of applause; it has certainly been for me a tremendous privilege to participate. Now, in the face of a changing world, the very same actors and institutions represented on the panels and in these pages—scholars, scientists, government attorneys, the defense bar, prosecutors, police, politicians and policymakers—must work diligently, often but not always together, to improve and preserve a criminal justice system that, even with its imperfections, should stand as a source of pride.