

## COMMENTS

### HOW THE DNA ACT VIOLATES THE FOURTH AMENDMENT RIGHT TO PRIVACY OF MERE ARRESTEES AND PRE-TRIAL DETAINEES

I. INTRODUCTION.....	158
II. DNA COLLECTION AND FOURTH AMENDMENT RIGHTS—EXAMINING THE FEDERAL DNA COLLECTION STATUTE AND RELEVANT FOURTH AMENDMENT JURISPRUDENCE .....	164
A. THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT AND THE DNA ACT .....	165
1. CREATING A DNA PROFILE IN CODIS .....	166
2. SAFEGUARDS INCLUDED IN THE DNA ACT .....	169
3. ADDITIONAL PROTECTIONS CREATED IN PRACTICE.....	171
B. CHANGES TO CATEGORIES OF PERSONS SUBJECT TO MANDATORY DNA COLLECTION .....	173
C. THE FOURTH AMENDMENT AND THE RIGHT TO PRIVACY.....	175
1. THE EXPECTATION OF PRIVACY .....	176
2. CIRCUIT SPLIT IN APPLYING THE FOURTH AMENDMENT TO THE DNA ACT .....	178
3. COURTS ANALYZE THE COLLECTION OF DNA FOLLOWING A CONVICTION.....	182
D. THE APPLICATION OF THE TOTALITY OF THE CIRCUMSTANCES APPROACH TO THE DNA ACT’S 2005 AND 2006 AMENDMENTS.....	185
1. THE RIGHT TO PRIVACY.....	187
2. THE GOVERNMENT’S INTERESTS.....	189
III. FIXING FEDERAL LAW: PROPOSALS TO MAKE 42 U.S.C. § 14135A(A)(1)(A) AND ITS APPLICATION CONSTITUTIONAL .....	191
A. CONGRESSIONAL CHANGES .....	191

B. DEFENSES TO PROPOSED CHANGES AND CRITIQUE OF CURRENT MANDATORY DNA SAMPLING.....	193
1. IMPORTANT DISTINCTION: COURTS USING POST- CONVICTION ANALOGIES TO JUSTIFY THE PRE- CONVICTION (ARRESTEES & PRE-TRIAL DETAINEES) DNA REQUIREMENT .....	195
2. DEFECTS IN THE SAFEGUARDS.....	198
3. DNA FOR “IDENTIFICATION” PURPOSES USED AS A PRETEXT .....	200
4. PRIVACY INTEREST TRUMPING GOVERNMENTAL INTEREST.....	202
5. MISREPRESENTATIONS AND IMPLICATIONS .....	205
6. PROPOSED CHANGES WOULD UPHOLD THE INTENDED PURPOSE OF THE AMENDMENTS TO THE DNA ACT.....	206
IV. CONCLUSION.....	208

## I. INTRODUCTION

High school students Alex and Sarah have been dating for two years.<sup>1</sup> Alex is currently eighteen years old, while Sarah is only sixteen. On a dare from her friends, Sarah took multiple nude photos of herself and sent them via text message to Alex’s cell phone. After receiving the photos, Alex saved them on his phone. However, Alex’s mother later found the photos of Sarah and called Sarah’s mother to inform her of the situation. Sarah’s mother, in disbelief that her daughter—a minor—had anything to do with it, called the police to file a complaint against Alex. The police investigated these claims and discovered the pornographic photos of Sarah on his phone. Even though Alex proclaimed that he was innocent and that his girlfriend Sarah voluntarily sent him the unsolicited photos, he was arrested and charged with felony possession of child pornography.<sup>2</sup>

After Alex was arrested, law enforcement informed him that he was required to submit to a DNA test. Alex refused and continued to assert his innocence in the matter, but he was then physically forced to submit to a DNA test. The government then analyzed the collected sample to create a profile that was then

---

1. This is a fictional hypothetical.

2. According to 18 U.S.C. § 2252 (2012), possession of child pornography is a felony.

2013] **The DNA Act & The Fourth Amendment** 159

entered into a national DNA database. Yet, the charges against Alex were subsequently dropped.

Even though the charges against him were dropped, Alex continues to suffer from the repercussions and humiliation of the accusations. Also, the government still possesses Alex's DNA profile in the database, as well as his actual DNA sample. In order for Alex to have his DNA profile expunged from the database, he must petition the court for a certified, final court order stating that the charges against him have been dismissed. He also must insure that the FBI receives the court order. Only after Alex takes these steps will the government eventually remove his DNA profile from their database, and, even after this, the government may still retain Alex's actual DNA sample because there is no process or provision to compel its destruction.

\*\*\*

As this hypothetical demonstrates, the current federal statute<sup>3</sup> places the longstanding presumption of innocence in jeopardy and also endangers the deep-rooted notions of privacy and due process protected by the Fourth Amendment. Unbeknownst to Alex, possessing nude pictures of his girlfriend was illegal because, despite being only two years his junior, she was a minor. After the government forced him to submit to a DNA test, they could use his DNA profile to compare it to other crime-scene samples to determine if Alex committed any other crimes. All of this occurred before Alex was even allowed a trial to determine his innocence or guilt.

A fundamental cornerstone of the United States' criminal justice system has always been the presumption of innocence.<sup>4</sup> This "innocent until proven guilty" principle "in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."<sup>5</sup> Therefore, by mandating DNA collection from, and creating DNA profiles of, persons not yet convicted, 42 U.S.C. § 14135a(a)(1)(A) (the DNA Act) requires an unjustified invasion

---

3. 42 U.S.C. § 14135a (2012). Many states have also adopted similar statutes; however, this Comment specifically addresses the statute as it exists at the federal level.

4. *Coffin v. United States*, 156 U.S. 432, 453 (1895).

5. *Id.*

of privacy upon persons who are presumed to be innocent.<sup>6</sup>

---

6. 42 U.S.C. § 14135a(a)(1)(A) (2012). 42 U.S.C. § 14135a in its entirety states:

(a) Collection of DNA samples

(1) From individuals in custody

(A) The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested, facing charges, or convicted or from non-United States persons who are detained under the authority of the United States. The Attorney General may delegate this function within the Department of Justice as provided in section 510 of title 28 and may also authorize and direct any other agency of the United States that arrests or detains individuals or supervises individuals facing charges to carry out any function and exercise any power of the Attorney General under this section.

(B) The Director of the Bureau of Prisons shall collect a DNA sample from each individual in the custody of the Bureau of Prisons who is, or has been, convicted of a qualifying Federal offense (as determined under subsection (d) of this section) or a qualifying military offense, as determined under section 1565 of title 10.

(2) From individuals on release, parole, or probation

The probation office responsible for the supervision under Federal law of an individual on probation, parole, or supervised release shall collect a DNA sample from each such individual who is, or has been, convicted of a qualifying Federal offense (as determined under subsection (d) of this section) or a qualifying military offense, as determined under section 1565 of title 10.

(3) Individuals already in CODIS

For each individual described in paragraph (1) or (2), if the Combined DNA Index System (in this section referred to as "CODIS") of the Federal Bureau of Investigation contains a DNA analysis with respect to that individual, or if a DNA sample has been collected from that individual under section 1565 of title 10, the Attorney General, the Director of the Bureau of Prisons, or the probation office responsible (as applicable) may (but need not) collect a DNA sample from that individual.

(4) Collection procedures

(A) The Attorney General, the Director of the Bureau of Prisons, or the probation office responsible (as applicable) may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual who refuses to cooperate in the collection of the sample.

(B) The Attorney General, the Director of the Bureau of Prisons, or the probation office, as appropriate, may enter into agreements with units of State or local government or with private entities to provide for the collection of the samples described in paragraph (1) or (2).

(5) Criminal penalty

An individual from whom the collection of a DNA sample is authorized under this subsection who fails to cooperate in the collection of that sample shall be—

(A) guilty of a class A misdemeanor; and

(B) punished in accordance with title 18.

(b) Analysis and use of samples

The Attorney General, the Director of the Bureau of Prisons, or the probation office responsible (as applicable) shall furnish each DNA sample collected under subsection (a) of this section to the Director of the Federal Bureau of Investigation, who shall carry out a DNA analysis on each such DNA sample and include the results in CODIS.

(c) Definitions

In this section:

(1) The term "DNA sample" means a tissue, fluid, or other bodily sample of

2013]      **The DNA Act & The Fourth Amendment**      161

Innocent persons, still waiting to be either charged or tried, are now required to assist the government in solving other crimes through the use of their own DNA, and may be “found guilty” before they are even tried. The crucial portion of the DNA Act provides that “[t]he Attorney General may, as prescribed by the Attorney General in regulation, *collect DNA samples from individuals who are arrested, facing charges, or convicted or from non-United States persons who are detained under the authority of the United States.*”<sup>7</sup> The statute, in conjunction with its regulation,<sup>8</sup> not only allows, but mandates, the invasion of an individual’s privacy via DNA sampling and profiling for persons merely arrested and/or facing charges,<sup>9</sup> both of which are categories of persons who are not yet convicted of any crime.

Recent court decisions have questioned whether the mandatory DNA testing of arrestees and pre-trial detainees pursuant to this statute violates the Fourth Amendment.<sup>10</sup>

---

an individual on which a DNA analysis can be carried out.

(2) The term “DNA analysis” means analysis of the deoxyribonucleic acid (DNA) identification information in a bodily sample.

(d) Qualifying Federal offenses

The offenses that shall be treated for purposes of this section as qualifying Federal offenses are the following offenses, as determined by the Attorney General:

- (1) Any felony.
- (2) Any offense under chapter 109A of Title 18.
- (3) Any crime of violence (as that term is defined in section 16 of Title 18).
- (4) Any attempt or conspiracy to commit any of the offenses in paragraphs (1) through (3).

(e) Regulations

(1) In general

Except as provided in paragraph (2), this section shall be carried out under regulations prescribed by the Attorney General.

(2) Probation officers

The Director of the Administrative Office of the United States Courts shall make available model procedures for the activities of probation officers in carrying out this section.

(f) Commencement of collection

Collection of DNA samples under subsection (a) shall, subject to the availability of appropriations, commence not later than the date that is 180 days after December 19, 2000.

7. 42 U.S.C. § 14135a(a)(1)(A) (2012) (emphasis added).

8. 28 C.F.R. § 28.12(b) (2012) (“Any agency of the United States that arrests or detains individuals or supervises individuals facing charges *shall* collect DNA samples from individuals who are arrested, facing charges, or convicted . . . .”) (emphasis added).

9. 42 U.S.C. § 14135a(a)(1)(A) (2012).

10. See *United States v. Pool*, 645 F. Supp. 2d 903 (E.D. Cal. 2009), *aff’d*, *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010), *reh’g en banc granted*, 646 F.3d 659 (9th Cir. 2011), *and vacated*, 659 F.3d 761 (9th Cir. 2011); *United States v. Mitchell*,

Mistakenly, the majority of courts have ultimately held that the collection and profiling of DNA samples without suspicion, as permitted by the DNA Act, is entirely constitutional and not a violation of the Fourth Amendment.<sup>11</sup> These courts have found that the government's interests in the collection of DNA for identification purposes outweigh the diminished expectations of privacy of the defendants, who are considered either arrestees or pre-trial detainees.<sup>12</sup> Most recently, a state statute authorizing DNA collection of arrestees was argued before the United States Supreme Court in *Maryland v. King*.<sup>13</sup> Characterizing the DNA

---

652 F.3d 387 (3d Cir. 2011); *People v. Buza*, 129 Cal. Rptr. 3d 753 (2011), *modified*, (Aug. 31, 2011), *review granted and opinion superseded*, 262 P.3d 854 (Cal. 2011); *Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012); *see also infra* Section II.D. *See also* *Maryland v. King*, 133 S. Ct. 1958 (2013) (holding that an arrestee's DNA, like fingerprinting and photographs, is a routine booking procedure for identification purposes, which is reasonable under the Fourth Amendment).

11. *See infra* Section II.D.

12. *See infra* Section II.D.

13. 133 S. Ct. 1958 (2013). On February 26, 2013, the United States Supreme Court heard oral arguments regarding a state statute authorizing DNA collection of arrestees. *King v. State*, 425 Md. 550 (2012), *cert. granted*, 133 S. Ct. 594 (U.S. 2012) (No. 12-207). In *King*, the defendant, Alonzo Jay King, Jr., was arrested for first- and second-degree assault. *Id.* at 555. According to Maryland's DNA Collection Act, DNA may be collected from any person arrested for committing or attempting to commit "a crime of violence" or burglary. MD. CODE ANN., PUB. SAFETY § 2-504 (LexisNexis 2012). Accordingly, King's DNA sample was "collected, analyzed, and entered into Maryland's DNA database," which ultimately matched an unsolved rape from 2003. *King*, 425 Md. at 555. After this DNA match, which "provided the sole probable cause" for the subsequent grand jury indictment, a search warrant was issued for a second sample of King's DNA. *Id.* The second sample also matched the 2003 rape, and, after twice denying his motion to suppress the DNA evidence, King was convicted of first-degree rape. *Id.* at 555, 559-60. On appeal to the Maryland Court of Appeals, King successfully argued that the provision of Maryland's DNA Collection Act authorizing DNA collection of arrestees was in violation of the Fourth Amendment; thus, the trial court erred in denying his motion to suppress DNA evidence. *Id.* at 555-61. In reversing the trial court's decision, the court of appeals held that, since King's first DNA sample was illegally obtained, the second sample—acquired via search warrant based on the information from the first sample—was fruit of the poisonous tree. *Id.* at 602-03. The state of Maryland subsequently appealed, and, on November 9, 2012, the State's petition for writ of certiorari was granted by the United States Supreme Court. *Maryland v. King*, 133 S. Ct. 594 (2012). Even though the federal DNA statute was not on appeal to the Supreme Court, the federal government maintains an interest in the Court's ruling on similar state statutes. *See generally* Brief for the United States as Amicus Curiae Supporting Petitioner, *Maryland v. King*, 133 S. Ct. 594 (2012) (No. 12-207) 2013 WL 50686. Consequently, in addition to filing an amicus curiae brief in support of Maryland, the United States Solicitor General also filed a motion for leave to participate in oral argument as amicus curiae, which the Supreme Court granted. *Maryland v. King*, 133 S. Ct. 1236 (2013). Notably, during oral arguments, Justice

2013]      **The DNA Act & The Fourth Amendment**      163

collection statute as a more accurate means of identification, the Court, in a 5-4 decision, held “that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure.”<sup>14</sup> However, the conflicting majority and dissenting opinions in these decisions, as well as the disparate holdings of the various circuits, demonstrate that courts continue to struggle with this issue.<sup>15</sup>

In light of the *King* decision, this comment proposes that the current DNA Act violates the fundamental notions of privacy established by the Fourth Amendment, and, thus, it is unconstitutional. Once an individual’s DNA is taken and submitted into a federal database, there are no guarantees or unfailing safety measures for retrieval of that DNA if the arrest is subsequently voided, or if the charges are thrown out or dismissed. The statute should be modified to prevent this invasion of privacy and to ensure the protections provided by the Fourth Amendment to persons whose arrests or pre-trial detentions do not result in eventual conviction.

---

Alito stated, “I think this is perhaps the most important criminal procedure case that this Court has heard in decades.” Oral Argument at 33:04, *Maryland v. King*, 133 S. Ct. 594 (No. 12-207), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_audio\\_detail.aspx?argument\\_t=12-207](http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument_t=12-207).

