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TWENTY-FIRST CENTURY FINGERPRINTS: THE THIRD CIRCUIT'S  
APPROVAL OF DNA COLLECTION UPON ARREST  
IN *UNITED STATES v. MITCHELL*

MEGAN POWNALL\*

“Solving crimes by [DNA analysis] furthers the fundamental objectives of the criminal justice system, helping to bring the guilty to justice and protect the innocent, who might otherwise be wrongly suspected or accused, through the prompt and certain identification of the actual perpetrators.”<sup>1</sup>

I. INTRODUCTION

Byron Halsey was a factory worker living with his girlfriend and her two children, Tina and Tyrone.<sup>2</sup> Byron worked hard to support his family, and he loved and treated Tina and Tyrone as his own.<sup>3</sup> One tragic evening, the two children were discovered in the basement of their apartment building, brutally murdered.<sup>4</sup> Law enforcement arrested the loving father figure and tried him for numerous crimes surrounding the deaths.<sup>5</sup> De-

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\* J.D. candidate, May 2013, Villanova University School of Law. This article is dedicated to the memory of Robert Campos, who blindly encouraged my academic career before it even began. I would like to thank Rachel Zuraw whose comments and feedback contributed greatly to the contents of this Article. I would also like to thank my family and friends for their unyielding love and support. Specifically, I would like to thank my parents, my grandmother, and Adam Wyss.

1. DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74,932, 74,933 (Dec. 10, 2008) (to be codified at 28 C.F.R. pt. 28).

2. See Tina Kelley, *DNA in Murders Frees Inmate After 19 Years*, N.Y. TIMES, May 16, 2007, at B1 (describing Halsey's life before arrest); see also *Know the Cases: Byron Halsey*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Byron\\_Halsey.php](http://www.innocenceproject.org/Content/Byron_Halsey.php) (last visited May 21, 2012) (summarizing Halsey's story).

3. See Kelley, *supra* note 2 (“Margaret Urquhart, the victims' mother, said in a statement: ‘I knew Byron loved Tyrone and Tina.’”); see also *Know the Cases: Byron Halsey*, *supra* note 2 (recounting how Halsey worked and raised his girlfriend's children as his own).

4. See Kelley, *supra* note 2 (documenting circumstances surrounding childrens' murder). A repairman found the childrens' bodies in the basement of the boarding house where the family lived. See *Know the Cases: Byron Halsey*, *supra* note 2 (discussing childrens' murder). Tina, the seven-year-old daughter, was strangled to death. See *id.* The eight-year-old son, Tyrone, was killed by four nails that were hammered into his head with a brick. See *id.* Both bodies showed evidence of sexual assault. See *id.*

5. See *Know the Cases: Byron Halsey*, *supra* note 2 (describing Halsey's arrest and charges against him). After a thirty-hour interrogation, Halsey falsely confessed to the murders and signed a written confession. See *id.* This confession led police to cease their investigation of the other suspect in the case, Clifton Hall, a neighbor in Halsey's apartment complex. See *id.* Prosecutors charged Halsey with two

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spite an apparent lack of evidence, the jury found Byron guilty of felony murder, aggravated assault, and child abuse and gave him two life sentences plus twenty more years in prison.<sup>6</sup> Thus, in addition to enduring the loss of his two cherished children, Byron was blamed and wrongly punished for their deaths.<sup>7</sup> Nineteen years later, tears streamed down his face as Byron listened to a judge tell him he was free to go.<sup>8</sup> After serving nearly two decades in prison, DNA evidence proved that the once diligent caregiver spent nearly half of his life in prison for a crime he did not commit.<sup>9</sup> When asked what he would do, his attorney reported that “[h]e said something about taking a bath . . . . He hasn’t taken one in 20 years.”<sup>10</sup>

Byron Halsey owes his new life to developments in DNA technology.<sup>11</sup> DNA evidence is a scientific tool that continues to develop and impact the way the criminal justice system operates.<sup>12</sup> But with such technological advances come legal complications.<sup>13</sup> In particular, critics have attacked the use of DNA technology in law enforcement as a violation of the Fourth

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counts of four separate crimes: felony murder, aggravated manslaughter, aggravated sexual assault, and possession of a weapon. *See id.*

6. *See id.* The jury also acquitted Halsey on several other charges, which made him ineligible for the death penalty. *See id.*

7. *See id.* (outlining facts leading to Halsey’s conviction being overturned).

8. *See Kelley, supra* note 2 (“Mr. Halsey, who was handcuffed, sat crying silently during the brief proceeding in Union County Superior Court before Judge Stuart L. Peim.”).

9. *See Know the Cases: Byron Halsey, supra* note 2 (summarizing facts that overturned Halsey’s conviction). Halsey contacted the Innocence Project, which was able to conduct DNA testing on evidence from the crime scene in 2006. *See id.* (recounting steps taken to free Halsey from prison). The evidence, semen and cigarette butts, implicated Clifton Hall in the death of the two children. *See id.* At the time, Hall was serving a prison sentence for three other sexual assaults. *See id.* After conducting a reinvestigation, the prosecution announced they were dropping all charges against Halsey. *See id.* (reporting on impact of new DNA evidence supporting Halsey). Consequently, Halsey was exonerated after serving nineteen years in prison. *See id.*

10. *See Kelley, supra* note 2 (stating Halsey “was looking forward to one thing in particular after being released. . . . ‘[T]aking a bath.’”).

11. For further discussion of the role of DNA evidence in Halsey’s exoneration, see *supra* notes 7–10 and accompanying text. As of March 2012, the FBI database of DNA samples (CODIS) contained 10,662,200 offender profiles and 423,000 more samples. *See CODIS—NDIS Statistics*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/lab/codis/ndis-statistics> (last visited May 21, 2012) (reporting statistical data contained in National DNA Index). Also, according to the FBI website, “[a]s of March 2012, CODIS has produced over 176,100 hits assisting in more than 169,000 investigations.” *Id.*

12. For further discussion of the overall effect of DNA technology on crime solving capabilities, see *supra* notes 7–11 and accompanying text.

13. For further discussion of previous challenges to constitutionality of DNA profiling, see *infra* notes 39–54 and accompanying text.

Amendment's protection against unreasonable searches.<sup>14</sup> Courts have rejected such challenges, reasoning that DNA testing is simply the modern version of the well-established practice of fingerprinting.<sup>15</sup> Consistent with that comparison, the Third Circuit's recent opinion in *United States v. Mitchell*<sup>16</sup> expands on prior precedent by holding that the government may collect DNA samples from all arrestees.<sup>17</sup> In doing so, the Third Circuit left several critical questions unanswered that may prove problematic in future litigation.<sup>18</sup>

This Brief discusses the precedent and policies underlying the *Mitchell* court's decision and provides an outline of issues left unresolved by the opinion.<sup>19</sup> Part II presents the development of the Fourth Amendment jurisprudence leading up to the DNA Analysis Backlog Elimination Act, including how courts have handled relevant issues in the past.<sup>20</sup> Part III evaluates the court's analysis in *Mitchell*.<sup>21</sup> Further, Part III discusses the unresolved issues left by the ruling and offers practitioners guidance regarding future litigation in this area of the law.<sup>22</sup> Finally, Part IV concludes by addressing the overall impact of the *Mitchell* decision and its importance within the Third Circuit.<sup>23</sup>

## II. THE EVOLUTION OF CONSTITUTIONAL CHALLENGES TO DNA EVIDENCE

Even the earliest forms of forensic crime solving were questioned under the Constitution.<sup>24</sup> Challengers looked to the Fourth Amendment for protection against potential intrusion from developing technology like

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14. For a discussion of cases addressing the constitutionality of taking and analyzing DNA, and the different analyses applied by the circuit courts, see *infra* notes 39–92 and accompanying text.

15. For a discussion of the analogy of DNA testing to fingerprinting, see *infra* notes 34–38 and accompanying text.

16. 652 F.3d 387 (3d Cir. 2011) (en banc).

17. See *id.* at 390 (holding DNA profiling of all individuals who are arrested or detained does not violate Fourth Amendment). For further discussion of previous Fourth Amendment challenges to the DNA Act, see *infra* notes 39–92 and accompanying text.

