Arguments concerning the conditions under which public authorities may collect, analyze, and retain DNA samples and profiles for the purpose of investigating crimes (“forensic DNA usages”) are often couched in terms of a familiar debate between individual rights and the common good. That is, the arguments are framed as a confrontation between those who champion individual rights, especially privacy, and those concerned with the common good, especially public safety and national security. Members of the first camp frequently argue that forensic DNA usages without “individualized suspicion,” without specific authorization by the courts, constitute a gross violation of basic rights. Those of the second camp often argue that these searches significantly curb crime, including terrorism, and that the interventions involved are limited.

By contrast, the liberal communitarian approach, which this chapter develops and applies to the issues raised by forensic DNA usages, assumes that all societies face two fully legitimate normative and legal claims—those posed by individual rights and by the common good—and that neither a priori trumps the other. Each society must work out the extent to which it tilts toward one of these two major claims on a given issue. The author has previously explored such a balance between individual rights and the common good as it applies to National Security Agency programs, the Patriot Act, public health laws, publication of state secrets, Megan’s laws, national identification cards, and medical privacy. These studies revealed that liberal communitarianism favors a distinct balance between individual rights and the common good for each of these areas of public policy. (For a discussion of this balance as it applies to privacy and security, see Chapter 7.)

This chapter will show that policies concerning forensic DNA usages have a profile all their own. The article first briefly reviews the history of forensic DNA usages, next addresses the criticisms of DNA usage by various advocates of individual rights, and then examines the contributions of
this technology to the common good. More attention is devoted to issues raised by rights advocates than to their contributions to the common good, because the latter are much less contested. In conclusion we find that these DNA usages pose a surprisingly distinct liberal communitarian balance.

It cannot be stressed enough that this chapter does not seek nor provide a comprehensive—let alone exhaustive—review of all the issues raised by forensic DNA usages concerning intrusions into individual rights or contributions to the common good. It merely seeks to place these usages in the liberal communitarian context and ask whether—on balance, at this time in history, in the United States—these usages tilt excessively in one direction or the other.

A. The History of Forensic DNA Usages

The first state DNA database used for forensic purposes was established in the United States, in Virginia in 1989, and was followed in 1990 by a pilot program of fourteen state and local laboratories linked by specially designed software called CODIS. This pilot program expanded into an FBI-operated system of state and local DNA profile databases in forty-one states and the District of Columbia beginning in 1991. A National DNA Index System (NDIS) became operational in October 1998. It contains qualifying DNA profiles, or DNA profiles that meet NDIS standards according to federal law, uploaded by participating federal, state, and local forensic laboratories. (Note that state and local jurisdictions may have less stringent rules about which DNA profiles may be included in their DNA databases.) As of July 2014, NDIS included more than eleven million DNA profiles.

Congress has expanded the breadth of the NDIS database over time. When NDIS was established, it was authorized to contain DNA identification records for “persons convicted of crimes” as well as “analyses of DNA samples recovered from crime scenes . . . from unidentified human remains . . . [and] voluntarily contributed from relatives of missing persons.” Congress defined a set of crimes that it considered sufficiently serious to warrant collecting DNA samples from those who commit them, including murder, sexual abuse, and kidnapping; these crimes are referred to as “qualifying offenses.” Initially, Congress included in NDIS only the DNA profiles of individuals who were then in custody for qualifying offenses at the state level, but eventually it also authorized the inclusion of DNA profiles of individuals who were convicted of and incarcerated for qualifying offenses at the federal level or in the District of Columbia. In 2000, Congress also authorized the inclusion in NDIS of DNA profiles collected from probationers and parolees who had been previously convicted of qualifying offenses, and it retroactively approved the collection of DNA samples from individuals then in custody who had been previously convicted of