14. *Maryland v. King*, 133 S. Ct. 1958 (2013). Released on June 3, 2013, the *King* opinion states that there is a need for law enforcement to accurately identify the arrestee, and that “[a] suspect’s criminal history is a critical part of his identity that officers should know when processing him for detention.” *Id.* Additionally, the Court notes the state statute in question allowed DNA collection for “serious crimes,” and the state statute contained certain safeguards—such as only allowing “DNA records that directly relate to the identification of individuals shall be collected and stored” and the prohibition of DNA tests for familial matches. *Id.* However, it is not clear whether those are limitations to its holding.

15. *See infra* Section II.D. *See also King*, 133 S. Ct. 1958 (Scalia, J., dissenting). In his dissent, Justice Scalia states that “[t]he Court’s assertion that DNA is being taken, not to solve crimes, but to *identify* those in the State’s custody, taxes the credulity of the credulous.” *Id.* He further argues that the majority’s “identification” reasoning is flawed. *Id.* “If identifying someone means finding out what unsolved crimes he has committed, then identification is indistinguishable from the ordinary law-enforcement aims that have never been thought to justify a suspicionless search.” *Id.* Additionally, Justice Scalia also rebuts the majority’s argument that the purpose of Maryland’s DNA statute was to allow for a more efficient means of determining an arrestee’s potential harmful risks to facility staff or to existing detainees and to assess whether King should be released on bail. *Id.* In doing so, Scalia notes the fact that King’s DNA sample was not matched to the prior unsolved crime until four months after his arrest, in which time King’s bail had already been set. *Id.*

Section II of this comment lays out the background procedural processes and jurisprudence that are essential for an understanding of the laws regarding DNA collection and profiling. This section explains the acts governing DNA sampling and analysis as well as the safeguards instituted to prevent abuse of DNA collection. Section II also details the right to privacy protected by the Fourth Amendment and how the case law concerning its application to DNA testing has evolved over the years. Additionally, this section describes the circuit split regarding the application of the Fourth Amendment to the DNA Act and addresses the two different approaches.

Section III of this comment proposes amending the DNA Act, while also maintaining Congress's intended purpose in passing the Act. Section III suggests that Congress either remove "arrestees and pre-trial detainees" from the statute or make alterations to the DNA Act and its regulations to place the burden of retrieving and expunging the DNA profile on the government. It also suggests that the DNA not be kept indefinitely and that definitive safeguards be implemented. Alternatively, this section proposes that courts should properly apply the requirements and analysis of what constitutes "legitimate governmental interests" and the importance of privacy interests. Additionally, Section III includes defenses to this proposed solution and a critique of the current statute and its limited precedential application after its expanded revision. This section further argues that courts treat the government's interests in DNA collection for "identification" purposes as a pretext, when the underlying intent to gain such information is to aid in solving other crimes. By upholding the DNA Act, courts guarantee that the government's interests in obtaining DNA to aid in solving past crimes will always trump an individual's interest in and expectation of privacy, which contravenes the purpose of the Fourth Amendment. Finally, Section IV summarizes the concerns regarding the current DNA Act and criticizes the precedent that allows for the deterioration of rights protected by the Fourth Amendment.

## **II. DNA COLLECTION AND FOURTH AMENDMENT RIGHTS—EXAMINING THE FEDERAL DNA COLLECTION STATUTE AND RELEVANT FOURTH AMENDMENT JURISPRUDENCE**

In order to understand the relationship between DNA

2013] **The DNA Act & The Fourth Amendment** 165

collection and the Fourth Amendment, it is important to understand the history and jurisprudence that led to the current status quo. This section will first outline the Violent Crime Control and Law Enforcement Act, and the DNA Act, which involve creating DNA profiles in the Combined DNA Index System, and then it will address the safeguards to the DNA Act. Additionally, it will explain the changes that broadened the DNA Act to include arrestees and pre-trial detainees subject to mandatory DNA collection. This section will then address the Fourth Amendment and privacy concerns associated with mandatory DNA collection, as well as summarize the circuit split regarding the application of the Fourth Amendment to DNA testing of convicted felons. Lastly, this section will discuss the application of the “totality of the circumstances” approach to mandatory DNA testing of arrestees and pre-trial detainees.

**A. THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT AND THE DNA ACT**

According to federal law, a “DNA sample” is defined as “a tissue, fluid, or other bodily sample of an individual on which a DNA analysis can be carried out.”<sup>16</sup> The definition of “DNA analysis” under federal law is an “analysis of the deoxyribonucleic acid (DNA) identification information in a bodily sample.”<sup>17</sup> In other words, a DNA sample is an actual physical sample from an individual, while DNA analysis is the examination and breakdown of that bodily sample into a DNA profile.<sup>18</sup> Both the DNA sample and DNA analysis are fundamental to the Violent Crime Control and Law Enforcement Act and the DNA Act.

In 1994, Congress approved and enacted the Violent Crime Control and Law Enforcement Act,<sup>19</sup> which gave the Federal Bureau of Investigation (FBI) the authorization to create an index of DNA samples.<sup>20</sup> After being given such authority, the FBI developed the Combined DNA Index System (CODIS), which

---

16. 42 U.S.C. § 14135a(c)(1) (2012).

17. *Id.* § 14135a(c)(2).

18. *United States v. Kincade*, 379 F.3d 813, 818-19 (9th Cir. 2004) (en banc) (plurality opinion).

19. *United States v. Mitchell*, 652 F.3d 387, 399 (3d Cir. 2011) (citing Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 42 U.S.C. §§ 13701–14223 (2012))).

20. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 42 U.S.C. §§ 13701–14223 (2012)).

allowed “forensics laboratories to exchange and compare DNA profiles electronically in an attempt to link evidence from crime scenes for which there are no suspects to DNA samples of convicted offenders on file in the system.”<sup>21</sup>

Later, in 2000, Congress passed the DNA Act, requiring a DNA sample collected “from each individual in the custody of the Bureau of Prisons who is, or has been, convicted of a qualifying Federal offense” and from each “individual on probation, parole, or supervised release.”<sup>22</sup> According to the DNA Act,

[t]he Attorney General, the Director of the Bureau of Prisons, or the probation office responsible (as applicable) may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual who refuses to cooperate in the collection of the sample.<sup>23</sup>

Furthermore, “[a]n individual from whom the collection of a DNA sample is authorized under this subsection who fails to cooperate in the collection of that sample shall be . . . guilty of a class A misdemeanor.”<sup>24</sup> Once the proper authority collects the DNA sample, the collection is sent to the FBI for analysis and entry into CODIS.<sup>25</sup>

The following sub-sections discuss the process for creating a DNA profile in CODIS, the statutory safeguards in the DNA Act, and the additional policies that were created by the FBI to afford protection against the improper use of the DNA profiles.

## 1. CREATING A DNA PROFILE IN CODIS

Once a DNA sample is collected, the samples are used in a DNA analysis, which is the identification and recording of an individual’s “genetic fingerprint.”<sup>26</sup> The DNA profiles use short tandem repeat technology (STR)<sup>27</sup> to analyze the presence of

---

21. *United States v. Mitchell*, 652 F.3d 387, 399 (3d Cir. 2011) (citing H.R. REP. NO. 106-900(I), at 8 (2000)).

22. DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, § 3(a)(1)-(2), 114 Stat. 2726 (codified as amended at 42 U.S.C. § 14135a(a)(1)-(2) (2012)).

23. 42 U.S.C. § 14135a(a)(4)(A) (2012). *See also Mitchell*, 652 F.3d at 399.

24. 42 U.S.C. § 14135a(a)(5)(A) (2012). *See also Mitchell*, 652 F.3d at 399.

25. 42 U.S.C. § 14135a(b) (2012). *See also Mitchell*, 652 F.3d at 399.

26. *United States v. Kincade*, 379 F.3d 813, 818-19 (9th Cir. 2004) (en banc) (plurality opinion).

27. STRs are:

2013]      **The DNA Act & The Fourth Amendment**      167

various alleles, which are codal sequences of genetic variants responsible for producing particular traits and characteristics.<sup>28</sup> These STRs are found at thirteen precise regions on an individual's DNA sample.<sup>29</sup> STR loci each can be found on the "junk DNA" and, according to the legislative history, the Director of the FBI purposely adopted testing "junk DNA" because "they are not associated with any known physical or medical characteristics."<sup>30</sup> Often STRs are thought of as repeated sequences of the "base pairs"<sup>31</sup> of DNA.<sup>32</sup> Accordingly, "there are

---

stretches of DNA where the DNA replicating mechanism appears to "stutter," resulting in different numbers of copies of repeated sequences. One common set of STRs involves repeated sequences of four bases -- for example, the sequence ACGT. Some people inherited from one parent a stretch of DNA with four repeats of ACGT; others inherited a stretch with six repeats, or one, or ten, or twenty-five. Each stretch with a different number of repeats is a different "allele." The fact that these stretches of DNA have a different number of these repeats makes them useful as "markers." Because their location on the chromosomes is known, they "mark" the location of genes that are nearby; because any individual will often have inherited a different length STR from his mother and his father, they can "mark" which chromosome came from which parent. Each of these STRs is found at one spot on one particular chromosome, a location known as a "locus."

Henry T. Greely et al., *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, 34 J.L. MED. & ETHICS 248, 249-50 (2006).

28. *Id.* at 876 n.5. An individual will have two alleles at each STR, one allele being inherited from each parent. William C. Thompson, et al., *Forensic DNA Statistics: Still Controversial in Some Cases*, THE CHAMPION, Dec. 2012, at 12-23. The National Commission on the Future of DNA Evidence provides the following illustrative example:

[A] specific allele of a particular gene is responsible for the enzyme that converts the amino acid phenylalanine into tyrosine. When this enzyme is missing or abnormal, the child develops the disease, phenylketonuria, or PKU. The result is severe mental retardation unless the child is treated; happily, with a specific diet the child develops normally.

*Id.* (citing NAT'L COMM. FOR THE FUTURE OF DNA EVIDENCE, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE FUTURE OF FORENSIC DNA TESTING 11, Nov. 2000, available at <https://www.ncjrs.gov/pdffiles1/nij/183697.pdf> [hereinafter FUTURE OF FORENSIC DNA TESTING]. "Because nearly 97 percent of DNA is non-genic, and because those 'regions show the same genetic variability that genes do, in fact usually more[,] . . . the words commonly used for describing genes (e.g., allele . . .) are carried over to [non-genic] DNA regions . . . ." United States v. Kincade, 379 F.3d 813, 819 (9th Cir. 2004) (citing FUTURE OF FORENSIC DNA TESTING, *supra* note 28, at 12). See also United States v. Mitchell, 652 F.3d 387, 400 (3d Cir. 2011).

29. *Boroian v. Mueller*, 616 F.3d 60, 65-66 (1st Cir. 2010).

30. *Kincade*, 379 F.3d at 818 (citing DNA Analysis Backlog Elimination Act of 2000, H.R. REP. NO. 106-900(I), at 27 (2000)). See also *Mitchell*, 652 F.3d at 400. But see *infra* Section III.B discussing how DNA technology is projected to expand in the future.

31. The sequence of the bases that make up one's DNA contains the genetic information encoded in DNA. Barbara J. Gislason & Mercedes Meyer, *Humans and Great Apes: A Search for Truth and Ethical Principles*, 8 J. ANIMAL & NAT. RESOURCE L. 1, 2 (2012). "A base is a repeating chemical unit in the DNA, which is

observed group variances in the representation of various alleles at the STR loci[;] however, DNA profiles derived by STR may yield probabilistic evidence of the contributor's race or sex."<sup>33</sup> The legislative history for the DNA Analysis Backlog Elimination Act of 2000 provides in pertinent part:

[F]urther assurance against the use of *convicted offender DNA profiles* for purposes other than law enforcement identification. In common parlance, they show only the configuration of DNA at selected "junk sites" which do not control or influence the expression of any trait . . .<sup>34</sup>

The term "junk DNA" is defined as "non-genic stretches of DNA not presently recognized as being responsible for trait coding."<sup>35</sup> Thus, the use of "junk DNA," as opposed to sections of the genetic code that code for specific traits, helps to preserve meaningful personal genetic information about the individual by disallowing such information from being published in CODIS.<sup>36</sup>

As mentioned, the DNA Act's legislative history states that these "genetic markers" were intentionally selected because they generally are not associated with any known physical characteristics.<sup>37</sup> As a result, using "junk DNA" creates a kind of "DNA fingerprint" which then gives specific information about the identity but little to no other personal information. The House Report further states:

DNA profiles generated in conformity with the national standards do not reveal information relating to any medical

---

also called a nucleotide." *Id.* In DNA, there are four nucleotides: Adenine (A), Thymine (T), Cytosine (C), and Guanine (G). *Id.* "Because of DNA's double-helix structure, these bases are found in opposing pairs on the strand, and thus the length of a segment of DNA could identically be measured in bases or base pairs." *Id.* at 3.

32. *United States v. Mitchell*, 652 F.3d 387, 400 (3d Cir. 2011) (citing Greely et al., *supra* at note 27, at 249).

33. *United States v. Kincade*, 379 F.3d 813, 818 (9th Cir. 2004) (citing *FUTURE OF FORENSIC DNA TESTING*, *supra* note 28, at 35, 39-42).

34. DNA Analysis Backlog Elimination Act of 2000, H.R. REP. NO. 106-900(I), at 27 (2000) (emphasis added).

35. *Mitchell*, 652 F.3d at 400 (citing *Kincade*, 379 F.3d at 818).

36. *Id.*

37. H.R. REP. NO. 106-900(I), at 27. *Contra* Jessica D. Gabel, *Redeeming the Genetic Groupon: Efficacy, Ethics, and Exploitation in Marketing DNA to the Masses*, 81 *MISS. L.J.* 363, 390 (2012) (citing J.M. BUTLER, *FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS* 17-22 (2nd ed. 2005)) ("[W]hat we once referred to as 'junk DNA' may later be found to contain valuable genetic information.").

2013]      **The DNA Act & The Fourth Amendment**      169

condition or other trait. By design, the effect of the system is to provide a kind of genetic fingerprint, which uniquely identifies an individual, but does not provide a basis for determining or inferring anything else about the person.<sup>38</sup>

Thus, the DNA profiles created by STRs are exceedingly individuated.<sup>39</sup> And, due to the significant number of alleles in each of the thirteen STR loci and extensive variations in their representation among humans, the probability “that two randomly selected individuals will share the same profile are infinitesimal—as are the chances that a person randomly selected from the population at large will present the same DNA profile as that drawn from crime-scene evidence.”<sup>40</sup>

## 2. SAFEGUARDS INCLUDED IN THE DNA ACT

When enacting the DNA Act, Congress included safeguards to prevent the improper use of the DNA samples.<sup>41</sup> First, it explicitly prohibits the use of DNA test results for specific reasons that are enumerated under privacy protection standards in the Violent Crime Control and Law Enforcement Act.<sup>42</sup> Further, the Violent Crime Control and Law Enforcement Act only allows the disclosure of DNA test results in the following situations:

- (A) to criminal justice agencies for law enforcement *identification* purposes;
- (B) in legal proceedings, if it is otherwise admissible . . . ;
- (C) for criminal defense purposes, to a defendant who shall have access to samples and analyses performed in connection with the case in which such defendant is charged; or
- (D) if personally identifiable information is removed, for a

---

38. H.R. REP. NO. 106-900(I), at 27.

39. *United States v. Kincade*, 379 F.3d 813, 818 (9th Cir. 2004) (en banc) (plurality opinion).

40. *Id.* at 819. See FUTURE OF FORENSIC DNA TESTING, *supra* note 28, at 7, 19-22, 39-42.