18. For further discussion of likely issues for future litigation, see *infra* notes 137–68 and accompanying text.

19. For further discussion of these issues, see *infra* notes 138–69 and accompanying text.

20. For further discussion of the historical development of the Fourth Amendment analysis of issues surrounding DNA evidence, see *infra* notes 24–111 and accompanying text.

21. For further discussion of the Third Circuit's analysis in *Mitchell*, see *infra* notes 116–37 and accompanying text.

22. For further discussion of issues relevant to future practice of law, see *infra* notes 138–69 and accompanying text.

23. For further discussion of the overall impact of *Mitchell*, see *infra* notes 170–78 and accompanying text.

24. For an explanation of the early history of Fourth Amendment challenges to fingerprinting evidence, see *infra* notes 29–38 and accompanying text.

fingerprints and mug shots.<sup>25</sup> With the advent of DNA testing, these Fourth Amendment challenges grew in number and scope.<sup>26</sup> Statutes and case law began to reflect the importance society placed on DNA profiling in criminal investigation.<sup>27</sup> Nonetheless, as DNA testing continued to evolve, many began to question how far the Fourth Amendment would let criminal investigation expand.<sup>28</sup>

#### A. *Early Crime-Solving and the Fourth Amendment*

The Fourth Amendment guarantees protection “against unreasonable searches and seizures . . . .”<sup>29</sup> The Supreme Court’s definition of reasonableness is best described by its opinion in *United States v. Jones*,<sup>30</sup> and by Justice Harlan’s concurrence in *Katz v. United States*,<sup>31</sup> to the extent it remains good law following *Jones*.<sup>32</sup> Under *Jones*, Fourth Amendment protection “embod[ies] a particular concern for government trespass upon the areas (‘persons, houses, papers, and effects’) it enumerates” and also seemingly extends to circumstances in which individuals have a “reasonable expectation of privacy” as expressed by Justice Harlan in *Katz*.<sup>33</sup>

25. For further discussion of early crime solving techniques and Fourth Amendment challenges to them, see *infra* notes 29–38 and accompanying text.

26. For a discussion of challenges to DNA testing and DNA profiling laws, see *infra* notes 48–50, 93–97 and accompanying text; for examples of these challenges, see *infra* notes 39–111 and accompanying text.

27. For a discussion of DNA profiling laws and public policies behind them, see *infra* notes 39–43, 52–54 and accompanying text. DNA profiling as referred to in this article means the collection and analysis of DNA samples within the CODIS system. For an explanation of the DNA profiles created within CODIS, see *infra* note 47.

28. For examples of challenges to DNA laws, see *infra* notes 58–92, 98–111 and accompanying text.

29. See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

30. 132 S. Ct. 945 (2012).

31. 389 U.S. 347 (1967).

32. See *Jones*, 132 S. Ct. at 949–52 (“As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas (‘persons, houses, papers, and effects’) it enumerates. *Katz* did not repudiate that understanding.” (footnote omitted)).

33. See *id.* at 950–52 (“[T]he *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test.”). In addressing reasonableness, the Court has historically endorsed a balancing test.

See *United States v. Knights*, 534 U.S. 112, 118–19 (2001) (“The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search 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.’” (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999))). For a helpful pre-*Jones* discussions of the Fourth Amendment’s application to DNA evidence, see Aaron B. Chapin, Note, *Arresting DNA: Privacy Expectations of Free Citizens Versus Post-Convicted Persons and the Unconstitutionality of DNA Dragnets*, 89 MINN. L. REV. 1842, 1848–49 (2005); Paul M.

Fingerprinting was one of the first major developments in crime solving that raised questions about an individual's Fourth Amendment rights.<sup>34</sup> While law enforcement agencies have used fingerprinting for over a century, the practice began in a time when individuals could easily hide their identity.<sup>35</sup> The collection of fingerprints generated only a few challenges and has long since been established as routine procedure.<sup>36</sup> In today's society, where identity and fingerprints may easily be concealed with the aid of technology, an apt analogy has developed between fingerprinting and DNA samples.<sup>37</sup> Accordingly, the use of DNA evidence by law enforcement has even been termed "fingerprints for the twenty-first century."<sup>38</sup>

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Monteleoni, Note, *DNA Databases, Universality, and the Fourth Amendment*, 82 N.Y.U. L. REV. 247, 261 (2007).

34. See *infra* note 36 (showing example of past constitutional challenges to fingerprinting).

35. See Corey Preston, Note, *Faulty Foundations: How the False Analogy to Routine Fingerprinting Undermines the Argument for Arrestee DNA Sampling*, 19 WM. & MARY BILL RTS. J. 475, 477 (2010) (describing importance of fingerprinting during its early emergence as crime solving tool).

36. See *id.* at 507 (chronicling development of routine practice of fingerprinting). Fingerprinting came under constitutional fire in *Davis v. Mississippi*. See *Davis v. Mississippi*, 394 U.S. 721, 723 (1969) (challenging validity of fingerprinting evidence); see also Preston, *supra* note 35, at 508 (describing facts of case). In *Davis*, police officers fingerprinted a large sample of local youths after a woman said she was raped by an "African American youth." See *Davis*, 394 U.S. at 722. During review by the Supreme Court, the Court found the fingerprint evidence inadmissible due to the possibility of harassment. See *id.* (explaining dangers of fingerprinting mass amounts of potential suspects). Looking at the case, commentator Corey Preston wrote, "[t]his intuition in *Davis* towards suppressing evidence that is gained from a broad criminal investigative purpose, or searches lacking individualized suspicion, has been consistently reaffirmed by the Court." Preston, *supra* note 35, at 508 (footnote omitted).

37. See *United States v. Mitchell*, 652 F.3d 387, 410 (3d Cir. 2011) (en banc) (analogizing DNA to fingerprints), *cert. denied*, 132 S. Ct. 1741 (2012).

38. See *id.* ("[W]e conclude that a DNA profile is used solely as an accurate, unique, identifying marker—in other words, as fingerprints for the twenty-first century."). The Supreme Court of Virginia in *Anderson v. Commonwealth* wrote extensively on the use of this analogy. See *Anderson v. Commonwealth*, 650 S.E.2d 702, 705 (Va. 2007) ("The analogous treatment of the taking of DNA samples to the taking of fingerprints has been widely accepted."). The Supreme Court of Virginia cited to several courts, including the Third Circuit. See *id.* (citing analogies used in Second, Third, Fourth, and Ninth Circuit courts). The court wrote, "[t]he Third Circuit held that '[t]he governmental justification for [DNA] 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.'" *Id.* (alterations in original) (citing *United States v. Sczubelek*, 402 F.3d 175, 185–86 (3d Cir. 2005)). For further analysis of *Sczubelek*, see *infra* notes 85–92 and accompanying text; for a full discussion of *Anderson*, see *infra* notes 107–11 and accompanying text.

B. *The Advent of DNA Collection*

Courts have reasoned that DNA testing is part of the natural evolution of crime solving technology.<sup>39</sup> Recognizing the importance of DNA evidence, Congress passed legislation in 1994 that allowed the FBI to create a DNA database known as the Combined DNA Index System (CODIS).<sup>40</sup> The purpose of CODIS was to allow the comparison and sharing of DNA samples among state and local laboratories in an effort to enhance crime solving capabilities.<sup>41</sup> Congress took action to physically obtain DNA samples in 2000 by passing the DNA Analysis Backlog Elimination Act of 2000 (“DNA Act” or the “Act”).<sup>42</sup> Under the DNA Act, law enforcement officials must obtain DNA from “each individual in the custody of the Bureau of Prisons who is, or has been, convicted of a qualifying Federal offense” and any “individual on probation, parole, or supervised release.”<sup>43</sup>

In an effort to preempt constitutional challenges, Congress built protections into the Act that provide safeguards for individual rights.<sup>44</sup> For example, the Act limits both who can have access to DNA samples and how the samples may be used.<sup>45</sup> The Act also provides a process for expunging a DNA sample from CODIS in the event of acquittal or dismissal.<sup>46</sup> Fi-

39. See *Mitchell*, 652 F.3d at 410 (arguing DNA today is what fingerprints were in early twentieth century); see also *Anderson*, 650 S.E.2d at 705 (using idea that DNA is part of natural progression in technology); Preston, *supra* note 35, at 475–76 (explaining use of analogy that DNA sampling is natural evolution of routine fingerprinting when it comes to identification technology).