41. See 42 U.S.C. §§ 14135e(b), 14132(b)(3) (2012). See also *United States v. Mitchell*, 652 F.3d 387, 399 (3d Cir. 2011).

42. See 42 U.S.C. § 14135e(b) (2012), which states:

(b) Permissive uses. A sample or result described in subsection (a) may be disclosed under the circumstances under which disclosure of information included in the Combined DNA Index System is allowed, as specified in subparagraphs (A) through (D) of section 210304(b)(3) [of the Violent Crime Control and Law Enforcement Act of 1994 (codified as amended at 42 U.S.C. 14132(b)(3))].

population statistics database, for identification research and protocol development purposes, or for quality control purposes.<sup>43</sup>

The second safeguard set by the DNA Act states that “a person who knowingly discloses a sample or result . . . in any manner to any person not authorized to receive it, or obtains or uses, without authorization, such sample or result” carries a criminal penalty of a fine of up to \$250,000 or imprisonment for up to one year.<sup>44</sup> Each instance of an unlawful disclosure of the DNA sample or result is treated as and punishable as a separate offense.<sup>45</sup> Furthermore, the Violent Crime Control and Law Enforcement Act holds that a failure to act in accordance with “the quality control and privacy requirements” described in 42 U.S.C. § 14132(b) can result in cancellation of access to the DNA index CODIS.<sup>46</sup>

As a final safeguard, the Violent Crime Control and Law Enforcement Act requires the DNA record be expunged from CODIS in very specific and limited circumstances.<sup>47</sup> First, *if* a conviction for a qualifying offense is overturned, and “*if* the Director receives, for *each* conviction . . . , a certified copy of a final court order establishing that such conviction has been overturned,” then expungement is mandatory.<sup>48</sup> Second, expungement of the DNA record is required when a DNA sample is taken following an arrest but the charge is subsequently dismissed or results in an acquittal or the charge is not timely filed, and “*if* the Attorney General receives, for each charge against the person . . . , a certified copy of a final court order establishing” such.<sup>49</sup> Finally, even if expungement is required, sought, and obtained, only an individual’s “DNA *profile* will be expunged from CODIS, the Government will retain his DNA *sample* indefinitely.”<sup>50</sup>

---

43. 42 U.S.C. § 14132(b)(3) (2012) (emphasis added).

44. *Id.* § 14135e(c).

45. *Id.*

46. *Id.* § 14132(c).

47. *Id.* § 14132(d)(1)(A).

48. *Id.* § 14132(d)(1)(A)(i). *See also* United States v. Mitchell, 652 F.3d 387, 399 (3d Cir. 2011).

49. 42 U.S.C. § 14132(d)(1)(A)(ii) (2012). *See also* Mitchell, 652 F.3d at 399.

50. Mitchell, 652 F.3d at 420 (Rendell, J., dissenting).

### 3. ADDITIONAL PROTECTIONS CREATED IN PRACTICE

In addition to statutory safeguards, the FBI, in accordance with the legislative history's indication that additional safeguards should be added to protect against improper use of DNA profiles, later implemented two significant policies and practices.<sup>51</sup> The first policy safeguard states that the FBI limits the type and amount of information stored in CODIS.<sup>52</sup> The CODIS Program and the National DNA Index System states that “[n]o names or other personal identifiers of the offenders, arrestees, or detainees are stored using the CODIS software.”<sup>53</sup> The National DNA Index System part of CODIS is subsequently only composed of the following information:

- (1) The DNA profile—the set of identification characteristics or numerical representation at each of the various loci analyzed;
- (2) The Agency Identifier of the agency submitting the DNA profile;
- (3) The Specimen Identification Number—generally a number assigned sequentially at the time of sample collection. This number does not correspond to the individual's social security number, criminal history identifier, or correctional facility identifier; and
- (4) The DNA laboratory personnel associated with a DNA profile analysis.<sup>54</sup>

Thus, when conducting a search in CODIS, a user can access only a limited amount of information, none of which identifies the person to whom the profile belongs.<sup>55</sup> Such restrictions enacted by the FBI regarding the information stored in CODIS reflect

---

51. *United States v. Mitchell*, 652 F.3d 387, 400 (3d Cir. 2011) (plurality opinion). See FED. BUREAU OF INVESTIGATION, CODIS PROGRAM AND THE NATIONAL DNA INDEX SYSTEM FACT SHEET, available at <http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet> [hereinafter FED. BUREAU OF INVESTIGATION]. See also H.R. REP. NO. 106-900(I), at 27 (2000).

52. FED. BUREAU OF INVESTIGATION, *supra* note 51. See also *Mitchell*, 652 F.3d at 400.

53. FED. BUREAU OF INVESTIGATION, *supra* note 51. See also *Mitchell*, 652 F.3d at 399.

54. FED. BUREAU OF INVESTIGATION, *supra* note 51. See also DNA Analysis Backlog Elimination Act of 2000, H.R. REP. NO. 106-900(I), at 27 (2000); *Mitchell*, 652 F.3d at 399.

55. *Mitchell*, 652 F.3d at 400.

Congress's concern and reasons for creating strict safeguards for privacy.<sup>56</sup>

The second governmental policy protection involves the actual data used to create the profile.<sup>57</sup> Neither the DNA Act nor the Violent Crime Control and Law Enforcement Act specifically indicate which exact portion(s) of the DNA should be used when creating the profile to be entered into CODIS.<sup>58</sup> However, the FBI in practice established an in-house policy of examining and analyzing only "junk DNA."<sup>59</sup>

Furthermore, other circuit courts have held that they are aware of the considerable amount of sensitive information that can be extracted from an individual's DNA and the extremely strong privacy interests concerning this information.<sup>60</sup> Other courts have nonetheless rejected these concerns as speculative in nature and held that there are safeguards in place to prohibit abusive use of the DNA collection and analysis.<sup>61</sup> For example, the First Circuit stated that the "DNA Act offers a substantial deterrent to such hypothetical abuse by imposing a criminal penalty for misuse of DNA samples."<sup>62</sup> The court further held that limited weight should be given to the sheer potential of abuse, and instead courts should focus more on present circumstances.<sup>63</sup> Additionally, the court stated that the mere possibility that junk DNA someday may not be considered "junk" anymore does not radically change the defendant's privacy interest.<sup>64</sup>

---

56. DNA Analysis Backlog Elimination Act of 2000, H.R. REP. NO. 106-900(I), at 25.

57. *United States v. Mitchell*, 652 F.3d 387, 400 (3d Cir. 2011).

58. *See* 42 U.S.C. § 14135a(c)(2) (2012) (defining DNA analysis as "analysis of the deoxyribonucleic acid (DNA) identification information in a bodily sample"); *United States v. Weikert*, 504 F.3d 1, 13, n.10 (1st Cir. 2007).

59. *Weikert*, 504 F.3d at 3-4 n.10 ("The government has stated repeatedly that it uses only junk DNA in creating individual DNA profiles."). *See also supra* Section II.A.1.

60. *United States v. Amerson*, 483 F.3d 73, 85 (2d Cir. 2007).

61. *Mitchell*, 652 F.3d at 407. *See Boroian v. Mueller*, 616 F.3d 60, 69 (1st Cir. 2010) (holding that the concerns that "junk DNA" could potentially divulge more private information about the individual "are merely hypothetical possibilities"); *United States v. Karo*, 468 U.S. 705, 712 (1984) (stating that the Court "ha[s] never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment").

62. *Weikert*, 504 F.3d at 13.

63. *Id.*

64. *Id.* *But see infra* Section III.B.

2013]      **The DNA Act & The Fourth Amendment**      173

Conversely, the Second Circuit held that the analysis and maintenance of an offenders' information in CODIS is a considerable infringement and potentially a very serious invasion of privacy created by the DNA Act.<sup>65</sup> Several other courts have conveyed that after an individual's DNA is lawfully taken and created into a profile, "the individual necessarily loses a reasonable expectation of privacy with respect to *any* subsequent use of that profile."<sup>66</sup> Several other appellate courts "have ruled that expectations of privacy in lawfully obtained blood samples . . . are not objectively reasonable by 'society's' standards," and, in particular, numerous jurisdictions have found that once a DNA sample and profile is lawfully obtained, no further privacy interests remain in the sample or the profile.<sup>67</sup>

### B. CHANGES TO CATEGORIES OF PERSONS SUBJECT TO MANDATORY DNA COLLECTION

In 2005 and 2006, Congress expanded the categories of individuals subject to DNA collection via federal statute.<sup>68</sup> According to legislative history, the purpose of broadening the Act was to allow both state and federal law enforcement to apprehend "rapists, murderers, and other violent criminals whom it otherwise would be impossible to identify and arrest."<sup>69</sup>

---

65. *Nicholas v. Goord*, 430 F.3d 652, 670 (2d Cir. 2005). *See also* *United States v. Amerson*, 483 F.3d 73, 85 (2d Cir. 2007).

66. *Boroian v. Mueller*, 616 F.3d 60, 68 (1st Cir. 2010). *See, e.g., State v. Hauge*, 79 P.3d 131, 144 (Haw. 2003) (citing state appellate decisions for the proposition that once a DNA profile has been lawfully procured from an offender, "no privacy interest persists in either the sample or the profile"); *see also Green v. Berge*, 354 F.3d 675, 680 (7th Cir. 2004) (Easterbrook, J., concurring) (stating, in response to a challenge to the state DNA collection statute, that lawfully obtained DNA samples may be put to a variety of uses because "the fourth amendment does not control how properly collected information is deployed").

67. *Hauge*, 79 P.3d at 144. *See* *People v. Baylor*, 118 Cal. Rptr. 2d 518 (Cal. Ct. App. 2002); *Smith v. State*, 744 N.E.2d 437, 439 (Ind. 2001) ("[O]nce DNA is used to create a profile, the profile becomes the property of the Crime Lab."); *Patterson v. State*, 742 N.E.2d 4, 11 (Ind. Ct. App. 2000), *reh'g granted*, 744 N.E.2d 945 (Ind. Ct. App. 2001); *Wilson v. State*, 752 A.2d 1250, 1272 (2000); *People v. King*, 232 A.D.2d 111, 117 (1997); *State v. Barkley*, 551 S.E.2d 131, 135 (2001).

68. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, tit. X, § 1004, 119 Stat. 2960 (2006) (codified as amended at 42 U.S.C. § 14135a(a)(1)(A) (2006)). *See also* *United States v. Mitchell*, 652 F.3d 387, 401 (3d Cir. 2011). It was specifically the DNA Fingerprinting Act of 2005, which is included within the Violence Against Women and Department of Justice Reauthorization Act of 2005, that extended the act to all persons arrested or detained. *Id.*

69. 151 CONG. REC. S9528 (daily ed. July 29, 2005) (statement of Sen. Kyl),

Additionally, Senator Kyl, the sponsor of the bill, stated:

The principal provisions of the DNA Fingerprint Act make it easier to include and keep the DNA profiles of criminal arrestees in the National DNA Index System, where that profile can be compared to crime-scene evidence. By removing current barriers to maintaining data from criminal arrestees, the act will allow the creation of a comprehensive, robust database that will make it possible to catch serial rapists and murderers before they commit more crimes.<sup>70</sup>

Senator Kyl further argued that he was certain that the adoption of this act would prevent rape and other violent crimes.<sup>71</sup>

In its current form, the DNA Act allows the Attorney General to “collect DNA samples from individuals who are *arrested, facing charges, or convicted*.”<sup>72</sup> This most recent augmentation of the act took effect as of January 9, 2009, along with other similar regulations instituted by the Attorney General.<sup>73</sup> In pertinent part, the regulation states that “[a]ny agency of the United States that arrests or detains individuals or supervises individuals facing charges shall collect DNA samples from individuals who are arrested, facing charges, or convicted.”<sup>74</sup> Also, it recognizes the authority of the Attorney General to place restrictions on which individuals from whom DNA samples may be collected.<sup>75</sup> Furthermore, the collection of DNA samples “may be limited to individuals from whom the agency collects fingerprints and may be subject to other limitations or exceptions approved by the Attorney General.”<sup>76</sup> While the DNA Act itself only *permits* the collection of DNA samples from individuals who are arrested or facing charges, the regulations governing enforcement *mandate* such collection.<sup>77</sup>

---

available at <http://www.gpo.gov/fdsys/pkg/CREC-2005-07-29/pdf/CREC-2005-07-29.pdf>.

70. *Id.*

71. *Id.*

72. 42 U.S.C. § 14135a(a)(1)(A) (2012) (emphasis added); *United States v. Mitchell*, 652 F.3d 387, 401 (3d Cir. 2011).

73. *Mitchell*, 652 F.3d at 401; 28 C.F.R. § 28.12 (2009).

74. 28 C.F.R. § 28.12(b) (2009).

75. *Mitchell*, 652 F.3d at 401; 28 C.F.R. § 28.12 (2009).

76. 28 C.F.R. § 28.12(b) (2009).

77. *Mitchell*, 652 F.3d at 401 (emphasis added).

**C. THE FOURTH AMENDMENT AND THE RIGHT TO PRIVACY**

The United States Constitution protects people from unreasonable searches and seizures.<sup>78</sup> The Fourth Amendment states:

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.<sup>79</sup>

Probable cause or a warrant are required prior to a search or seizure in order for it to be deemed reasonable and constitutional.<sup>80</sup> Even though the reasonableness factor has never been specifically defined, over the years, the United States Supreme Court has delineated many of the parameters of what constitutes reasonable searches and seizures and the very few exceptions to warrantless searches.<sup>81</sup> Furthermore, the exclusionary rule<sup>82</sup> requires weightier justifications for interference with a person's life, liberty, and freedom with less than probable cause.<sup>83</sup>

Prior to the appointment of Earl Warren to the United

---

78. U.S. CONST. amend. IV.

79. *Id.*

80. Michael Mello, *Stop: Terry v. Ohio Step-by-Step, as an Illustration of Fourth Amendment Analysis (or, What Did Detective Martin McFadden Know, and When Did He Know It?)*, 44 No. 4 CRIM. L. BULL. art. 5 (2008).

81. See *Katz v. United States*, 389 U.S. 347, 357 (1967) (noting that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions”); see also *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that the officer had reasonable suspicion to believe the suspect was armed and engaged in a criminal activity, and thus the patting down of the defendant's outer clothing was, in the totality of the circumstances, constitutional); *United States v. Sokolow*, 490 U.S. 1 (1989) (noting that reasonable suspicion, like probable cause, cannot be reduced to fixed legal rules, but instead courts must consider the totality of circumstances).

82. The exclusionary rule, as implemented in *Weeks v. United States*, “generally requires a court to exclude evidence obtained through illegal means from consideration at trial.” Laurence Naughton, *Taking Back Our Streets: Attempts in the 104th Congress to Reform the Exclusionary Rule*, 38 B.C. L. REV. 205, 210 (1996) (citing *Weeks v. United States*, 232 U.S. 383, 398 (1914)).

83. Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 425 (2004).

States Supreme Court, the idea of a constitutional right to privacy did not exist as enforceable law.<sup>84</sup> The Warren Court established and entrenched the idea that privacy was part and parcel of the Constitution's guarantees to the people through its holdings over the years.<sup>85</sup> The jurisprudence of the Supreme Court in those post-Warren years focused on curtailing the powers of the government and adhered to the ideal displayed by the language of our founding documents of freedom and individual liberties.<sup>86</sup> This was nowhere more evident than in *Griswold v. Connecticut*, where the right to privacy was read into the Fourth Amendment.<sup>87</sup> *Griswold* created a high water mark for the rights of the accused and the fair treatment of suspects, and it upheld the ideal that people are innocent until proven guilty and should be treated as such.

### 1. THE EXPECTATION OF PRIVACY

After the right to privacy was interpreted as part of the Fourth Amendment, courts then faced the challenge of defining its limits. In *Katz v. United States*, the Supreme Court stated that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion . . . ."<sup>88</sup> The Court further held that "the Fourth Amendment protects people . . . . What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."<sup>89</sup> However, if an individual seeks to preserve something as private, even if it is in a publicly accessible area, it still may be constitutionally protected.<sup>90</sup>

The jurisprudence following the *Katz* decision adopted

---

84. G. Sidney Buchanan, *The Right of Privacy: Past, Present, and Future*, 16 OHIO N.U. L. REV. 403, 403 (1989).

85. *Id.* at 1336-38.

86. See *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963) (extending the right to counsel to all indigent defendants); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (establishing that criminal suspects should be informed of their rights); *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) (applying the exclusionary rule prohibiting the use of illegally seized evidence at trial to the States).

87. *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965).

88. *Katz v. United States*, 389 U.S. 347, 350 (1967).

89. *Id.* at 351.

90. *Id.* at 351-52 (holding that a person has a reasonable expectation of privacy while using a public telephone booth).

2013]      **The DNA Act & The Fourth Amendment**      177

Justice Harlan's concurrence, which established the concept of an individual's "reasonable expectation of privacy."<sup>91</sup> Courts found that under the Fourth Amendment, the controlling definition of a search requires that the court consider whether there was a "legitimate expectation of privacy in the invaded place."<sup>92</sup> A legitimate expectation of privacy exists if a two-prong test is satisfied.<sup>93</sup> The first prong requires a subjective expectation of privacy in that it inquires whether an individualized expectation of privacy actually existed, while the second prong addresses whether that expectation is one that society recognizes and considers reasonable.<sup>94</sup> Conversely, courts have identified situations where no expectation of privacy existed.<sup>95</sup>

---

91. *United States v. Jones*, 132 S. Ct. 945, 950 (2012) (citing *Katz*, 389 U.S. at 351 (Harlan, J., concurring)) ("Our later cases have applied the analysis of Justice Harlan's concurrence in that case, which said that a violation occurs when government officers violate a person's 'reasonable expectation of privacy.'"). *See also* *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968) (noting that the "capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion.").

92. *Charles Alan Wright, et al.*, 3A FED. PRAC. & PROC. CRIM. § 663 (4th ed. 2011) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978)).

93. *Id.* (stating that

[t]he *Katz* definition of search has evolved into a two-part test. Both prongs must be satisfied for a search to exist. The first prong [is] whether the defendant has a subjective expectation of privacy that was violated . . . . The second prong, whether the defendant's expectation of privacy is one society recognizes as reasonable, is the main focus of the cases. The test is often shortened and expressed as whether the defendant has a reasonable expectation of privacy that police violated.)

94. *Wright et al.*, *supra* note 92. *See Rakas*, 439 U.S. at 143. "A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.'" *Id.* at 143 n.12. But legitimate "expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Id.* *See also* *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) ("A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.").

95. *See Minnesota v. Carter*, 525 U.S. 83 (1998) (noting that individuals who were briefly in another person's apartment with the sole purpose of packaging cocaine, "had no legitimate expectation of privacy in the apartment, and, thus, any search that may have occurred did not violate their Fourth Amendment rights"); *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) ("[S]ociety is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and . . . , accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confine of the prison cell."); *United States v. Cunag*, 386 F.3d 888, 895-96 (9th Cir. 2004) (holding that the defendant had no legitimate expectation of privacy in a hotel room because he used fraud to rent the room and never lawfully occupied it); *Johnson v. Quander*, 440 F.3d 489, 498 (D.C.

In using the expectation of privacy test, courts were faced with addressing law enforcement's plain perceptions of the evidence with technology that augmented their perceptions.<sup>96</sup> The Court concluded that without a warrant, the use of devices, such as thermal imagers, violated the Fourth Amendment because such "sense-enhancing" technology "explore[s] details of the home that would previously have been unknowable without physical intrusion."<sup>97</sup> Moving forward, the Court has frequently held that houses enjoy the highest expectation of privacy and the greatest Fourth Amendment protection.<sup>98</sup> However, when faced with applying the Fourth Amendment and the expectation of privacy to cases challenging the DNA Act, courts have differed as to which analysis to implement.

## 2. CIRCUIT SPLIT IN APPLYING THE FOURTH AMENDMENT TO THE DNA ACT

Prior to the 2005 and 2006 extension of the DNA Act, nearly every circuit court addressed the constitutional challenge that asserted the DNA sampling and indexing statute was an unreasonable search that violated the Fourth Amendment.<sup>99</sup> Prior to the amendment to the DNA Act, courts upheld the DNA statute as to individuals who had been convicted and incarcerated or who were on probation, parole, or supervised release.<sup>100</sup>

---

Cir. 2006) (finding that accessing a post-probationer's DNA records stored in the CODIS database is not a search).

96. *Kyllo v. United States*, 533 U.S. 27 (2001) (noting that, if "hot spots" are detected by a thermal imager, it may strengthen existing suspicion that marijuana is being grown on the premises, and such results may be used to establish probable cause to obtain a search warrant; thus, the Court held that it was an unconstitutional search).

97. *Id.* at 40. See also *Wright et al.*, *supra* note 92.

98. *Wright et al.*, *supra* note 92. See *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (holding that a "firm line" must be drawn around an individual's home, which prohibits a search without a warrant, absent exigent circumstances, regardless of whether probable cause to arrest the individual exists).

99. *United States v. Mitchell*, 652 F.3d 387, 402 (3d Cir. 2011).

100. *Id.* See, e.g., *United States v. Stewart*, 532 F.3d 32, 36-37 (1st Cir. 2008); *United States v. Kriesel*, 508 F.3d 941, 950 (9th Cir. 2007); *United States v. Weikert*, 504 F.3d 1, 15 (1st Cir. 2007); *Banks v. United States*, 490 F.3d 1178, 1193 (10th Cir. 2007); *United States v. Amerson*, 483 F.3d 73, 75 (2d Cir. 2007); *United States v. Hook*, 471 F.3d 766, 773 (7th Cir. 2006); *United States v. Conley*, 453 F.3d 674, 679-81 (6th Cir. 2006); *United States v. Kraklio*, 451 F.3d 922, 924-25 (8th Cir. 2006); *Johnson v. Quander*, 440 F.3d 489, 497 (D.C. Cir. 2006); *Nicholas v. Goord*, 430 F.3d 652, 655, 658 (2d Cir. 2005); *United States v. Sczubelek*, 402 F.3d 175, 177 (3d Cir. 2005); *United States v. Kincaide*, 379 F.3d 813, 839 (9th Cir. 2004) (en banc) (plurality opinion). In *Boroian*, the First Circuit reviewed the issue of whether a

2013]      **The DNA Act & The Fourth Amendment**      179

However, the proper method of analyzing and applying the Fourth Amendment to the DNA Act caused circuits to split in their decisions.<sup>101</sup>

The two approaches included: (1) the totality of the circumstances approach, and (2) the special needs exception approach. The majority of courts have performed a “totality of the circumstances” test.<sup>102</sup> Reasonableness is the benchmark by which the Fourth Amendment is analyzed, and whether a search is reasonable “is determined by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”<sup>103</sup> Therefore, when implementing the totality of the circumstances test, courts balance the degree to which the search infringes upon an individual’s right to privacy against the degree to which the search is required for the advancement of legitimate governmental interests.<sup>104</sup> The majority of circuits—including the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth,<sup>105</sup> Eleventh, and District of Columbia—endorsed the totality of the circumstances approach when applying the Fourth Amendment to the DNA Act.<sup>106</sup>

---

former probationer’s DNA profile retained in CODIS by the Government required a Fourth Amendment analysis. The First Circuit held that the “FBI’s retention and periodic matching of [the offender’s DNA] profile against other profiles in CODIS for the purpose of identification” did not qualify as an “intrusion on the offender’s legitimate expectation of privacy and thus [did] not constitute a separate Fourth Amendment search.” *Boroian v. Mueller*, 616 F.3d 60, 68 (1st Cir. 2010).

101. *United States v. Mitchell*, 652 F.3d 387, 402-03 (3d Cir. 2011).

102. Ashley Eiler, *Arrested Development: Reforming the Federal All-Arrestee DNA Collection Statute to Comply with the Fourth Amendment*, 79 GEO. WASH. L. REV. 1201, 1213 (2011) (citing *United States v. Knights*, 534 U.S. 112, 118 (2001)) (internal citations omitted).

103. *United States v. Knights*, 534 U.S. 112, 118-19, 122 (2001) (citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

104. *Mitchell*, 652 F.3d at 402 (citing *Knights*, 534 U.S. at 119).

105. See *infra* Section II.D. See also *United States v. Pool*, 645 F. Supp. 2d 903, 913 (E.D. Cal. 2009), *aff’d*, *United States v. Pool*, 621 F.3d 1213, 1214 (9th Cir. 2010), *reh’g en banc granted*, 646 F.3d 659 (9th Cir. 2011), *and vacated*, 659 F.3d 761 (9th Cir. 2011); *People v. Buza*, 197 Cal. App. 4th 1424 (2011), *as modified*, (Aug. 31, 2011), *review granted and opinion superseded*, 262 P.3d 854 (Cal. 2011); *Haskell v. Harris*, 669 F.3d 1049, 1058 (9th Cir. 2012).

106. See *United States v. Weikert*, 504 F.3d 1, 9-11 (1st Cir. 2007) (stating “the centrality of law enforcement objectives to the DNA Act buttresses our conclusion that the totality of the circumstances analysis, rather than the special needs analysis, is appropriate”); *United States v. Sczubelek*, 402 F.3d 175, 184-86 (3d Cir. 2005) (finding that the totality of the circumstances test allows for mandating DNA

However, a minority of circuits use a different approach—the Supreme Court’s “special needs” exception to the warrant requirement of the Fourth Amendment.<sup>107</sup> This exception permits a search without a warrant when “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”<sup>108</sup> Additionally, the Supreme Court has applied the special needs exception to non-criminal investigatory types of cases and held that, “[i]n these cases, a significant governmental interest, such as the

---

collection from a criminal offender absent suspicion); *Groceman v. U.S. Dep’t of Justice*, 354 F.3d 411, 413 (5th Cir. 2004) (holding that “[c]ourts may consider the totality of circumstances, including a person’s status as an inmate or probationer, in determining whether his reasonable expectation of privacy is outweighed by other factors”); *Wilson v. Collins*, 517 F.3d 421, 427 (6th Cir. 2008) (noting that a similar state DNA statute was correctly addressed under the totality of the circumstances test); *United States v. Kraklio*, 451 F.3d 922, 924-25 (8th Cir. 2006) (finding the DNA Act constitutional under the totality of the circumstance test); *United States v. Kriesel*, 508 F.3d 941, 946 (9th Cir. 2007) (reaffirming the totality of circumstances test as the key to determining whether a search is reasonable); *Padgett v. Donald*, 401 F.3d 1273, 1278 n.4 (11th Cir. 2005) (finding the DNA statute constitutional under a totality of the circumstances analysis); *Mitchell*, 652 F.3d at 405-16.

107. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). *See also* *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (“Although we usually require that a search be undertaken only pursuant to a warrant (and thus supported by probable cause, as the Constitution says warrants must be) . . . we have permitted exceptions when ‘special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’”) (citing *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring)).

108. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). The Second Circuit noted that most cases considered by the Supreme Court under the “special needs” analysis “involved individuals with a diminished expectation of privacy.” *Nicholas v. Goord*, 430 F.3d 652, 666-67 (2d Cir. 2005). *See, e.g.*, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653-57 (1995). Furthermore, the Second Circuit held that a diminished expectation of privacy is a primary requirement for special needs cases. *United States v. Lifshitz*, 369 F.3d 173, 186 (2d Cir. 2004) (“[T]hose subject to the search must enjoy a diminished expectation of privacy, partly occasioned by the special nature of their situation, and partly derived from the fact that they are notified in advance of the search policy”). The Second Circuit also stated that the “special needs” cases “reaffirm ‘the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance.’” *Roe v. Marcotte*, 193 F.3d 72, 78 (2d Cir. 1999) (quoting *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989)). *See also* *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 618-24 (1989) (holding that “[t]he Government’s interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, ‘likewise presents’ a special needs exception beyond normal law enforcement that allows departure from the typical warrant and probable-cause requirements” (internal citations omitted)).

2013]      **The DNA Act & The Fourth Amendment**      181

maintenance of institutional security, public safety, and order, must prevail over a minimal intrusion on an individual's privacy rights to justify a search on less than individualized suspicion."<sup>109</sup> The Court implemented the special needs exception regarding searches and seizures to keep order and promote security.<sup>110</sup> The Second, Seventh, and Tenth circuits have adopted this approach.<sup>111</sup> The United States Supreme Court indicated in *Maryland v. King* that the special needs approach did not apply to DNA collection statutes.<sup>112</sup>

---

109. *Roe v. Marcotte*, 193 F.3d 72, 78 (2d Cir. 1999).

110. *See O'Connor v. Ortega*, 480 U.S. 709, 725 (1987) (providing that the search of desks and offices of employees "should be judged by the standard of reasonableness" expressed in the "special needs" exception); *T.L.O.*, 469 U.S. at 346-47 (holding that the search of student property in schools without probable cause was reasonable); *Skinner*, 489 U.S. at 633 (noting that, in highly regulated industries, blood and urine tests to determine alcohol use following rail accidents are justified by safety concerns); *Von Raab*, 489 U.S. 656, 666-67 (stating that the United States Customs Service's mandatory testing of employees who applied for promotion or transfer to positions directly involving the interdiction of illegal drugs or to positions that required employees to carry a firearm was reasonable despite absence of probable cause or some level of reasonable suspicion); *Marcotte*, 193 F.3d at 78; *see also* *Eiler*, *supra* note 102, at 1213-14 (noting that, while a majority of federal circuit courts adopted the totality of circumstances analysis, a minority of federal circuits implemented the special needs exception).

111. *Marcotte*, 193 F.3d at 78; *Nicholas v. Goord*, 430 F.3d 652, 666-67 (2d Cir. 2005) (rejecting the "traditional Fourth Amendment balancing test" and instead "applying the special-needs test to suspicionless-search regimes"); *United States v. Hook*, 471 F.3d 766, 772-73 (7th Cir. 2006), *aff'd*, No. 04 CR 1045, 2006 WL 5152924 (N.D. Ill. Jan. 20, 2006) (applying the "special needs" approach yet recognizing that other circuits use the totality of circumstances test); *United States v. Warren*, 566 F.3d 1211, 1213 (10th Cir. 2009) (upholding a search as a special-needs parole search because the participating police officer acted under the direction of a parole officer). *See also* *United States v. Amerson*, 483 F.3d 73, 78 (2d Cir. 2007) (noting the circuit split but opting to follow the "special needs" approach); *Green v. Berge*, 354 F.3d 675, 677-78 (7th Cir. 2004) (upholding Wisconsin's DNA collection statute under the "special needs" doctrine). The Tenth Circuit has acknowledged that its "own precedents are divided." *Banks v. United States*, 490 F.3d 1178, 1183 (10th Cir. 2007). In *Banks*, the court applied the totality of the circumstances test. However, in its most recent case, the Tenth Circuit applied the "special needs" exception. *Id.* at 1184; *Warren*, 566 F.3d at 1213.

112. *Maryland v. King*, 133 S. Ct. 1958 (2013) (The majority stated that even though the special needs cases were in line with the result reached in *King*, they "do not have a direct bearing on the issues presented in this case, because unlike the search of a citizen who has not been suspected of a wrong, a detainee has a reduced expectation of privacy.").