40. See DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. § 14135a(a)(3) (2006) (codifying congressional authorization to create CODIS database for DNA samples); see also *Mitchell*, 652 F.3d at 399 (discussing congressional enactment of Violent Crime Control and Law Enforcement Act that gave FBI power to establish CODIS).

41. See § 14135a (outlining process for creating DNA profile within CODIS); see also *Mitchell*, 652 F.3d at 399 (“[CODIS] allows State and local 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.” (quoting H.R. Rep. 106-900(I), at 8 (2000), reprinted in 2000 U.S.C.C.A.N. 2323, 2324)).

42. See § 14135a (permitting physical collection of DNA from specific criminal offenders).

43. § 14135a(a)(1)-(2).

44. See generally DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74,932, 74,933–41 (Dec. 10, 2008) (codified at 28 C.F.R. pt. 28) (presenting safeguards and policy reasons behind each provision of DNA Act).

45. See § 14135a(a)(4)(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 . . . to detain, restrain, and collect a DNA sample . . .”). The text of the DNA Act protects the integrity of the sample by severely limiting the sampling and profiling procedure. See *id.* § 14135a(b) (stating each sample collected shall be furnished to FBI for DNA analysis and inclusion in CODIS).

46. See DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. at 74,932 (explaining expunging process). Under the DNA Act, a person can petition to have his or her sample removed from

nally, the type of DNA used in the creation of a CODIS profile is a sequence of DNA known as “junk DNA,” which cannot be used to independently identify the source of the sample.<sup>47</sup>

However, the Act’s safeguards did not shield the statute from constitutional attack.<sup>48</sup> The DNA Act has consistently faced criticism as enabling unreasonable, and thus unconstitutional, searches.<sup>49</sup> The Supreme Court laid the framework for these challenges when it ruled that the “compelled intrusion” of extracting blood for blood alcohol testing constituted a search under the Fourth Amendment.<sup>50</sup> This decision, however, did not negate the Court’s prior justification of blood testing as only a minimal intrusion on individual rights.<sup>51</sup>

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CODIS if an individual’s conviction has been overturned, if charges were dismissed, if no charges were filed, or if that individual was acquitted. See § 14132(d). This process requires the individual to obtain a final court order establishing the factual basis for requesting expungement. See *id.*

47. See DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. at 74,932 (explaining process for creating “genetic fingerprints”). The Department of Justice explains that the DNA entered into CODIS is “information concerning 13 ‘core loci[ ]’ amount[ing] to ‘genetic fingerprints’ that can be used to identify an individual uniquely, but do not disclose an individual’s traits, disorders, or dispositions.” *Id.* at 47,933. The Ninth Circuit in *United States v. Kincade* described the process of creating the CODIS profile, writing:

Through the use of short tandem repeat technology (“STR”), the Bureau analyzes the presence of various alleles located at 13 markers (or loci) on DNA present in the specimen. These STR loci are each found on so-called “junk DNA”—that is, non-genic stretches of DNA not presently recognized as being responsible for trait coding—and “were purposely selected because they are not associated with any known physical or medical characteristics.” . . . Due to the substantial number of alleles present at each of the 13 STR loci . . . and wide-spread variances in their representation among human beings, the chance 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.

*United States v. Kincade*, 379 F.3d 813, 818–19 (9th Cir. 2004) (footnote omitted) (citation omitted).

48. For discussion of the safeguards built into the DNA Act, see *supra* notes 44–47 and accompanying text; for a summary of challenges to the DNA Act, see *infra* notes 58–92, 98–111 and accompanying text.

49. See *United States v. Mitchell*, 652 F.3d 387, 402 (3d Cir. 2011) (en banc) (“The DNA Act and its state-law analogues have been subject to numerous constitutional challenges, generally on the ground that DNA collection and analysis is an unreasonable search in violation of the Fourth Amendment.”), *cert. denied*, 132 S. Ct. 1741 (2012). For more cases challenging the constitutionality of the DNA Act, see *infra* notes 58–92, 98–111 and accompanying text.

50. See *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 616 (1989) (“We have long recognized that a ‘compelled intrusio[n] into the body for blood to be analyzed for alcohol content’ must be deemed a Fourth Amendment search.” (alteration in original) (quoting *Schmerber v. California*, 384 U.S. 757, 767–68 (1966))).

51. See *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957) (explaining blood tests are part of everyday life which amount to only minimal intrusion); see also *Kincade*, 379 F.3d at 836–37 (citing *Abram* as law applicable to today’s jurisprudence).



Every circuit court faced with a Fourth Amendment challenge has upheld the constitutionality of the original DNA Act.<sup>52</sup> Despite the frequent litigation, the circuit courts are split as to the proper analytical test to apply to these Fourth Amendment challenges.<sup>53</sup> Courts have developed two distinct tests for these Fourth Amendment issues: the “special needs test” and a “totality of the circumstances test.”<sup>54</sup>

### 1. *Special Needs Test*

A minority of circuit courts have adopted what is known as the special needs test.<sup>55</sup> Under a special needs analysis, a court considers the purpose served by a warrantless search.<sup>56</sup> If the search was conducted for purposes unrelated to law enforcement, and a warrant or finding of probable cause would have been unreasonable under the circumstances, the search is within the Fourth Amendment exception.<sup>57</sup>

The Second Circuit applied the special needs test to the 2000 DNA Act in *United States v. Amerson*.<sup>58</sup> The court determined DNA collection aided law enforcement in identifying individuals.<sup>59</sup> However, according to the court, this was not a law enforcement purpose because DNA collection “does not involve any suggestion that the individual is being suspected of having committed a crime (other than the one of which he had already been convicted).”<sup>60</sup> Further, the court found DNA testing to be a “special” need because it is beyond the scope of “normal” law enforcement

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52. See *Mitchell*, 652 F.3d at 402 (referring to other circuit courts upholding DNA indexing statutes under Constitution); see also Ashley Eiler, Note, *Arrested Development: Reforming the Federal All-Arrestee DNA Collection Statute to Comply with the Fourth Amendment*, 79 GEO. WASH. L. REV. 1201, 1213 (2011) (discussing prior holdings of circuits throughout United States). For a discussion of cases challenging the constitutionality of the DNA Act, see *infra* notes 58–92, 98–111 and accompanying text.

53. See Eiler, *supra* note 52, at 1213 (summarizing contrasting tests used to review Fourth Amendment challenges throughout circuit courts).

54. See *infra* notes 55–57, 63–66 and accompanying text (explaining provisions of special needs and totality of circumstances tests).

55. See Eiler, *supra* note 52, at 1213–16 (“The minority approach adopted by federal circuit courts examines whether the DNA collection statute being considered presents a ‘special need’ beyond normal law enforcement needs that renders the ‘warrant and probable-cause requirement impracticable.’”).

56. See *United States v. Amerson*, 483 F.3d 73, 80 (2d Cir. 2007) (describing special needs test as looking at relationship between need and law enforcement).

57. See *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (explaining that warrantless searches are justified when probable cause and warrant are impracticable); see also *United States v. Kincade*, 379 F.3d 813, 823 (9th Cir. 2004) (explaining most special needs cases involve searches in special non-law enforcement circumstances, like preserving school setting).

58. 483 F.3d 73 (2d Cir. 2007).

59. See *id.* at 82 (summarizing analysis of DNA Act under special needs test).

60. See *id.* (justifying DNA Act as beyond law enforcement purposes because it does not involve suspecting individual of criminal activity).