### 3. COURTS ANALYZE THE COLLECTION OF DNA FOLLOWING A CONVICTION

The majority of courts have applied the totality of circumstances approach.<sup>113</sup> In *United States v. Sczubelek*—a case pertaining to the constitutionality of the DNA Act as applied to individuals out on supervised release—the Third Circuit observed and analyzed both the reasonableness standard approach and the special needs exception approach and concluded that the totality of the circumstances test was the proper analysis.<sup>114</sup> The special needs approach was rejected in *Sczubelek* because “the purpose for the collection of DNA goes well beyond the supervision by the Probation Office of an individual on supervised release.”<sup>115</sup>

*Sczubelek*, as well as other cases which adopted the totality of the circumstances approach, rely on *United States v. Knights*<sup>116</sup> and *Samson v. California*,<sup>117</sup> which concern searches of a probationer and a parolee respectively.<sup>118</sup> However, the totality of the circumstances approach also applies to circumstances beyond situations involving supervised release.<sup>119</sup> The Supreme Court has held that “the key principle of the Fourth Amendment” is the balancing of competing interests.<sup>120</sup> The Fourth Amendment approach utilized to evaluate the reasonableness of a contested search is the balancing of the totality of the circumstances.<sup>121</sup>

It is first useful to examine how the courts upholding DNA

---

113. See *supra* Section II.C.2.

114. *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005).

115. *Id.* at 184; *United States v. Weikert*, 504 F.3d 1, 10 (1st Cir. 2007) (finding that the special needs test is inappropriate as “law enforcement objectives predominate” in the collection of DNA).

116. *United States v. Knights*, 534 U.S. 112, 188 (2001).

117. *Samson v. California*, 547 U.S. 843 (2006). In *Samson*, the Supreme Court answered the question, left unaddressed in *Knights*, of whether the status of a conditional releasee diminishes or eliminates a released prisoner’s reasonable expectation of privacy so as to allow for suspicionless searches of their person after release. The Court held such searches without any individualized suspicion were constitutional.

118. *United States v. Mitchell*, 652 F.3d 387, 403 (3d Cir. 2011). See also *Knights*, 534 U.S. 112 (2001); *Samson*, 547 U.S. 843 (2006).

119. *Mitchell*, 652 F.3d at 403.

120. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981)) (internal citations omitted). See also *Bell v. Wolfish*, 441 U.S. 520, 559-60 (1979) (upholding the constitutionality of strip searches of pre-trial detainees under a totality of the circumstances balancing approach).

121. *Mitchell*, 652 F.3d at 403 (citing *Knights*, 534 U.S. 112, 118).

2013]      **The DNA Act & The Fourth Amendment**      183

collection following conviction have evaluated and applied the totality of the circumstances test in concluding that such searches were reasonable.<sup>122</sup> “[C]hallenges to the DNA Act” were initiated “by individuals who were incarcerated following convictions (prisoners) or by individuals on probation, parole, or supervised release (collectively, probationers).”<sup>123</sup> *Sczubelek* involved an examination into “the taking of the [DNA] sample under the . . . *Knights* totality of the circumstances test” and held that “the taking of a DNA sample from an individual on supervised release is not an unreasonable search.”<sup>124</sup>

In conducting the Fourth Amendment balancing test, courts have considered a variety of factors.<sup>125</sup> First, the court in *Skinner v. Railway Labor Executives’ Association et al.* held the intrusive nature of a blood test to be minimal.<sup>126</sup> Secondly, the *Sczubelek* court held that while a blood test is only a slight intrusion into an ordinary citizen’s privacy, it would be considered unconstitutional, but individuals on supervised release and individuals on probation “do not enjoy the absolute liberty to which every citizen is entitled.”<sup>127</sup>

In *Sczubelek*, considering the defendant’s status as an individual convicted of a felony and who was on supervised release, the court held that he maintained a “reduced right to privacy—and in particular to privacy of identity . . . . Individuals on supervised release cannot reasonably expect to keep information bearing on their physical identity from government records.”<sup>128</sup> Therefore, when determining the degree of intrusion the DNA collection had on his privacy, the court held that “for criminal offenders the privacy interests implicated by the collection of DNA are minimal.”<sup>129</sup> On the other hand, the Third Circuit agreed that the advancement of legitimate governmental interests had a high enough degree of compelling interests to

---

122. *United States v. Mitchell*, 652 F.3d 387, 403 (3d Cir. 2011).

123. *Id.*

124. *Id.* at 403-04 (citing *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005)).

125. *Id.* at 404.

126. *Id.* (citing *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 625 (1989)).

127. *Sczubelek*, 402 F.3d at 184 (quoting *Knights*, 534 U.S. at 119 (internal quotations and citations omitted)).

128. *Id.* at 184-85.

129. *Id.*

warrant DNA collection of criminal offenders.<sup>130</sup> The court reasoned that “[a] DNA database promotes increased accuracy in the investigation and prosecution of criminal cases” and will “aid in solving crimes when they occur in the future,” “help to exculpate individuals who are serving sentences of imprisonment for crimes they did not commit,” and “help to eliminate individuals from suspect lists when crimes occur.”<sup>131</sup> Thus, the *Sczubelek* court found that the “interest in accurate criminal investigations and prosecutions is a compelling interest that the DNA Act can reasonably be said to advance.”<sup>132</sup>

The Third Circuit then analyzed other factors that contributed to determining if the search was reasonable.<sup>133</sup> The court considered the DNA Act’s prior version, in which the court held that the Act alone left no discretion and clearly stated from whom the DNA sample must be taken.<sup>134</sup> The court further considered that the DNA Act specifically delineates “permissible uses for the samples and punishes unauthorized disclosure of DNA samples.”<sup>135</sup> The Act also grants the right to expunge the DNA profile from CODIS upon reversal or dismissal of a conviction.<sup>136</sup> Ultimately, the Third Circuit concluded that, when evaluating the totality of the circumstances, the collection and analysis of probationers’ DNA samples did not violate the Fourth Amendment because “the degree to which the DNA Act serves to meet [public interests] [outweighed] the minimal intrusion occasioned by giving a blood sample and the reduced privacy expectations of individuals on supervised release.”<sup>137</sup>

Other circuits have also conducted similar analyses and generally relied on the same factors utilized in *Sczubelek*.<sup>138</sup> However, the Ninth Circuit recognized additional factors, such as the government’s interest in collecting DNA from a convicted

---

130. *United States v. Sczubelek*, 402 F.3d 175, 184-85 (3d Cir. 2005).

131. *Id.*

132. *Id.*

133. *United States v. Mitchell*, 652 F.3d 387, 404 (3d Cir. 2011).

134. *Sczubelek*, 402 F.3d at 187.

135. *Mitchell*, 652 F.3d at 404 (citing *Sczubelek*, 402 F.3d at 187).

136. *Id.*

137. *Id.* at 404.

138. *United States v. Kriesel*, 508 F.3d 941, 949-950 (9th Cir. 2007). *See also* *United States v. Pool*, 621 F.3d 1213, 1218 (9th Cir. 2010), *reh’g en banc granted*, 646 F.3d 659 (9th Cir. 2011), *and vacated*, 659 F.3d 761 (9th Cir. 2011); *Haskell v. Harris*, 669 F.3d 1049, 1053-54 (9th Cir. 2012); *Mitchell*, 652 F.3d at 404-05.

2013]      **The DNA Act & The Fourth Amendment**      185

felon currently on supervised release to aid in the solution of past crimes.<sup>139</sup> Also, courts found the fingerprinting process to be akin to DNA profiling:

To be sure, genetic fingerprints differ somewhat from their metacarpal brethren, and future technological advances in DNA testing (coupled with possible expansions of the DNA Act's scope) may empower the government to conduct wide-ranging "DNA dragnets" that raise justifiable citations to George Orwell. Today, however, . . . CODIS operates much like an old-fashioned fingerprint database (albeit more efficiently).<sup>140</sup>

Therefore, the Second Circuit stated that DNA, like fingerprints, establishes a record of the individual's identity that is based on scientific knowledge.<sup>141</sup> Hence, the Third Circuit concluded that a DNA profile is merely "fingerprints for the twenty-first century."<sup>142</sup>

**D. THE APPLICATION OF THE TOTALITY OF THE  
CIRCUMSTANCES APPROACH TO THE DNA ACT'S 2005 AND 2006  
AMENDMENTS**

As previously stated, due to revision of the DNA Act, the scope of the act was expanded to include both arrestees and pre-trial detainees.<sup>143</sup> Since its enactment, there has been modest jurisprudence on the matter. In three cases—*United States v.*

---

139. *United States v. Kriesel*, 508 F.3d 941, 949 (9th Cir. 2007).

140. *United States v. Mitchell*, 652 F.3d 387, 409-10 (3d Cir. 2011) (citing *Johnson v. Quander*, 440 F.3d 489, 499 (D.C. Cir. 2006)). See, e.g., *Boroian v. Mueller*, 616 F.3d 60, 65 (1st Cir. 2010) ("Under the DNA Act, DNA profiles currently function as identification records not unlike fingerprints, photographs, or social security numbers."). Accord *Banks v. United States*, 490 F.3d 1178, 1192 (10th Cir. 2007) ("These restrictions allow the Government to use an offender's DNA profile in substantially the same way that the Government uses fingerprint and photographic evidence . . . . Only here, DNA provides a more advanced and accurate means . . . ."); *Rise v. Oregon*, 59 F.3d 1556, 1559 (9th Cir. 1995); *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992) ("The governmental justification for this form of identification . . . relies on no argument different in kind from that traditionally advanced for taking fingerprints and photographs, but with additional force because of the potentially greater precision of DNA sampling and matching methods.").

141. *United States v. Amerson*, 483 F.3d 73, 85 (2d Cir. 2007). Accord *Kriesel*, 508 F.3d at 947.

142. *Mitchell*, 652 F.3d at 410.

143. Violence Against Women & Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1004, 119 Stat. 2960, 3085 (codified as amended at 42 U.S.C. § 14135a(a)(1)(A) (2012)). See also *Mitchell*, 652 F.3d at 405.

*Pool*,<sup>144</sup> *United States v. Mitchell*,<sup>145</sup> and *Haskell v. Harris*<sup>146</sup>— courts have considered the constitutionality of the statute as applied to arrestees or pre-trial detainees by implementing the totality of circumstances approach.<sup>147</sup> Nevertheless, the difficulties of dealing with this issue are clearly seen in the

---

144. *United States v. Pool*, 645 F. Supp. 2d 903, 913 (E.D. Cal. 2009), *aff'd*, *United States v. Pool*, 621 F.3d 1213, 1214 (9th Cir. 2010), *reh'g en banc granted*, 646 F.3d 659 (9th Cir. 2011), *and vacated*, 659 F.3d 761 (9th Cir. 2011). While the Eastern District of California in *Pool* upheld the expanded version of the DNA Act, the court specified its limitations. *United States v. Pool*, 645 F. Supp. 2d 903, 913 (E.D. Cal. 2009). The court held that DNA sampling was allowed only after a determination had been made of the existence of probable cause. *Id.* The court stated that its holding did “not authorize for DNA sampling after citation or arrest for infractions or misdemeanors, as in these cases there will be no *judicial* finding of probable cause soon after the arrest or citation, or no *grand jury* finding before or after the arrest.” *Id.* Additionally, the court specifically highlighted that police officials are not to conduct DNA sampling before a “judicial finding of probable cause” is made, and the hearing to determine such must occur within forty-eight hours following arrest and detention. *Id.* Lastly, the *Pool* court stressed that the underpinning of its decision rested on the finding of probable cause for criminal charges, which then permits the court to set conditions on release, similar to those of probationers and parolees. *Id.* On appeal, the Ninth Circuit affirmed the district court’s decision. Even though the court upheld the expanded version of the DNA Act, the panel opinions were withdrawn expecting an en banc review. *United States v. Pool*, 646 F.3d 659, 659 (9th Cir. 2011), *vacated*, 659 F.3d 761 (9th Cir. 2011). Thus, the three-judge opinion may no longer “be cited as binding precedent by or to any court of the Ninth Circuit.” *Id.* However, before an en banc review occurred, the defendant entered a guilty plea, thereby mooting the controversy. *Id.*

145. *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011). *Mitchell* also provides a current example of the application of the totality of the circumstances test to an individual who is both an arrestee and a pre-trial detainee at the time the Government sought to obtain his DNA sample. *Id.* at 405.

146. *Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012). *Haskell* involved a class action suit for a preliminary injunction to stop the mandatory collection DNA samples from adults arrested for felonies. *Id.* In a three-judge panel, with one dissenting judge, the Ninth Circuit upheld the constitutionality of a California statute, which, similar to 42 U.S.C. § 14135a, authorizes warrantless DNA collection from persons arrested for felonies. *Id.* at 1051. The court considered the following factors: an arrestee’s diminished privacy interests, the minimal intrusion of a buccal swab, the limited scope of DNA information being extracted, the limitations and regulations on the manner in which that information is used, the deterrent effect of future crimes, and to exculpation of innocent arrestees. *Id.* at 1065. After balancing all of these factors, the court concluded the statute was constitutional. *Id.*

147. *See supra* notes 144-146. *See also* *People v. Buza*, 129 Cal. Rptr. 3d 753, 755 (2011), *as modified* (Aug. 31, 2011), *review granted and opinion superseded*, 262 P.3d 854 (Cal. 2011). While *Buza* is a state court opinion, it addresses the mandatory DNA testing and ultimately held it unconstitutional due to the weight of privacy interests involved. The California Supreme Court has granted a petition for review, but it has not yet released its opinion. *Id.*

2013]      **The DNA Act & The Fourth Amendment**      187

various majority and dissenting opinions.<sup>148</sup>

In analyzing the totality of the circumstances, courts balance an individual's right and expectation of privacy against the government's interest in obtaining the DNA.<sup>149</sup> Therefore, the following sections demonstrate the courts analysis of: (1) the privacy concerns due to the intrusion of the DNA test on the defendant; and (2) the government's interests in obtaining DNA.

### 1. THE RIGHT TO PRIVACY

When analyzing the reasonableness of a search using the totality of the circumstances, courts typically begin by evaluating the degree of intrusion the search has on an individual's privacy.<sup>150</sup> In order to understand the intrusion into one's privacy, the search itself must first be analyzed. Under § 14135a, the collection of a DNA sample involves a two-prong search, each of which are separate and distinct searches.<sup>151</sup> First, the actual physical collection of the DNA sample from the individual constitutes a search.<sup>152</sup> Second, the processing of the DNA sample and creating a DNA profile for CODIS generates another search.<sup>153</sup> Both searches are subject to the Fourth Amendment Due Process Clause.

In *Mitchell*, as well as in cases from other circuits, the collection of a DNA sample is categorized as an invasion of privacy that is subject to the limitations of the Fourth Amendment.<sup>154</sup> However, the Supreme Court has frequently held that blood tests are "a commonplace in these days of periodic physical examinations and experience with them teaches that the

---

148. *See supra* notes 144-146.

149. *United States v. Knights*, 534 U.S. 112, 119 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

150. *Id.* at 118-19 (quoting *Houghton*, 526 U.S. at 300).

151. *United States v. Mitchell*, 652 F.3d 387, 406 (3d Cir. 2011).

152. *Id.* at 405.

153. *Id.* at 407.