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activity.<sup>61</sup> Accordingly, the court upheld the DNA Act as constitutionally valid.<sup>62</sup>

## 2. *Totality of the Circumstances Test*

The majority of the circuit courts, including the Third Circuit, have adopted a totality of the circumstances test to analyze challenges to the DNA Act.<sup>63</sup> The Fourth Amendment's totality of the circumstances test is a balancing test that requires courts to compare the intrusion on individual privacy with the government interests furthered by that intrusion.<sup>64</sup> This test is built on the Supreme Court's holding in *Samson v. California*,<sup>65</sup> which weighed an arrestee's expectation of privacy against compelling government interests.<sup>66</sup>

Several circuit courts have applied the totality of the circumstances test to DNA testing statutes.<sup>67</sup> One of the initial cases appeared in the Ninth Circuit in *Rise v. Oregon*.<sup>68</sup> In *Rise*, the court addressed the constitutionality of a state law mandating DNA testing for certain criminal offenders.<sup>69</sup> The court began its analysis by clarifying that information derived from a DNA sample is analogous to that from a fingerprint, in that both are "identifying marker[s] unique to the individual from whom the infor-

61. *See id.* (arguing DNA testing is not something normal law enforcement methodologies utilize and is therefore within special need).

62. *See id.* at 88 (concluding DNA Act satisfies special needs test).

63. *See Eiler, supra* note 52, at 1213–14 (commenting on use of totality of circumstances test throughout majority of circuits).

64. *See Preston, supra* note 35, at 479 ("The 'totality of the circumstance' test requires balancing the degree of intrusion on an individual's privacy and the legitimate government interest that that intrusion serves.").

65. 547 U.S. 843 (2006). In *Samson*, the Supreme Court held that, under the totality of the circumstances, a parolee can be subject to search or seizure by an officer of the law without warrant or cause. *See id.* (discussing application and outcome of case).

66. *See id.* at 848 (adopting totality of circumstances test for Fourth Amendment challenges); *see also Eiler, supra* note 52, at 1214 (describing Supreme Court precedent in *Samson*). Courts that apply the totality of the circumstances test often point to the government's law enforcement interests. *See id.* at 1214–15 (outlining government interests served by CODIS). These interests include the ability to: rehabilitate parolees and releasees; efficiently and accurately solve crimes; and exonerate the wrongly convicted. *See United States v. Weikert*, 504 F.3d 1, 1 (1st Cir. 2007) (presenting arguments in favor of government interests); *United States v. Kincade*, 379 F.3d 813, 838 (9th Cir. 2004) (showing government interests which tip totality of circumstances test in favor of government); *Eiler, supra* note 52, at 1214 (describing government interests).

67. For other cases examining the constitutionality of the 2000 DNA Act, *see infra* notes 68–92 and accompanying text.

68. 59 F.3d 1556 (9th Cir. 1995). Prior to the case addressing the constitutionality of the statute, the challenger was convicted of attempted murder. *See id.* at 1558 (discussing Fourth Amendment challenges to state law mandating DNA collection and summarizing facts of previous case).

69. *See id.* (restating provisions of Oregon DNA law requiring DNA testing of convicted murderers and sexual offenders).

mation is derived.”<sup>70</sup> After applying the totality of the circumstances test, the court upheld the constitutional validity of the state statute.<sup>71</sup> The court explained that convicted criminals have a diminished right to privacy that is outweighed by the wider societal benefit of the statute.<sup>72</sup>

Building on this precedent, the Ninth Circuit applied the same analysis to the DNA Act in *United States v. Kincade*.<sup>73</sup> The defendant in *Kincade* was serving a period of supervised release when his probation officer requested a blood sample.<sup>74</sup> The defendant refused and challenged the constitutionality of the DNA Act in court.<sup>75</sup> The court began its analysis by extending the principles of the diminished privacy expectation, acknowledged in *Rise*, to parolees and conditional releasees.<sup>76</sup> The court further reasoned that both the blood sample and the information contained therein were only minimal intrusions into individual privacy.<sup>77</sup> To complete its evaluation of the Act, the court found that the societal concerns of monitoring and rehabilitating parolees were valid government in-

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70. *Id.* at 1559.

71. *See id.* at 1560, 1562 (applying totality of circumstances test to determine law was reasonable and constitutional). While the court did not explicitly acknowledge that it was applying a totality of the circumstances or balancing test, it stated that the issue “requires us to balance the gravity of the public interest served by the creation of a DNA data bank, the degree to which the data bank would advance the public interest, and the severity of the resulting interference with individual liberty.” *Id.* at 1560.

72. *See id.* at 1560, 1562 (explaining convicted criminals do not have same privacy rights as other citizens, and outlining public policy concerns which led court to its holding). When analyzing the government interests served by the DNA sampling, the court looked at crime solving interests such as identifying suspects, prosecuting offenders, and the benefit to the prosecution of increased accuracy in identifying criminal offenders. *See id.* at 1561 (outlining public policies addressed by DNA sampling law).

73. *See United States v. Kincade*, 379 F.3d 813, 836 (9th Cir. 2004) (“In evaluating the totality of the circumstances, we must balance the degree to which DNA profiling interferes with the privacy interests of qualified federal offenders against the significance of the public interest served by such profiling.”).

74. *See id.* at 820 (summarizing facts of case).

75. *See id.* (discussing facts leading up to defendant’s constitutional challenge).

76. *See id.* at 833 (“[P]arolees and other conditional releasees are not entitled to the full panoply of rights and protections possessed by the general public.”).

77. *See id.* at 837–38 (finding intrusions caused by DNA Act only minimal). The court first relied on Supreme Court precedent, which found that invasions caused by blood tests are minimal. *See id.* at 837 (discussing analysis from *Breithaupt v. Abram*, 352 U.S. 432 (1957)). Then, the court determined the DNA sample only makes a record of the offender’s identity, nothing more. *See id.* at 837–38. In conclusion, the court wrote, “[a]s currently structured and implemented, however, 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.” *Id.* at 838.

terests.<sup>78</sup> Accordingly, the Ninth Circuit upheld the constitutionality of the DNA Act.<sup>79</sup>

The First Circuit examined the validity of the DNA Act in *United States v. Weikert*.<sup>80</sup> The challenger in *Weikert* opposed the taking of DNA upon his conditional release from prison.<sup>81</sup> The court relied on Supreme Court precedent, and applied the totality of the circumstances test.<sup>82</sup> Following the approach of the Ninth Circuit, the First Circuit held the DNA Act to be constitutional when applied to individuals on conditional release.<sup>83</sup> The court found that the public policy concerns outweighed any violation of the rights of an individual on conditional release.<sup>84</sup>

The Third Circuit undertook a Fourth Amendment challenge to the 2000 DNA Act in *United States v. Sczubelek*.<sup>85</sup> In *Sczubelek*, the challenger was a person on supervised release who protested a warrantless DNA extraction.<sup>86</sup> The court applied the totality of the circumstances test and found no constitutional violation.<sup>87</sup> First, the court reasoned that the intrusion caused by a blood test is minimal.<sup>88</sup> Second, the court noted that an indi-

78. *See id.* at 838–39 (explaining benefits of DNA testing such as monitoring parolees and providing closure to victims).

79. *See id.* at 839 (“In light of conditional releasees’ substantially diminished expectation 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.”).

80. *See United States v. Weikert*, 504 F.3d 1, 2–3 (1st Cir. 2007) (“This case presents a question of first impression in this circuit: is it a violation of the Fourth Amendment’s prohibition on unreasonable searches and seizures to require an individual on supervised release to provide a blood sample for purposes of creating a DNA profile and entering it into a centralized database?”).

81. *See id.* (summarizing facts of case).

82. *See id.* at 11 (laying out applicable precedent and determining totality of circumstances test was appropriate).

83. *See id.* at 11–18 (holding DNA sampling and profiling to be constitutionally valid). The First Circuit followed the analysis applied by other courts, balancing the small invasion of the blood sample with valid public policy concerns addressed by the sampling. *See id.* (summarizing history and precedent court used when applying totality of circumstances test).

84. *See id.* (affirming holding in case).

85. *See United States v. Sczubelek*, 402 F.3d 175, 177 (3d Cir. 2005) (ruling on constitutionality of collecting DNA samples from people on supervised release).

86. *See id.* (reiterating issue in case).

87. *See id.* (“The government’s interest in building a DNA database for identification purposes, similar to its interest in maintaining fingerprint records, outweighs the minimal intrusion into a criminal offender’s diminished expectation of privacy.”).

88. *See id.* at 184 (citing *Skinner v. Ry. Labor Execs. Ass’n*, 469 U.S. 602, 616 (1989)). For a full discussion of *Skinner*, see *infra* notes 120–21 and accompanying text.

vidual on supervised release has a lesser right to privacy in their identity, and DNA is merely a more reliable means of identification.<sup>89</sup>

Additionally, the court emphasized that DNA databases promote accuracy in criminal investigations and, consequently, protect society.<sup>90</sup> After examining the competing interests, the court found the benefit to society outweighed the burden on the individual.<sup>91</sup> While both tests are applied amongst the circuit courts, the majority favor the totality of the circumstances test.<sup>92</sup>

### C. DNA and Arrestees

In an effort to further improve crime solving capabilities, Congress extended the collection of DNA with a 2006 amendment to the DNA Act (“2006 DNA Act”).<sup>93</sup> Under this amendment, law enforcement officials are required to obtain DNA samples from all individuals who are arrested, facing charges, or facing convictions.<sup>94</sup> Federal regulation implements the federal statute, which mandates DNA collection and leaves no discretion on the part of the law enforcement officer.<sup>95</sup> A vast array of court cases and scholarly literature have targeted the 2000 DNA Act, but the newest addition to the Act has produced less commentary.<sup>96</sup> The Supreme Court has been silent on the issue, and prior to *Mitchell*, only one circuit reviewed a case challenging the 2006 amendment.<sup>97</sup>

89. *See id.* at 185 (describing lower level of liberty given to individuals on supervised release). The court found that once the defendant was convicted of a felony, his identity became a state interest. *See id.* That interest was served by creating a permanent record, including: fingerprints, photographs, and DNA. *See id.* (outlining booking procedures that serve legitimate state interest in identifying criminals).

90. *See id.* at 185–86 (explaining compelling government interests served by DNA collection and maintaining DNA database).

91. *See id.* (holding that government interests outweighed minimal burden on individual rights).

92. For a discussion of the use of the totality of the circumstances test to analyze DNA Act challenges, see *supra* notes 64–92 and accompanying text.

93. *See* 42 U.S.C. § 14135a (2006) (extending 2000 DNA Act to allow DNA sampling of all arrestees); *see also* United States v. Mitchell, 652 F.3d 387, 390 (3d Cir. 2011) (en banc) (describing most recent amendments to DNA Act), *cert. denied*, 132 S. Ct. 1741 (2012).

94. *See generally* DNA-Sample Collection and Biological Evidence Preservation in Federal Jurisdiction, 73 Fed. Reg. 74,932 (Dec. 10, 2008) (codified at 28 C.F.R. pt. 28) (explaining policies and provisions of 2006 DNA Act).

95. *See* 28 C.F.R. § 28.12 (2009) (“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 . . . .”); *see also* Mitchell, 652 F.3d at 401 (explaining mandatory nature of DNA collection).

96. For a full discussion of constitutional challenges to the 2000 DNA Act, see *supra* notes 63–92 and accompanying text.

97. *See* United States v. Pool, 621 F.3d 1213, 1214 (9th Cir. 2010) (reviewing constitutionality of DNA Act’s 2006 amendment), *rehearing en banc granted*, 646 F.3d 659 (9th Cir. 2011), *vacated as moot*, 59 F.3d 761 (9th Cir. 2011); *see also* Eiler,

In *United States v. Pool*,<sup>98</sup> the Ninth Circuit reviewed the 2006 amendment.<sup>99</sup> While the Ninth Circuit has since vacated its opinion after the defendant entered a guilty plea, the court's analysis is still noteworthy as the first to review the 2006 amendments to the DNA Act.<sup>100</sup> In *Pool*, the defendant's pretrial release was contingent on providing a DNA sample.<sup>101</sup> The defendant argued that arrestees have the same rights as normal citizens.<sup>102</sup> The court rejected this argument and determined probable cause for arrest set an arrestee apart from the average population.<sup>103</sup> The court then applied the totality of the circumstances test to the Fourth Amendment challenge.<sup>104</sup> After weighing both sides, the court found the state's legitimate interest in identifying arrestees outweighed the defendant's diminished expectation of privacy in his identity.<sup>105</sup> The court reasoned that DNA was simply a more accurate means of identification that served the state's interest, and upheld the newly modified DNA Act.<sup>106</sup>

While *Pool* was the only federal case to examine the 2006 amendments prior to *Mitchell*, the Supreme Court of Virginia did so in *Anderson v. Commonwealth*.<sup>107</sup> In *Anderson*, the defendant challenged DNA testing upon arrest after his DNA matched a sample taken in a rape case twelve years earlier.<sup>108</sup> The court determined that taking DNA was no different than providing a fingerprint, an analogy that is widely accepted amongst the

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*supra*, note 52, at 1202–03 (summarizing lack of review of any statutorily mandated DNA sampling by Supreme Court).

98. 621 F.3d 1213 (9th Cir. 2010), *rehearing en banc granted*, 646 F.3d 659 (9th Cir. 2011), *vacated as moot*, 659 F.3d 761 (9th Cir. 2011).

99. *See generally id.* (ruling on question of whether all arrestee DNA testing in 2006 DNA Act is constitutional).

100. *See United States v. Pool*, 646 F.3d 659 (9th Cir. 2011), *rehearing en banc granted*, 646 F.3d 659 (9th Cir. 2011), *vacated as moot*, 659 F.3d 761 (9th Cir. 2011).

101. *See Pool*, 621 F.3d at 1215 (summarizing facts of case).

102. *See id.* at 1219 (summarizing defendant's argument that his Fourth Amendment rights, which he shared with normal population, were violated).

103. *See id.* (“[Probable cause] was the ‘watershed event’ that distinguished Pool from the general public and allowed for the application of the totality of the circumstances test.”).

104. *See id.* at 1217 (deciding to apply totality of circumstances test to analyze defendant's challenge).

105. *See id.* at 1217, 1219 (holding arrestees have diminished expectation of privacy upon finding of probable cause for arrest, and once individuals are arrested their identity becomes matter of state interest).

106. *See id.* at 1222–23 (explaining use of DNA as most accurate way to determine identity).

107. 650 S.E.2d 702, 703 (Va. 2007) (reviewing constitutionality of sampling all individuals placed under arrest). Although *Anderson* is a state rather than a federal case, it has been important to the development of this area of law because it is one of two cases to have addressed the constitutionality of the DNA Act at that time. *See id.* (describing lack of jurisprudence).

108. *See id.* at 704 (summarizing facts of case).

state and federal courts.<sup>109</sup> Applying this reasoning, the Supreme Court of Virginia determined that the minor intrusion upon an arrestee's privacy was far outweighed by the state's law enforcement interests.<sup>110</sup> Accordingly, the court held that taking DNA samples is "analogous to the taking of a suspect's fingerprints upon arrest and [is] not an unlawful search under the Fourth Amendment."<sup>111</sup>

### III. ANALYSIS

Prior to *Mitchell*, only the Ninth Circuit in *Pool* and the Supreme Court of Virginia in *Anderson* had undertaken constitutional review of the 2006 DNA Act.<sup>112</sup> As the second federal circuit court to review the constitutionality of the 2006 DNA Act, the Third Circuit built on precedent surrounding the original DNA Act.<sup>113</sup> Citing public policy concerns and its own prior decisions, the court ultimately upheld the 2006 DNA Act.<sup>114</sup> However, the issues that *Mitchell* left untouched warrant just as much attention as the precedential opinion.<sup>115</sup>

#### A. Upholding the Constitutionality of All Arrestee DNA Testing

To begin its analysis of the 2006 DNA Act, the Third Circuit adopted the totality of the circumstances test.<sup>116</sup> Citing its use of the test in *Sczubelek*, the court determined that the test is applicable beyond searches of probationers and parolees.<sup>117</sup> Balancing the competing individual and

109. See *id.* at 705 ("Upon arrest, the accused is subject to a routine booking process, including the taking of fingerprints. A DNA sample of the accused taken upon arrest, while more revealing, is no different in character than acquiring fingerprints upon arrest."). For a full discussion of the analogy of DNA to fingerprints, see *supra* note 38.