154. *Id.* at 407. *See also* *United States v. Sczubelek*, 402 F.3d 175, 182 (3d Cir. 2005) (concluding that giving a required blood sample for DNA analysis is a search); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989) (holding that

[w]e have long recognized that a compelled intrusion into the body for blood to be analyzed for alcohol content must be deemed a Fourth Amendment search . . . .

[T]his physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable.)

(internal quotations and citations omitted)).

quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain;” thus, the intrusion of one’s privacy is not significant.<sup>155</sup> Additionally, the Court recognized society’s belief that blood tests are not overly extensive intrusions on an individual’s privacy and bodily integrity.<sup>156</sup> Moreover, while blood samples “generally were obtained through venipuncture (blood drawn from the arm), . . . currently, the FBI provides kits that allow a blood sample to be collected by means of a finger prick.”<sup>157</sup> While obtaining blood through venipuncture or a finger prick are general means, there are other ways to obtain DNA.

Even more common and less invasive than a finger prick is a “buccal swab,” which involves collecting DNA samples by swabbing the inside of a person’s mouth.<sup>158</sup> Thus, even though blood tests are routine, “the rule permits and facilitates the use of buccal swabs to collect DNA samples.”<sup>159</sup>

The second search under § 14135a is the actual process of using the DNA sample to create a DNA profile for CODIS.<sup>160</sup> Courts have recognized this search as an infringement upon an individual’s privacy.<sup>161</sup> Furthermore, the Supreme Court held

---

155. *Schmerber v. California*, 384 U.S. 757, 771 (1966). See also *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 625 (1989).

156. *Winston v. Lee*, 470 U.S. 753, 762, (1985). The procedure for a blood test is routine in today’s society. *Id.* at 76. “It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors.” *Id.* at n.5 (quoting *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957)).

157. DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74932-01, 74935 (Dec. 10, 2008).

158. *Id.*

159. *Id.* (quoting *Schmerber*, 384 U.S. at 771). See also *Nicholas v. Goord*, 430 F.3d 652, 680 (2d Cir. 2005) (finding that cheek swabs, although constituting a search, are less invasive than blood draws). Cf. *Skinner*, 489 U.S. at 625 (noting that breath tests are less intrusive than blood tests as they “do not require piercing the skin and may be conducted safely outside a hospital environment”). In light of this precedent, the act of collecting a DNA sample is “neither a significant nor an unusual intrusion.” *United States v. Weikert*, 504 F.3d 1, 12 (1st Cir. 2007).

160. *United States v. Mitchell*, 652 F.3d 387, 407 (3d Cir. 2011) (citing *United States v. Mitchell*, 681 F. Supp. 2d 597, 609 (W.D. Pa. 2009), *rev’d*, 652 F.3d 387 (3d Cir. 2011)).

161. *Skinner*, 489 U.S. at 603. The Court recognized that “a compelled intrusion into the body for blood to be tested for alcohol content and the ensuing chemical analysis constitute searches.” *Id.* The Court also held a breath test to be a search because “it requires the production of ‘deep lung’ breath and thereby implicates

2013] **The DNA Act & The Fourth Amendment** 189

that the Fourth Amendment protects an individual's interests in privacy and human dignity and forbids searches which intrude on such interests for the mere possibility that evidence might be acquired.<sup>162</sup> The Court further held that if there is no clear indicium "that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search."<sup>163</sup>

An analysis of the Fourth Amendment's expectation of privacy involves "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>164</sup> However, for a complete totality of the circumstances analysis, one's privacy interests must be weighed against the government's interests.

## 2. THE GOVERNMENT'S INTERESTS

The second step in the totality of the circumstances approach is the analysis of the government's interests in the information and weighing of that interest against the individual's privacy expectations and interests.<sup>165</sup> The United States Supreme Court held in a case involving the warrantless search of probationer's apartment that, when evaluating the government's interest, "it must be remembered that the very assumption of probation is that the probationer is more likely than others to violate the law."<sup>166</sup> The Court further stated that:

---

concerns about bodily integrity." *Id.* The dissent found that even though urine collection and analysis may not involve an intrusion into an individual's body, it is a search because of the intrusion upon one's "expectations of privacy as to medical information and the act of urination that society has long recognized as reasonable." *Id.* at 646 (Marshall, J., dissenting). See *United States v. Sczubelek*, 402 F.3d 175, 182 (3d Cir. 2005); *United States v. Amerson*, 483 F.3d 73, 85 (2d Cir. 2007).

162. *Schmerber v. California*, 384 U.S. 757, 769-70 (1966).

163. *Id.* at 770 (referring to testing the defendant's blood for alcohol on suspicion of drunk driving).

164. *Katz v. United States*, 389 U.S. 347, 361 (1967); *Smith v. Maryland*, 442 U.S. 735, 735 (1979); *Bond v. United States*, 529 U.S. 334, 338 (2000); *Patterson v. State*, 742 N.E.2d 4, 11 (Ind. Ct. App. 2000), *on reh'g*, 744 N.E.2d 945 (Ind. Ct. App. 2001). See *supra* Section II.C.1.

165. *United States v. Knights*, 534 U.S. 112, 119 (2001) (citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). See also *Virginia v. Moore*, 553 U.S. 164, 171 (2008).

166. *Knights*, 534 U.S. at 113 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987)).

[t]he State's interest in apprehending criminal law violators, thereby protecting potential victims, may justifiably focus on probationers in a way that it does not on the ordinary citizen. . . . The degree of individualized suspicion required is a determination that a sufficiently high probability of criminal conduct makes the intrusion on the individual's privacy interest reasonable. Although the Fourth Amendment ordinarily requires probable cause, a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable.<sup>167</sup>

Other circuit courts agreed with this rationale. For instance, the Ninth Circuit held that:

[i]n light of conditional releasees' substantially diminished expectations of privacy, the minimal intrusion occasioned by blood sampling, and the overwhelming societal interests so clearly furthered by the collection of DNA information from convicted offenders, we must conclude that compulsory DNA profiling of qualified federal offenders is reasonable under the totality of the circumstances. Therefore, we today realign ourselves with every other state and federal appellate court to have considered these issues—squarely holding that the DNA Act satisfies the requirements of the Fourth Amendment.<sup>168</sup>

Additionally, the Ninth Circuit held in *Haskell* that the statute was constitutional due to the government's interests in identifying suspects and linking arrestees to criminal investigations.<sup>169</sup> Thus, courts have recognized that probationers and conditional releasees have a higher probability of criminal conduct.

Furthermore, some courts, such as the *Mitchell and Haskell* courts, have held that DNA samples are vehicles of identification and are no different from fingerprints.<sup>170</sup> However, the *Buza* court rejected this reasoning, stating that DNA evidence is

---

167. *United States v. Knights*, 534 U.S. 112, 113 (2001). *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968).

168. *United States v. Kincade*, 379 F.3d 813, 839 (9th Cir. 2004) (en banc) (plurality opinion).

169. *Haskell v. Harris*, 669 F.3d 1049, 1059-60 (9th Cir. 2012).

170. Gabel, *supra* note 37, at 391.

2013]      **The DNA Act & The Fourth Amendment**      191

primarily used for investigative purposes.<sup>171</sup> Also, the *Buza* court pointed out that processing a DNA sample can take up to thirty-one days, while fingerprints are submitted electronically almost immediately.<sup>172</sup> Thus, courts have established that in this means of identification, given the subject's propensity for criminal conduct coupled with his diminished expectation of privacy, the government's interest in the DNA outweighs any privacy concerns.

**III. FIXING FEDERAL LAW: PROPOSALS TO MAKE  
42 U.S.C. § 14135a(a)(1)(A) AND ITS APPLICATION  
CONSTITUTIONAL**

In order to cure the current problems of the DNA Act, Congress should make the following changes to the Act. First, Congress should revert the statute to its prior language, excluding pre-trial detainees and arrestees, and only allow mandatory DNA testing for persons *convicted*. In the alternative, Congress should hold pre-trial detainees and arrestees' privacy interests above those of the government. Second, Congress needs to shift the burden of retrieving and destroying the DNA profile to the government instead of imposing it on the arrestee or pre-trial detainee who is subsequently freed or exonerated. Such changes to the DNA Act would ensure privacy protections of pre-trial detainees and arrestees, prevent abuse of such DNA collection, and still allow the government to use DNA obtained post-conviction to solve other crimes.

**A. CONGRESSIONAL CHANGES**

The easiest method of correcting the statute is simply to change the statute back to its former state, which would allow mandatory DNA testing strictly for post-conviction individuals and not arrestees or pre-trial detainees. The removal of "arrestees and pre-trial detainees" from the statute would cure the resulting privacy issues and burden problems placed on arrestees and pre-trial detainees.

In the event that Congress does not revert back to the original statutory language of the Act, Congress should give due

---

171. Gabel, *supra* note 37, at 391 (citing *People v. Buza*, 129 Cal. Rptr. 3d 753, 767 (2011), *as modified* (Aug. 31, 2011), *review granted and opinion superseded*, 262 P.3d 854 (Cal. 2011)).

172. *Buza*, 129 Cal. Rptr. 3d at 772.

weight to the pre-conviction status of arrestees and pre-trial detainees, to Fourth Amendment privacy concerns, and to the advancement of science and technology that will further effect the constitutionality of DNA sampling. In *Kyllo v. United States*, the Supreme Court addressed the Fourth Amendment in relation to the use of advancing technology in searches.<sup>173</sup> DNA analysis falls within the ambit of “sense-enhancing” technology described in *Kyllo*, as it explores details of a person’s genetic makeup that would be unknowable without some sort of physical intrusion.<sup>174</sup>

Furthermore, the Supreme Court held that “when the government conducts a search by using specialized technology to perceive what it otherwise could not, and when that search invades a person’s home, it is unreasonable and in violation of the Fourth Amendment.”<sup>175</sup> The Court has also frequently held that a person’s home enjoys the highest expectation of privacy and the greatest Fourth Amendment protection.<sup>176</sup> A person’s body is the “home” to their genetic makeup. A person’s own body should be sacrosanct, and the government is using specialized technology to perceive what otherwise cannot be perceived by the naked eye. Therefore, Congress should revise the DNA Act and remove “arrestees and pre-trial detainees” from its language because arrestees and pre-trial detainees should be accorded the same rights as other non-convicted citizens.

Additionally, the burden of retrieving and expunging the DNA profile should shift to the government, as it was the government’s error that led to the wrongfully obtained DNA profile. Congress should transfer the burden by imposing strict deadlines for the government to retrieve the final court order establishing that such conviction has been overturned or that the “charge has been dismissed or [has] resulted in an acquittal or that no charge was filed within the applicable time period.”<sup>177</sup>

---

173. See *supra* Section II.C.1.

174. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 40 (2001). See also Wright et al., *supra* note 92.

175. Mike Silvestri, *Naturally Shed DNA: The Fourth Amendment Implications in the Trail of Intimate Information We All Cannot Help but Leave Behind*, 41 U. BALT. L. REV. 165, 171 (2011) (citing *Kyllo*, 533 U.S. at 40).

176. Wright et al., *supra* note 92. See *Kirk v. Louisiana*, 536 U.S. 635, 637-38 (2002) (holding that an individual’s home is most protected from a warrantless search, absent exigent circumstances, regardless of whether probable cause to arrest the individual exists).

177. *United States v. Mitchell*, 652 F.3d 387, 420 (3d Cir. 2011) (Rendell, J., dissenting). See *supra* Section II.A.2.

For example, suppose the government was required to implement a system whereby they were required to update their databases quarterly as to the arrestees and pre-trial detainees' conviction or release status with verifiable case-identification numbers, or else the DNA profile would automatically be destroyed from CODIS. This system would give a great incentive to the government because if the government wished to keep DNA profiles in CODIS indefinitely, then it would be the government's burden to guarantee that the DNA profiles are of post-conviction individuals. Pursuant to this framework, the government should also bear the costs and responsibility associated with DNA collection and maintaining DNA databases, rather than forcing the innocent to bear the costs of their own constitutional deprivation. Also, once a DNA profile is removed from CODIS, the government should not be allowed to keep the DNA sample indefinitely and should be required to destroy it and all records of it.

#### **B. DEFENSES TO PROPOSED CHANGES AND CRITIQUE OF CURRENT MANDATORY DNA SAMPLING**

Some critics of this proposal argue that there are multitudes of crimes and cases that are aided or solved by DNA. However, the taking of DNA in order to determine whether a presumably innocent arrestee is implicated in any other unrelated offenses lacks not only probable cause, but also does not meet the lower standard of individualized suspicion as required by the Fourth Amendment. Thus, DNA sampling for purposes of aiding in solving other crimes should only be applied to post-conviction offenders. This proposal does not seek to let the guilty go free, but recognizes the fundamental principle that an individual is innocent until proven guilty—all innocent people should be afforded the same rights as guaranteed by the Constitution. While arrestees and pre-trial detainees have diminished expectations of privacy compared to non-arrested persons, the arrestee/pre-trial detainee's expectation of privacy is still greater than that of a convicted felon. Thus, arrestees and pre-trial detainees should not be classified together with convicted felons and subject to searches and seizures of their persons—specifically their blood and DNA—that they can never retrieve.

Proponents of the statute, including some courts, argue that possible technological advancements, which could reveal a wealth of sensitive information, do not warrant a Fourth Amendment

analysis.<sup>178</sup> However, the bigger picture must be considered. DNA technology has already come a long way and is projected to expand even further in the future.<sup>179</sup> Specifically, DNA can already be used to discover biological traits, medical conditions, and relationships between individuals.<sup>180</sup> As long as the government has the DNA samples within their control, they have access to this sensitive and private information and potentially other information in the future. Thus, the only solution to prevent this unprecedented infringement on citizens is to limit the government's retrieval of DNA samples to only after conviction.

Another criticism of this proposal is that shifting the burden of retrieving and expunging the DNA profile to the government is too costly. While this may—or may not—be true, this policy argument should be given little weight; if it is in the government's interest to retrieve DNA, then the government should naturally be responsible for it. Frequently in tort and contract cases, courts prefer placing the financial burden on the party causing injury, especially when that party is best able to bear the cost.<sup>181</sup> In the instant circumstances, the government is the party responsible for “causing injury” by invading one's privacy to obtain a DNA sample. Thus, the government, with its vast amount of resources, is best able to and should bear the costs associated with maintaining and expunging DNA.

Despite these counter-arguments, there are numerous shortfalls with the DNA Act and its regulations as they affect

---

178. See *supra* Section II.C.1.

179. *United States v. Mitchell*, 652 F.3d 387, 425 (3d Cir. 2011) (Rendell, J., dissenting). See also Gabel, *supra* note 37, at 390 (citing JOHN M. BUTLER, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS 17-22 (2nd ed. 2005)).

180. *Mitchell*, 652 F.3d at 409 n.19 (citing Brief for Appellee at 35, *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011) (No. 09-4718)).

181. See, e.g., *Mullins v. Tyson Foods, Inc.*, 143 F.3d 1153, 1159 (8th Cir. 1998). In *Mullins*, involving a premise liability claim, the court noted that “a workers' compensation program, like any insurance program, is a cost-spreading mechanism, whereby liability is placed on the party best able to bear the cost of injury.” See also *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 127 (1998), which stated:

When one private party is injured by another, the injury can be redressed in at least two ways: by awarding compensatory damages or by imposing a sanction on the wrongdoer that will minimize the risk that the harm-causing conduct will be repeated. Thus, in some cases a tort is redressed by an award of punitive damages; even when such damages are payable to the sovereign, they provide a form of redress for the individual as well.