110. See *id.* at 704–07 (analyzing balance of arrestee's privacy interest against state's interest in improved law enforcement).

111. *Id.* at 706.

112. For further discussion of *Pool*, see *supra* notes 98–106 and accompanying text; for a further discussion of *Anderson*, see *supra* notes 107–11 and accompanying text.

113. See *infra* notes 116–37 and accompanying text (summarizing Third Circuit's arguments and reasoning).

114. See *infra* notes 116–37 and accompanying text (discussing court's basis for upholding 2006 DNA Act).

115. For discussion of the unresolved issues presented in *Mitchell* and their overall significance in the Third Circuit, see *infra* notes 138–69 and accompanying text.

116. See *United States v. Mitchell*, 652 F.3d 387, 390 (3d Cir. 2011) (en banc) ("[W]e apply a 'totality of the circumstances' test, balancing the intrusion on Mitchell's privacy against the Government's interest in the collection and testing of his DNA."), *cert. denied*, 132 S. Ct. 1741 (2012).

117. See *id.* at 390, 403 (explaining use of totality of circumstances test). The court determined that the totality of the circumstances test applied to Mitchell's situation by relying on Supreme Court precedent from *Tennessee v. Garner*. See *id.* at 403 (citing *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). In *Garner*, the Supreme Court wrote that the "key principle" in Fourth Amendment analysis, and determin-

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governmental interests aided the court in analyzing the reasonableness of the DNA sampling.<sup>118</sup> More specifically, the court concluded that to determine the reasonableness of DNA testing under the circumstances involved balancing the intrusion of privacy against government interests in collecting and testing DNA.<sup>119</sup>

The totality of the circumstances test led the court to split its analysis of DNA collection into two searches: the physical collection of the DNA and the processing of the DNA sample.<sup>120</sup> The court began its analysis by asserting that collecting DNA constitutes a search under the Fourth Amendment.<sup>121</sup> Regarding the collection of the DNA sample, the court relied on Supreme Court precedent, as they did in *Sczubelek*, to determine that blood tests constitute a minimal intrusion of privacy.<sup>122</sup> By applying its analysis in *Sczubelek*, the court concluded that “the act of collecting a DNA sample is ‘neither a significant nor an unusual intrusion.’”<sup>123</sup>

Applying the totality of the circumstances test to the processing of the DNA sample, the court quickly rejected Mitchell’s argument that DNA is not comparable to fingerprints.<sup>124</sup> While the lower court agreed with Mitchell’s assertion that DNA contains more information than just identity, the Third Circuit was unconvinced.<sup>125</sup> Rather, the court reiterated the widespread use of the fingerprint-DNA analogy and found that “a

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ing the reasonableness of a search, is the balancing of all interests. *See id.* (reciting idea that Fourth Amendment rests on reasonableness of search and seizure). Thus, the *Mitchell* court reasoned that the totality of the circumstances test applies to the contested search and the Fourth Amendment analysis. *See id.*

118. *See id.*

119. *See id.* (reiterating purposes of totality of circumstances test are determining reasonableness and balancing interests).

120. *See id.* at 406 (writing collection of DNA under DNA Act requires two Fourth Amendment searches: physical collection and DNA analysis).

121. *See id.* (relying on Supreme Court precedent, *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 616 (1989)).

122. *See id.* at 406 (concluding DNA testing requires only minimal intrusion of privacy). The court relied on the Supreme Court case *Skinner v. Ry. Labor Execs. Ass’n*, stating “The Supreme Court has repeatedly held that the ‘intrusion occasioned by a blood test is not significant, since such “tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain.’” *Id.* at 406–07 (quoting *Skinner*, 489 U.S. at 625).

123. *See id.* at 407 (citing *United States v. Weikert*, 504 F.3d 1, 12 (1st Cir. 2007)).

124. *See id.* at 409–10 (rejecting Mitchell’s argument and reiterating analogy that DNA samples are akin to fingerprints).

125. *See id.* at 409 (“The District Court agreed [with Mitchell], holding that ‘to compare the fingerprinting process and the resulting identification information obtained therefrom with DNA profiling is pure folly.’” (quoting *United States v. Mitchell*, 681 F. Supp. 2d 597, 608 (W.D. Pa. 2009))).



DNA profile is used solely as an accurate, unique, identifying marker—in other words, as fingerprints of the twenty-first century.”<sup>126</sup>

Because the court determined DNA profiling is merely a form of identification, its analysis continued by asking to what extent an individual has an expectation of privacy in his or her identity.<sup>127</sup> According to the court, an arrestee has a lesser expectation of privacy in their identity.<sup>128</sup> The court based its conclusion on two ideas: “probable cause to arrest and the use of fingerprints as a method of identification.”<sup>129</sup> The court noted that once law enforcement found probable cause for arrest, an arrestee’s identification became “a matter of legitimate state interest.”<sup>130</sup> Thus, because DNA collection occurs after arrest, the arrestee had a diminished expectation of privacy in his or her own identity.<sup>131</sup> The court further noted that because DNA was only being used for identification, DNA profiling would not invade the diminished privacy interest.<sup>132</sup>

126. *See id.* at 409–10 (continuing analysis by citing well-accepted use of DNA-fingerprint analogy in its “sister circuits”). The court further strengthened its argument that DNA is merely being used for identification by explaining the nature of “junk DNA.” *See id.* at 410 (“Like fingerprints, ‘at least in the current state of scientific knowledge, the DNA profile derived from the [individual’s] blood sample establishes only a record of the [individual’s] identity.’ Given the protections built into the DNA Act, the Government’s stated practice of only analyzing ‘junk DNA,’ and the current limits of technology, the information stored in CODIS serves only an identification purpose.” (citations omitted)). For a full discussion of “junk DNA”, see *supra* note 47 and accompanying text.

127. *See id.* at 410 (determining issue is degree of privacy individual has in his or her own identity).

128. *See id.* at 410–12 (concluding arrestees and pretrial detainees have “diminished expectation of privacy” in their identity). The court again looked closely at the fingerprint-DNA analogy. *See id.* at 411 (discussing usefulness of analogy between DNA and fingerprints). The court quoted the Fourth Circuit and wrote:

The universal approbation of fingerprints as a method of identifying arrestees despite the invasion of privacy “is not surprising when we consider that probable cause had already supplied the basis for bringing the person within the criminal justice system. With the person’s loss of liberty upon arrest comes the loss of at least some, if not all, rights to personal privacy otherwise protected by the Fourth Amendment.”

*Id.* at 411 (quoting *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992)).

129. *See id.* (writing that diminished expectation of arrestees’ privacy comes from two principles of probable cause needed for arrest and using DNA for identification, like fingerprinting).

130. *See id.* (quoting *Jones*, 962 F.2d at 306). The court explained, “We accept this proposition because the identification of suspects is relevant not only to solving the crime for which the suspect is arrested, but also for maintaining a permanent record to solve other past and future crimes.” *See id.* (quoting *Jones*, 962 F.2d at 306).

131. *See id.* at 412 (“DNA collection occurs only after it has been determined that there is probable cause to believe that the arrestee committed a crime. In light of this probable cause finding, arrestees possess a diminished expectation of privacy in their own identity, which has traditionally justified taking their fingerprints and photographs.”).