2013] **The DNA Act & The Fourth Amendment** 195

arrestees and pre-trial detainees, as well as with courts' analyses and the upholding of the statute's constitutionality. First, there are no interests in an arrestee or pre-trial detainee's DNA that cannot be served post-conviction. The differences between an arrestee or pre-trial detainee and a convict are blatant enough that the analysis and application of the Fourth Amendment should reflect such distinctions. Thus, courts should stray away from applying post-convict DNA testing precedent to current arrestees or pre-trial detainees. Secondly, the safeguards implemented within the statute and in practice to protect against improper utilization of DNA are arbitrary and ineffective and have great potential for abuse. Third, the court uses the statute's "identification" purposes as a pretext to further the government's interests in solving other crimes at the expense of individual privacy interests.

Considering these shortfalls, the proposals made in Section III.A are justified for six reasons: (1) they recognize the important distinction between arrestees/pre-trial detainees and parolees/convicted persons; (2) they avoid the defects in the statute's "safeguards" as to arrestees and detainees; (3) they prevent the possible pretextual use of DNA testing of arrestees and detainees; (4) they properly elevate arrestees' and detainees' interests in privacy over governmental interests in identification and solving other crimes; (5) they address the privacy concerns inherent in such DNA testing; and (6) they comport with legislative history by allowing law enforcement to connect proven criminals to other crimes and aid in preventing future crimes.

**1. IMPORTANT DISTINCTION: COURTS USING POST-CONVICTION ANALOGIES TO JUSTIFY THE PRE-CONVICTION (ARRESTEES & PRE-TRIAL DETAINEES) DNA REQUIREMENT**

Even though an arrestee or detainee has a somewhat diminished expectation of privacy compared to a non-arrested person, arrestees and pre-trial detainees retain greater privacy rights than that of a convicted felon. There are no interests in an arrestee or pre-trial detainee's DNA that cannot be served post-conviction, and the reliance on precedent that suggests otherwise is an incorrect assumption.<sup>182</sup> These types of analogies are inherently flawed because of the distinguishable issues between pre-conviction and post-conviction. A convict has little to no

---

182. *See supra* Section II.C.3.

expectation of privacy, while an arrestee or pre-trial detainee has a higher expectation of privacy.<sup>183</sup> When considering questions related to an individual's rights to privacy, courts have expanded Supreme Court precedent in order to conclude that convicts, either incarcerated or on supervised release, "have a diminished expectation of privacy; therefore, courts have reasoned that such individuals can be subject to DNA collection even in the absence of individualized suspicion that they have committed additional crimes."<sup>184</sup> However, that does not apply to arrestees and pre-trial detainees.

Additionally, legislative history of the DNA Analysis Backlog Elimination Act of 2000 states that "DNA profiles [are] electronically [used] in an attempt to link evidence from crime scenes for which there are no suspects to *DNA samples of convicted offenders* on file in the system."<sup>185</sup> The expanded statute broadens this scope, and is thus outside Congress's original intent of creating the statute in the first place. Therefore, the factors considered in a totality of circumstances approach should differ significantly because there are different interests in play.

---

183. *United States v. Mitchell*, 652 F.3d 387, 421 (3d Cir. 2011) (Rendell, J., dissenting).

184. *Eiler*, *supra* note 102, at 1214. *See, e.g.*, *United States v. Weikert*, 504 F.3d 1, 11 (1st Cir. 2007) (citing *Samson v. California*, 547 U.S. 843, 855 n.4 (2006)) (stating that "[t]he grounds cited by the Supreme Court in its decision to apply a totality of the circumstances analysis in *Samson*—the state's broad concerns regarding 'recidivism, public safety, and reintegration' . . . apply similarly to parolees and supervised releasees"); *Banks v. United States*, 490 F.3d 1178, 1185 (10th Cir. 2007) (citing *United States v. Knights*, 534 U.S. 112, 119 (2001)) (noting that "the defendant's status as a probationer also carried with it intrinsic weight in the government's favor," because criminal convicts do not enjoy the same freedoms as law-abiding citizens); *United States v. Kraklio*, 451 F.3d 922, 924-25 (8th Cir. 2006) (holding the DNA Act constitutional given that a probationer has a diminished expectation of privacy).

185. H.R. REP. NO. 106-900, at 8 (2000) (emphasis added).

Pursuant to the 1994 legislation, the DNA identification system incorporates strict privacy protections. The statutory rules for the system provide that stored DNA samples and DNA analyses may be used for law enforcement identification purposes and virtually nothing else. . . . This ensures that if the DNA profile of a convicted offender is included in the index, the information will not be disclosed, and he will suffer no adverse consequences later in life—unless DNA matching shows him to be the source of DNA found at the scene of another crime or crimes.

*Id.* at 27. *See supra* Section II.B. and *infra* Section III.B.6 (explaining the legislative history of the Violence Against Women and Department of Justice Reauthorization Act of 2005).

2013]      **The DNA Act & The Fourth Amendment**      197

Courts have incorrectly relied on extending the mandatory DNA testing of prisoners, probationers, or parolees to arrestees and pre-trial detainees. In *Sczubelek*, for example, the defendant was a probationer, who had previously been convicted of a crime. A conviction causes a permanent change in the convicted person's status because the status changes from an ordinary citizen to a "lawfully adjudicated criminal[ ] whose proven conduct substantially heightens the government's interest in monitoring" him and "quite properly carries lasting consequences."<sup>186</sup> Therefore, once a person becomes a convict, the government's interests, rightfully so, become more compelling in overseeing that the convict is rehabilitated and does no further harm to society. However, arrestees and pre-trial detainees have not yet been branded as a convict; therefore their status as a person still carries a greater expectation of privacy than that of a convict.

Additionally, advocates of the statute have argued that, once arrested, a person is subject to fingerprinting and possibly even body cavity searches during booking. These advocates take the position that obtaining DNA is no different. However, there are vast differences between the reasons and policies behind fingerprinting and body cavity searches of arrestees. As will be stated in Section III.B.3, using DNA for identification purposes is a pretext. The *Buza* court rejected such reasoning, stating that DNA evidence is primarily used for investigative purposes.<sup>187</sup> Also, it can take up to thirty-one days to process and analyze a DNA sample, but fingerprints are transmitted electronically almost immediately.<sup>188</sup> Furthermore, the purpose behind body cavity searches for incoming arrestees is primarily for the safety of the guards, as well as the other inmates, in case an arrestee is hiding contraband—such as drugs or weapons. Such a search is permitted by the Fourth Amendment due to the greater weight of the safety and protection of other persons. The collection and testing of DNA from arrestees does not serve as a means of protecting guards and inmates from contraband. Thus, these two arguments are distinguishable from DNA testing for two reasons: (1) fingerprinting already exists as a successful means of

---

186. *United States v. Kincade*, 379 F.3d 813, 836 (9th Cir.2004) (en banc) (plurality opinion).

187. Gabel, *supra* note 37, at 392 (citing *People v. Buza*, 129 Cal. Rptr. 3d 753, 767 (2011), *as modified* (Aug. 31, 2011), *review granted and opinion superseded*, 262 P.3d 854 (Cal. 2011)).

188. *Buza*, 129 Cal. Rptr. 3d at 772.

identification without need for further “identification,”<sup>189</sup> and (2) the same safety concerns behind body cavity searches, as to law enforcement and prison personnel, do not apply to DNA testing. For all of the reasons stated above, the rationale used to support DNA testing on those who are convicted is inapplicable to arrestees and detainees.

## 2. DEFECTS IN THE SAFEGUARDS

The safeguards incorporated into the statute are problematic and, ultimately, ineffective. As mentioned, the three safeguards built into the federal law governing the collection of DNA include: (1) that the disclosure of DNA test results only be provided “to criminal justice agencies for law enforcement *identification* purposes;”<sup>190</sup> (2) unauthorized use or disclosure carries a criminal penalty of a fine of up to \$250,000 or imprisonment of up to one year;<sup>191</sup> and (3) whenever a conviction is overturned or, when following an arrest, the charge is subsequently dismissed or results in an acquittal or the charge is not timely filed, the Violent Crime Control and Law Enforcement Act requires expungement of the DNA record from CODIS by the Director of the FBI upon receipt of a certified, final order.<sup>192</sup>

The first major problem to the statutory “protections” is that the statute’s limitation of the disclosure of the DNA analysis for purposes of identification only is merely a pretext. Furthermore, if the DNA were only used for identification of the arrestee and/or pre-trial detainee, then that would serve the same purpose as fingerprinting and mug shots, which occur during an arrestee’s booking. As stated herein,<sup>193</sup> the current means of identifying arrestees and pre-trial detainees already exists via fingerprinting, which is not only cheaper but also a less intrusive means.

The second problem, which involves the criminal penalty for misuse of DNA, is that there are no oversight protections. It is simply the government overseeing itself to not misuse the samples. Additionally, the way Congress and the courts are

---

189. See *infra* Section III.B.3.

190. 42 U.S.C. § 14132(b)(3)(A) (2012) (emphasis added).

191. *Id.* § 14135e(c).

192. *Id.* § 14132(d)(1)(A); § 14132(d)(1)(A)(i)-(ii). See also *United States v. Mitchell*, 652 F.3d 387, 399 (3d Cir. 2011).

193. See *supra* Section III.B.1 and *infra* Section III.B.3.

2013]      **The DNA Act & The Fourth Amendment**      199

heading, and the more they mandate the suspicionless searches and seizures of individuals' personhood, the less useful these types of protections are. If society starts mandatory DNA testing at one's birth, then there would be no need for a criminal penalty of misuse because the interest and expectation of privacy would be lost once the DNA was extracted and stored by the government.

Third, the statute puts the burden on the person whose privacy was invaded to then follow up with the government in order to make them expunge the DNA record from CODIS. The statute's rigid requirement of the receipt of the final, certified order of the court before the expungement process begins does not take into account the time that it takes to make this happen, nor the fact that the government is the one in control. For example, consider Alex from the prior hypothetical. His DNA was taken and submitted to CODIS after he was arrested, but the charges against Alex were subsequently dismissed. However, if the government has ulterior or competing motives in keeping Alex's DNA—perhaps they think he was involved in another crime—the government may delay submitting a final court order that the charges against Alex had been dismissed. In the meantime, the government might begin comparing Alex's DNA to attempt to match it to another crime.

Even more appalling is that, even though the *DNA profile* is destroyed from CODIS, the statute does not mention what happens with the *original sample* taken. There is no requirement that the original sample be destroyed; therefore, the government could just as easily recreate the profile from the original sample whenever their interests warranted such. "In the face of such heightened privacy interests, statutory restrictions on the use of the DNA collected from suspects who have not been convicted of a crime, though not wholly irrelevant, are not panaceas."<sup>194</sup> Thus, the invasion of privacy that occurs when searching and seizing an arrestee or pre-trial detainee's DNA is not and cannot be offset by these "safeguards;" however, adopting the proposed changes herein would avoid such problematic defects.

---

194. United States v. Mitchell, 652 F.3d 387, 416 (3d Cir. 2011) (Rendell, J., dissenting).

### 3. DNA FOR “IDENTIFICATION” PURPOSES USED AS A PRETEXT

The proclaimed need for the statute is “identification” purposes. However, prior to the enactment of this statute, arrestees and pre-trial detainees were identified through fingerprints and photographs. The Supreme Court has acknowledged that “both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification.”<sup>195</sup> Thus, law enforcement already has the ability to identify arrestees and pre-trial detainees through other established means, such as fingerprinting and photographing.

Arguing that DNA is a modern-day fingerprint is incorrect because there are vast differences between the two. DNA can be used to discover biological traits and relationships between individuals, while fingerprints cannot.<sup>196</sup> When researching biological relationships using DNA, two types of searches are used. First is a normal search “seeking exact matches,” but that will also lead to a partial match that could belong to a relative of the individual whose DNA profile was run in the database.<sup>197</sup> The second search is called “familial,” “which typically refers to a *purposeful* search of the DNA database not for the person who left the crime-scene sample, but rather for a relative of that individual.”<sup>198</sup>

The concerns regarding the vast amount of information to be obtained from DNA have been dismissed as speculative and mere

---

195. *Pennsylvania v. Muniz*, 496 U.S. 582, 591 (1990) (plurality opinion) (citing *Schmerber v. California*, 384 U.S. 757, 764 (1966)) (treating procedures to identify an arrestee as exempt from the strictures of *Miranda v. Arizona*, 384 U.S. 436 (1966)).

196. *United States v. Mitchell*, 652 F.3d 387, 409 n.19 (3d Cir. 2011) (citing Brief for Appellee, *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011) (No. 09-4718)).

197. DNA-Sample Collection and Biological Evidence Preservation in the Federal Courts, 73 Fed. Reg. 74932-01, 74938 (to be codified at 28 C.F.R. 238, pt. 28 (Dec 10, 2008)).

198. Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 297, 300 (2010); *Mitchell*, 652 F.3d at 409 n.19 (internal quotations and citation omitted). *But cf.* Greely et al., *supra* note 27, at 254 (discussing the benefits of familial DNA searches and arguing that, instead of spending resources on investigating relatives of all the partial matches identified by a DNA search, this familial information should be collected and stored, so law enforcement could easily “check a database to find out information about their parents, siblings, and children.”).

2013]      **The DNA Act & The Fourth Amendment**      201

possibilities, which do not change the analysis.<sup>199</sup> The issues have been viewed as hypothetical possibilities, and that “[s]hould technological advancements change the value of ‘junk DNA,’ reconsideration of our Fourth Amendment analysis may be appropriate.”<sup>200</sup> For now, courts have stated that “CODIS is not designed for intentional familial searches and experts agree that searches of that type would not produce any useful information.”<sup>201</sup>

However, the analysis should be changed because an arrestee and pre-trial detainee has a greater interest and expectation in privacy than a convicted felon. If the information obtained from DNA “related to identification and nothing else could be obtained from it, the analogy to fingerprinting would be complete,”<sup>202</sup> but that analogy is flawed because the information obtained reveals more than just identification and more than is necessary for identification. Simply because the statute is not designed for discovery of additional intrusive information does not mean that it cannot be used for that purpose. Moreover, it actually implies that it is capable of doing exactly what the government says it does not do.

The court states that “the amount and type of personal

---

199. *United States v. Mitchell*, 652 F.3d 387, 409 n.19 (3d Cir. 2011):

The possibility of an unintentional or intentional CODIS “hit” for Mitchell’s biological relatives does not change our analysis. To begin with, Mitchell has not shown that he has standing to assert the Fourth Amendment rights of his relatives. *See Rakas v. Illinois*, 439 U.S. 128, 138-40 (1978). Even if he did, the record does not contain any evidence of a possible search or investigation of Mitchell’s relatives, and the claim is entirely speculative. *See Boroian v. Mueller*, 616 F.3d 60, 70 (1st Cir. 2010) (“The record contains no other information shedding light on how frequently partial matches occur in the national database, exactly what they reveal, or what kind of follow-up investigation is done when a partial match arises . . . . [Therefore] . . . that claim is similarly speculative.”).

200. *Id.* at 408 (citing *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2629 (2010) (“The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.”)).

201. *Id.* at 409 n.19 (citing DNA-Sample Collection and Biological Evidence Preservation in the Federal Courts, 73 Fed. Reg. 74932-01, 74938 (to be codified at 28 C.F.R. 238, pt. 28 (Dec 10, 2008)) (“The current design of the DNA identification system does not encompass searches of this type against the national DNA index.”). *See also* Murphy, *supra* note 198, at 300 (“[M]ost experts acknowledge that the current iteration of the CODIS software does a poor job of identifying true leads in familial searches.”)).