132. *See id.* (“[B]ecause DNA profiles developed pursuant to the DNA Act function as ‘genetic fingerprints’ used only for identification purposes, arrestees

On the other side of the totality of the circumstances test, the court pointed to important law enforcement interests for obtaining DNA samples from all arrestees.<sup>133</sup> The court stated that the interests laid out in *Sczubelek*, generally related to “collecting identifying information to aid law enforcement,” apply equally to arrestees and detainees.<sup>134</sup> Accordingly, the court found that officials have a strong interest in identifying arrestees, and DNA is a more accurate way to serve that interest.<sup>135</sup> Ultimately, the court wrote that proper identification “assists the Government in accurate criminal investigations and prosecutions . . . . Collecting DNA samples from arrestees can speed both the investigation of the crime of arrest and the solution of any past crime for which there is a match in CODIS.”<sup>136</sup> After looking to Third Circuit precedent, prior circuit holdings, and public policy, the court ultimately upheld the 2006 amendments as constitutional, and therefore not a Fourth Amendment violation.<sup>137</sup>

B. *Unresolved Issues and Future Concerns About New Technology and DNA Testing*

While the Third Circuit answered the question regarding the constitutionality of the 2006 amendments, several questions remain unanswered that could prove significant for practitioners in future litigation.<sup>138</sup> First, the court explicitly refused to rule on the issue of whether DNA could be constitutionally retained after an individual’s release.<sup>139</sup> The limitless testing of each DNA sample under current law aggravates the question of the constitutionality of DNA retention.<sup>140</sup> Second, the court quickly dismissed the fact that technological advances could allow more significant information to be solicited from “junk DNA” samples.<sup>141</sup>

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and pretrial detainees have reduced privacy interests in the information derived from a DNA sample.”).

133. *See id.* at 390 (concluding that DNA collection mandated by 2006 DNA Act serves important law enforcement purposes).

134. *See id.* at 413 (citing *United States v. Sczubelek*, 402 F.3d 175, 186 (3d Cir. 2005)).

135. *See id.* at 414 (applying valid public policy and state law enforcement interests to arrestees and detainees).

136. *Id.* at 414–15.

137. *See id.* at 415–16 (holding 2006 DNA Act does not violate Fourth Amendment ban on unreasonable searches).

138. For further discussion of the questions left unanswered by *Mitchell*, see *infra* notes 138–69 and accompanying text.

139. *See Mitchell*, 652 F.3d at 412 (“We leave for another day the question of whether an individual may challenge the Government’s retention of his DNA sample or profile.”). For further discussion of the retention of DNA samples after release, see *infra* notes 150–53 and accompanying text.

140. *See Eiler*, *supra* note 52, at 1202 (discussing repeated use of each DNA sample); see also *infra* notes 144–59 and accompanying text (arguing use of DNA samples within CODIS may be subject of future litigation).

141. *See Mitchell*, 622 F.3d at 407 (dismissing defendant’s argument regarding future use of DNA samples due to its hypothetical nature). In rejecting *Mitchell*’s

Upon initial analysis, these issues seem to fit into the current Fourth Amendment framework.<sup>142</sup> However, by explicitly ignoring these questions, the Third Circuit, along with its sister circuits, has left holes in its Fourth Amendment analysis.<sup>143</sup> Third Circuit practitioners in this area of the law must acknowledge these gaps and proceed carefully when dealing with these issues.<sup>144</sup>

### 1. *Treatment of DNA*

The manner in which government agents treat DNA samples could face constitutional challenges.<sup>145</sup> First, any DNA sample within CODIS is subject to recurring and indeterminate use.<sup>146</sup> This means that a single DNA sample could potentially be analyzed hundreds of times in a day, comparing every new sample for a possible match.<sup>147</sup> Further, a DNA sample is useful for familial searches, which often lead to further investigation into an individual's family background.<sup>148</sup> While *Mitchell* clearly vali-

argument that future advances in DNA technology could alter potential Fourth Amendment violations of DNA sampling, the Third Circuit wrote:

While we acknowledge the seriousness of Mitchell's concerns about the possible misuse and future use of DNA samples, we conclude that these hypothetical possibilities are unsupported by the record before us and thus do not have any substantial weight in our totality of the circumstances analysis. Should technological advancements change the value of "junk DNA," reconsideration of our Fourth Amendment analysis may be appropriate.

*Id.* at 408.

142. For a discussion of the Supreme Court's most recent case law on the Fourth Amendment, see *supra* notes 29–33 and accompanying text. For a discussion of notable case law on the 2006 amendments, see *supra* notes 93–111 and accompanying text.

143. See, e.g., Ashley J. McCarron, Comment, *Do the Crime, Serve the Time, Then Leave Your DNA Behind: United States v. Weikert*, 3 J. HEALTH & BIOMEDICAL L. 379, 386 (2007) (stating court's reluctance to face certain issues portends future problems in law); see also *infra* notes 160–69 and accompanying text (arguing current Fourth Amendment analysis could come unraveled with future changes).

144. For more information on the importance to practitioners, see *infra* notes 145–69 and accompanying text.

145. See Linda Bartusiak, Comment, *Plea Bargaining for DNA: Implications on the Right to Privacy*, 13 U. PA. J. CONST. L. 1115, 1124 (2011) (presenting argument that indefinite retention of DNA samples may be unconstitutional); see also Eiler, *supra* note 52, at 1202 (proposing that repeated use of DNA analysis on single sample could be constitutional violation).

146. See Eiler, *supra* note 52, at 1202 ("In the CODIS database, an arrestee's DNA profile is subject to repeated and indefinite use by law enforcement officials across the nation, who perform searches to match unidentified biological evidence from crime scenes to an individual in the database in hopes of solving a crime.").

147. See *id.* (describing repetitive testing allowed with each search of CODIS database).

148. See Bartusiak, *supra* note 145, at 1126–27 (explaining familial searches within CODIS database). Commentator Linda Bartusiak describes familial searches as "permit[ing] investigators who find a partial DNA match to use that person as a 'pivot,' or a person who is likely related to the true offender. Once police identify a pivot, they can investigate that person's relatives with greater scru-

dated the collection and testing of DNA samples, the constitutionality of recurring DNA tests remains unclear.<sup>149</sup>

Similarly, there is a question as to whether a DNA sample can be constitutionally retained after a prisoner's release.<sup>150</sup> Several courts, including the Third Circuit in *Mitchell*, refused to discuss this issue.<sup>151</sup> While a prisoner, or even an arrestee, may have a diminished expectation of privacy that validates initial DNA sampling, this diminished expectation does not last forever.<sup>152</sup> While arrestees have the option to expunge their sample if charges are dropped, they cannot petition the court for two years following their arrest.<sup>153</sup>

Practitioners should be aware of these unresolved issues, for they may be the subjects of future litigation in this field of law.<sup>154</sup> For defense counsel, these ambiguities could be an entry point for a new constitutional challenge to the DNA Act.<sup>155</sup> The court in *Mitchell* recognized the possibility of future problems with the DNA Act, but refused to expand on current Fourth Amendment precedent; in doing so, the court outlined a hole in current jurisprudence.<sup>156</sup> If an individual no longer has a diminished

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tiny, despite the absence of any individualized suspicion." *Id.* (footnote omitted). Bartusiak suggests such searches could be beyond the scope of DNA analysis currently permitted under the Fourth Amendment. *See id.* (arguing current statutes need revision to comply with Fourth Amendment).

149. *See United States v. Mitchell*, 652 F.3d 387, 412 (3d Cir. 2011) (en banc) (refusing to address indefinite retention of DNA samples after release), *cert. denied*, 132 S. Ct. 1741 (2012).

150. *See id.* (leaving issue of government's retention of DNA samples for another case); *see also United States v. Weikert*, 504 F.3d 1, 15 (1st Cir. 2007) ("[W]e express no opinion on the constitutionality of the retention and searching by the government of the DNA profiles of individuals who have completed their terms of conditional release . . .").

151. *See Mitchell*, 652 F.3d at 412 (deferring review of constitutionality of DNA retention after release); *see also Weikert*, 504 F.3d at 15 (refusing to determine if retaining and indefinitely searching DNA samples is constitutional); *United States v. Kincade*, 379 F.3d 813, 837–38 (9th Cir. 2004) (limiting analysis to current issue while denying opportunity to determine whether government may constitutionally retain samples for DNA profiling).

152. *See Bartusiak*, *supra* note 145, at 1124 (arguing that arrestees' diminished expectation of privacy may not be diminished forever and such DNA sampling causes more than initial invasion of privacy).

153. *See id.* at 1126 (discussing limited nature of expungement and potential for Fourth Amendment invasions during two year waiting period). For more information on the expungement process, *see supra* note 46 and accompanying text.

154. *See infra* notes 155–59 (presenting arguments and issues for future litigation).

155. *See Monteleoni*, *supra* note 33, at 247 (explaining current law allows for storage of entire genetic codes after release, posing "lifelong risk of abuse" of DNA sample).