202. D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORNELL J.L. & PUB. POL’Y 455, 482 (2001).

information to be contained in the DNA profile is nominal.”<sup>203</sup> However, this is a specious conclusion that evinces a fundamental ignorance of the amount and type of information actually available or a willful blindness to it. If familial and biological searches can be conducted, the information appears to be more than nominal. Even if the search merely yielded “nominal” information on matches, the government still possesses the sample from which the DNA profile is made. This intrusion on privacy is significant and unreasonable given that the scope of other personal information that can be obtained from a DNA sample is extraordinarily broad.<sup>204</sup> Significantly, as a district court correctly concluded, “DNA is ‘an information science,’ ‘not an identification science.’”<sup>205</sup>

Furthermore, it is not out of the realm of possibility that the government might disregard or change its policy of using only “junk DNA.” Considering ongoing technological advances, “junk DNA” could potentially reveal far more extensive information than it currently divulges.<sup>206</sup> Even though “junk DNA” is a minimal DNA sample, the amount of information and detail extracted from it is huge. As mentioned, DNA can already be used to ascertain one’s biological traits, medical conditions, and other relatives. This information is not only private, but it is irrelevant for identification purposes. Access to all this private information is an invasion of privacy of arrestees and pre-trial detainees, which the Fourth Amendment was enacted to protect.

#### 4. PRIVACY INTEREST TRUMPING GOVERNMENTAL INTEREST

Proponents of the statute claim that the “legitimate governmental interests” outweigh those privacy interests of an arrestee or pre-trial detainee, and thus, no violation of the Fourth Amendment exists. The government’s sole interest is in solving other crimes, while the individual’s interest is keeping their DNA

---

203. *United States v. Mitchell*, 652 F.3d 387, 408-09 (3d Cir. 2011). See *United States v. Kincade*, 379 F.3d 813, 838 (9th Cir. 2004) (en banc) (plurality opinion) (“As currently structured and implemented . . . the DNA Act’s compulsory profiling of qualified federal offenders can only be described as minimally invasive—both in terms of the bodily intrusion it occasions, and the information it lawfully produces.”).

204. Brief for Appellee at 34, *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011) (No. 09-4718).

205. *Mitchell*, 652 F.3d at 407 (citing Brief for Appellee, *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011) (No. 09-4718)).

206. *Id.*

2013]      **The DNA Act & The Fourth Amendment**      203

private, rather than the creation of a DNA profile in the government's depository. Courts have justified prior intrusions on privacy via DNA collection for convicts, probationers, and parolees because post-conviction individuals lose those rights and expectations once convicted. However, arrestees and pre-trial detainees are *pre-trial* persons, still considered innocent (until proven guilty), who have higher expectations of privacy than those already convicted. Therefore, the rationale used by the statute's advocates is flawed. The actual physical collection of the DNA sample and the creating of a DNA profile for CODIS are searches and seizures that violate the Fourth Amendment.

The use of DNA to solve other crimes to justify the search and seizure of such DNA is not a compelling argument in light of the fact that the searches and seizures being conducted under the expanded statute are of persons presumed innocent. Additionally, there is no government interest in an arrestee or pre-trial detainee's DNA except to discover or solve past or future crimes. Such a fishing expedition for evidence of other crimes is not allowed under the Fourth Amendment, because courts have consistently held such general searches are unreasonable.<sup>207</sup> When balancing the privacy interests of an innocent individual against the government's interests in solving other crimes, privacy should always trump warrantless and suspicionless searches and seizures.<sup>208</sup> If not, then why not require mandatory DNA testing at birth? Then the government could solve, and possibly even prevent, a multitude of crimes. However, the thought of requiring every born child to submit to a DNA test for the government's database seems extreme and outrageous. Extrapolated to its logical conclusion, it is easy to see both the flaws in the justifications for continued use of pre-trial arrestee DNA and the enormous potential for abuse and misuse, as well as the extreme costs associated with regulating and maintaining such a massive database. Such costs, including those to liberty and privacy, are too great to justify such disregard for the Fourth Amendment.

---

207. See *e.g.*, *United States v. Foster*, 100 F.3d 846, 850 (10th Cir. 1996), *reh'g denied*, 104 F.3d 1228 (suppressing all evidence seized after law enforcement disregarded the scope of the search warrant and made "a wholesale seizure of [defendant's] property amounting to a fishing expedition *for the discovery of incriminating evidence*") (emphasis added).

208. See *United States v. Mitchell*, 652 F.3d 387, 416 (3d Cir. 2011) (Rendell, J., dissenting).

Proponents of mandatory DNA testing argue that arrestees and pre-trial detainees have lower privacy rights and expectations, even though they are presumed innocent. For example, police are allowed to conduct searches incident to lawful arrest, while persons who have not given law enforcement reasonable suspicion of wrongdoing are not subject to such searches. However, arrestees and pre-trial detainees are still innocent persons who have a greater expectation of, and interest in, privacy than a convicted felon. An arrestee's reduced privacy expectations are not so far reduced as to pale in comparison to governmental interests when it comes to DNA testing. Thus, the focus should be on balancing the individual's expectation of privacy with the interests of the government.

Additionally, consider if a mistakenly identified person is arrested for a federal crime. The government receives "the automatic right to sample the arrestee's DNA, to analyze it, and to include a profile derived from the DNA sample in CODIS."<sup>209</sup> This mistakenly identified person, now an arrestee, has no recourse and is required to submit his DNA or be charged with a class A misdemeanor.<sup>210</sup> And should an innocent, mistakenly identified individual choose not to submit to the DNA test and be charged with a class A misdemeanor, when the mistaken identity comes to light and initial charges are dropped, that individual is still facing a federal offense for not submitting his DNA for a crime he did not commit in the first place. Moreover, "although his DNA *profile* will be expunged from CODIS, the Government will retain his DNA *sample* indefinitely," leaving the government still in possession and control of an individual's person and property, whether it was lawfully obtained or not.<sup>211</sup>

The Third Circuit, in relying on post-conviction precedent, further states that arrestees and pre-trial detainees have a diminished expectation of privacy.<sup>212</sup> However, if a person on trial is innocent until proven guilty, then his expectation of privacy is the same as any other non-convicted person. It is incorrect to assume that arrestees and pre-trial detainees are more likely to commit future crimes in order "to justify the

---

209. *United States v. Mitchell*, 652 F.3d 387, 420 (3d Cir. 2011).

210. *See* 42 U.S.C. § 14135a(a)(5) (2012).

211. *Mitchell*, 652 F.3d at 420 (Rendell, J., dissenting).

212. *Id.* at 412.

2013]      **The DNA Act & The Fourth Amendment**      205

collection and analysis of their DNA.”<sup>213</sup> Arrestees and pre-trial detainees have much stronger and weightier interests in their privacy than the government’s interest in collecting potential evidence for crime solving.<sup>214</sup> Hence, their privacy interests should prevail over the government’s interests in conducting a fishing expedition.

Taking into account these considerations, when balancing the government’s interests against privacy interests, the scale should be tipped in favor of privacy and the Fourth Amendment. However, that is currently not the case.

### 5. MISREPRESENTATIONS AND IMPLICATIONS

In *United States v. Mitchell*, the Third Circuit followed the Supreme Court’s precedent that the intrusion of a blood test is not significant and that the extraction of blood is painless.<sup>215</sup> However, this was an inaccurate interpretation, and missed the issue. While the Supreme Court recognizes that the actual blood draw may be considered painless, it is not the focus of concern. Similarly, swabs for DNA are not physically invasive or painful either. This discussion by the Third Circuit is, at best, irrelevant, and, at worst, seriously misleading, because the crux of the matter is the unconstitutional search and seizure provided by the DNA Act, which involves the transforming of DNA into a profile that is then entered into a database. The search and resulting seizure are key, not the physical pain or invasion by needle or swab. Even though the statute recognizes the possibility of an unconstitutional search and therefore requires that the DNA profile be expunged, the statute allows a Fourth Amendment violation by the indefinite seizure of the actual DNA sample.

The focal point of the issue is that the government is taking a part of a person’s body—one’s blood—when they are extracting DNA. The Fourth Amendment was designed to give people the right “to be secure in their persons, houses, papers, and

---

213. *United States v. Mitchell*, 652 F.3d 387, 422 (3d Cir. 2011). See *United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006) (“That an individual is charged with a crime cannot, as a constitutional matter, give rise to any inference that he is more likely than any other citizen to commit a crime if he is released from custody.”).

214. See *Mitchell*, 652 F.3d at 421 (Rendell, J., dissenting).

215. *Id.* at 406 (citing *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 625 (1989) (quoting *Schmerber v. California*, 384 U.S. 757, 771 (1966)). Accord *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005) (“[T]he intrusion of a blood test is minimal.”).

effects.”<sup>216</sup> Yet, the DNA Act does exactly the opposite. It strips persons presumed innocent of the protection of their persons and their effects—a two-fold violation of the Fourth Amendment.

Additionally, in order to understand the severe implications of the DNA Act, consider the following analogous hypothetical. David, driving down Smith Street, is pulled over by police and receives a speeding ticket. Simultaneously to police entering David’s receipt of the speeding ticket into their database, the government immediately deducts the amount of the ticket from his bank account. David’s options are to accept that he was speeding or contest the ticket and apply for a refund. David decides to contest the ticket and does so effectively. Now, in order for David to receive the money that was wrongfully taken, he must wait until the government issues an order stating he was incorrectly ticketed for speeding. Once such order is obtained, he must then petition the government for reimbursement. Should the government be backlogged with other more pressing issues, it is David’s responsibility to continue to follow up for such refund. The result here is bizarre, but no less so than what the DNA Act currently allows. Yet, this illuminates the need for Congress and the courts to focus more on the privacy interests of the individual and less on the government’s interests in solving crimes.

## 6. PROPOSED CHANGES WOULD UPHOLD THE INTENDED PURPOSE OF THE AMENDMENTS TO THE DNA ACT

When Congress amended the statute to broaden the scope of the categories of individuals subject to DNA collection, the legislative history indicates that the purpose was to allow both state and federal law enforcement to apprehend “rapists, murderers, and other violent criminals whom it otherwise would be impossible to identify and arrest.”<sup>217</sup> Senator Kyl, the sponsor of the bill, stated that the revisions would make it easier to maintain national databases of criminal arrestees in order to compare the DNA profile to crime-scene evidence, and it would prevent serial rapists and murderers from committing more crimes.<sup>218</sup>

---

216. U.S. CONST. amend. IV.

217. 151 Cong. Rec. S9528 (daily ed. July 29, 2005) (statement of Sen. Kyl), available at <http://www.gpo.gov/fdsys/pkg/CREC-2005-07-29/pdf/CREC-2005-07-29.pdf>.

218. *Id.*

2013]      **The DNA Act & The Fourth Amendment**      207

Considering the lengthy DNA processing time,<sup>219</sup> if the matter actually involved a serial rapist or murderer, thirty-one days is enough time to commit more crimes. Undeniably, there is great interest in catching and prosecuting criminals, but those interests should not trump the rights granted by the United States Constitution to individuals. Taken to its illogical conclusion, assuming the actual purpose is to prevent rapes and murders, why not require that the arrestee be detained for the thirty-one days until his DNA profile is entered into CODIS. Then, if there are no matches to crimes, he is allowed to go. But if there are matches, regardless of the type of crime, he remains in detention. The notion of denying someone release pending DNA testing provokes flagrant misuses of the law.

Additionally, as stated herein, there are no interests in an arrestee or pre-trial detainee's DNA that cannot be served post-conviction. This type of fishing expedition for evidence of other crimes is not allowed under the Fourth Amendment because such a general search is unreasonable.<sup>220</sup> If the proposed changes were enacted, DNA collection would still be allowed post-conviction, and law enforcement would still be able to connect proven criminals to other crimes and aid in preventing future crimes while giving due weight and credence to the privacy concerns of those citizens presumed innocent until proven guilty.<sup>221</sup>

---

219. *People v. Buza*, 129 Cal. Rptr. 3d 753, 772 (2011), *as modified* (Aug. 31, 2011), *review granted and opinion superseded*, 262 P.3d 854 (Cal. 2011).

220. *See supra* Section III.B.4.

221. In the alternative, should the statute remain in its current form, courts should properly apply the requirements and analysis of what constitutes "legitimate governmental interests." Courts should also properly weigh these interests against the grave privacy concerns that arise when intruding on an individual's "person[], house[], papers, and effects." U.S. CONST. amend. IV. As Justice Rendell stated in his dissenting opinion in *Mitchell*,

[T]he majority gives short shrift to an arrestee's and pre-trial detainee's expectation of privacy in his DNA, reducing it to an interest in identity only, and overstates the significance of the Government's interest in collecting evidence to solve crimes. It reasons that limitations on the *use* of an arrestee's most personal information immunizes the Government from the Fourth Amendment's warrant requirement. But this ignores the fact that the searches and seizure of one's DNA permitted by 42 U.S.C. § 14135(a)(1)(A) implicate privacy interests far more expansive than mere identity.

*United States v. Mitchell*, 652 F.3d 387, 416 (3d Cir. 2011) (Rendell, J., dissenting). Courts should further mandate that governmental interests must satisfy a higher threshold. A government's interests in obtaining DNA samples from arrestees or pre-trial detainees should only be allowed in immediate, exigent circumstances. When there is a concern that an immediate apprehension of an arrestee or pre-trial detainee's DNA must be obtained or it may never be retrieved thereafter, then the

#### IV. CONCLUSION

As it currently stands, the mandatory DNA testing of arrestees and pre-trial detainees compromises long-standing, fundamental notions of privacy and due process. The United States criminal justice system has long been and still is a proponent of the presumption of innocence. However, the DNA Act not only jeopardizes this notion, but it destroys deep-rooted jurisprudence by requiring an unfounded invasion of privacy upon persons who are presumed to be innocent. The statute as it currently stands should be modified to prevent the invasion of privacy and to ensure the protections provided by the Fourth Amendment to persons whose arrests do not result in a definitive conviction. As it stands, the law allows for the deterioration of rights protected by the Fourth Amendment.

Additionally, emphasis should be made on the distinction between post-conviction status and pre-conviction status and the different interests of each. The main focus on obtaining DNA information is to aid in solving other crimes. But that interest does not overcome individual privacy interests, as the government's interests can still be satisfied after conviction. Modifying the DNA Act is necessary to ensure the statute's constitutionality as suggested, while ensuring such revisions maintain Congress's intended purpose of identifying offenders and protecting society from criminals, which can be done without the inclusion of arrestees and pre-trial detainees. The proposals herein ensure that the fundamental protections provided by the Fourth Amendment are preserved and privacy interests are sheltered from abuse. Should these proposals be implemented, the longstanding presumption of innocence, as was due to Alex in the introductory hypothetical, will be preserved. The proposals not only protect and ensure his, and all citizens', constitutional right to privacy, but they also prohibit citizens from being physically forced to submit to a DNA test in furtherance of an embarrassment already suffered. Lastly, Alex will not be required to jump through additional hoops by having to chase down the government to confirm that proper paperwork was received, and that the government will only then destroy the

---

government's interests *may* outweigh the interests in privacy. Also, if there is an immediate threat of serious injury to someone's life, liberty, or limb, and the arrestee or pre-trial detainee's DNA will prevent such injury, then the government's interests may exceed the arrestee's or pre-trial detainee's interests and expectations of privacy.

2013] **The DNA Act & The Fourth Amendment** 209

DNA profile from CODIS. The implementation of these proposals ensures that the privacy interests of Alex, as well as people similarly situated to him, are protected from such appalling, unwarranted and unnecessary intrusions.

Stephanie Beaugh<sup>222</sup>

---

222. I would like to give special thanks to Charlin S. Fisher for his knowledge and advice on the topic.