156. *See Mitchell*, 652 F.3d at 411–13 (arguing arrestee's diminished expectation of privacy allows invasions of privacy such as fingerprinting, photographing, and DNA testing); *see also McCarron*, *supra* note 143 at 386 ("In specifically noting its reluctance to decide the constitutionality of whether retention of DNA profiles after a conditional releasee is no longer monitored and has paid his debt to soci-

expectation of privacy, the invasion of privacy from DNA profiling may no longer be minimal.<sup>157</sup> In that case, an individual's Fourth Amendment rights may even outweigh any state interests, leading to the breakdown of the entire analytical framework.<sup>158</sup> Prosecutors should also be wary of this potential issue, which could affect the admissibility of DNA evidence procured from old and long forgotten samples.<sup>159</sup>

## 2. *Technological Advancements*

The rapid nature of advancing technology also creates uncertainty for future litigation.<sup>160</sup> While courts refused to weigh in on the potential for future changes to DNA technology, they recognized the possible need for re-evaluation of the Fourth Amendment analysis.<sup>161</sup> Commentators already argue that "junk DNA" could yield more personal information than originally believed.<sup>162</sup> Most recently, discoveries show that DNA can be

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ety, the court acknowledges the bigger issue on the horizon. There is a tremendous privacy issue at stake when DNA is analyzed and stored." (footnote omitted)).

157. See Bartusiak, *supra* note 145, at 1125–26 (expressing concern about privacy interests and retention of DNA samples for indefinite time periods); see also Monteleoni, *supra* note 33, at 270–71 ("[C]riminal DNA database statutes authorize retention of DNA profiles and samples long after the search target has left the criminal justice system and had her full privacy interest restored. Since the burden on privacy endures as long as the record is maintained in the government's database, there is no reason for the government to be able to 'tag' someone while he is subject to a diminished privacy interest and use this temporary diminution to burden his privacy for life." (footnotes omitted)). If an individual no longer has a lessened privacy interest, the courts' current Fourth Amendment analysis no longer fits. See *supra* notes 127–32 and accompanying text (explaining court's analysis is based on conclusion that state interests outweigh individual rights). Linda Bartusiak cited the Privacy Act of 1974, which "has ben [sic] interpreted to prevent federal law enforcement agencies from maintaining dossiers of information on individuals not suspected of wrongdoing . . .," to oppose expansive DNA testing of all arrestees. See Bartusiak, *supra* note 145, at 1125 (arguing Privacy Act is statutory bar to retention of DNA following release).

158. For a discussion of the significance of the balancing of state interests and individual rights in this context, see *supra* notes 127–37 and accompanying text.

159. See generally *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying exclusionary rule to all states and affirming that unconstitutionally obtained evidence is inadmissible at trial).

160. See generally D.H. Kaye, *Please, Let's Bury the Junk: The CODIS Loci and the Revelation of Private Information*, 102 Nw. U. L. REV. COLLOQUY 70 (2007) (discussing debate over usefulness of "junk DNA" and potential threats for litigation).

161. See *United States v. Weikert*, 504 F.3d 1, 13 (1st Cir. 2007) ("[W]e agree that, '[s]hould the uses to which 'junk DNA' can be put be shown in the future to be significantly greater than the record before us today suggests, a reconsideration of the reasonableness balance struck would be necessary.'" (alteration in original) (quoting *United States v. Amerson*, 483 F.3d 73, 85 n.13 (2d Cir. 2007))).

162. See Kristen Bolden, Note, *DNA Fabrication, a Wake Up Call: The Need to Reevaluate the Admissibility and Reliability of DNA Evidence*, 27 GA. ST. U. L. REV. 409, 410 (2011) (analyzing uses of "junk DNA" beyond identification); see also Simon A. Cole, *Is the "Junk" DNA Designation Bunk?*, 102 Nw. U. L. REV. COLLOQUY 54, 57 (2007) (describing how loci used in junk DNA analysis can be used to predict genetic diseases).

replicated in a lab through a fairly simple process.<sup>163</sup> These innovations in DNA technology could potentially unravel the analysis based on the idea that DNA is a simple and more accurate form of a fingerprint.<sup>164</sup>

While this idea may be based on theoretical possibilities, practitioners should be aware of the ramifications of changing technology.<sup>165</sup> A small change in the usefulness of “junk DNA” could completely destabilize current Fourth Amendment analysis and tip the totality of the circumstances test in favor of a constitutional challenger.<sup>166</sup> Any improvements in the amount of information obtainable from “junk DNA” would alter the invasion of privacy resulting from DNA testing.<sup>167</sup> Further, the replication of DNA may still seem like a far-fetched idea for many, but the possibility could disassemble the theory that DNA is more precise and accurate than fingerprinting.<sup>168</sup> In light of these unresolved issues, practitioners could argue Fourth Amendment review of DNA testing balances on a volatile scale between apparent stability and total collapse.<sup>169</sup>

#### IV. CONCLUSION

The Third Circuit’s decision in *Mitchell* marked an additional step toward diminished protection for individual Fourth Amendment rights.<sup>170</sup> The holding expanded preexisting precedent and protection of the DNA Act.<sup>171</sup> Yet, the court failed to address several issues that could be the

163. See generally Bolden, *supra* note 162 (explaining realistic possibility of reproducing human DNA and its impact on use of DNA evidence).

164. See McCarron, *supra* note 143, at 387 (arguing changes in science could change value of DNA evidence).

165. See *infra* notes 166–69 and accompanying text (discussing why technological advances are pertinent to future Fourth Amendment law).

166. See *United States v. Mitchell*, 652 F.3d 387, 410–12 (3d Cir. 2011) (en banc) (using idea that junk DNA only produces limited information, and this is only minimal intrusion into privacy), *cert. denied*, 132 S. Ct. 1741 (2012); see also McCarron, *supra* note 143, at 387 (arguing potential changes to DNA technology could alter impact on privacy interests). One law professor said, regarding the impact of future DNA technology, “As technology becomes more advanced, to what extent is the Constitution going to limit the use of technology, and to what extent are we going to limit the use of technology?” Anna Stolley Persky, *An Arresting Development: Courts Split over DNA Testing for Those Merely Charged with a Crime*, 98 A.B.A. J. 15, 16 (2012) (quoting Thomas Jefferson School of Law Professor David Steinberg).

167. For a discussion of the legal significance of the idea that “junk DNA” contains only limited information, see *supra* notes 124–26 and accompanying text.

168. See Bolden, *supra* note 162, at 412 (reporting ability to reproduce DNA may impact DNA testing). If DNA is easily replicated, the courts may no longer be able to argue DNA is a more accurate means of identification than fingerprints.

169. For further discussion of the gaps in current Fourth Amendment jurisprudence and the resulting instability in the law, see *supra* notes 160–68 and accompanying text.

170. For further discussion of *Mitchell*, see *supra* notes 116–37 and accompanying text.

171. For an analysis of *Mitchell* relative to prior precedent, see *supra* notes 160–69 and accompanying text.

subject of the next wave of Fourth Amendment challenges.<sup>172</sup> Indeed, future advances in genetic and DNA technology could bring the DNA Act under constitutional fire once again.<sup>173</sup> These uncertainties have the potential to completely destroy prior Fourth Amendment analysis of DNA profiling laws.<sup>174</sup>

In light of the amount of litigation surrounding the DNA Act, scholars believe the issue is headed for Supreme Court review.<sup>175</sup> Considering the important public policies advanced by the DNA Act that were recognized by every court undertaking such analysis, the Supreme Court is likely to agree with the Third Circuit.<sup>176</sup> However, if the current status quo of DNA technology changes, the outcome of a Supreme Court review may not be so certain.<sup>177</sup> Until then, *Mitchell* governs the 2006 DNA Act's interpretation, and as DNA science currently stands, our society views the use of DNA evidence "as a miraculous science capable of exposing untold individual truths and as a law enforcement tool reserved for solving the most heinous crimes."<sup>178</sup>

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172. For an examination of the issues left unanswered following *Mitchell*, see *supra* notes 138–69 and accompanying text.

173. For a discussion of the importance of future developments in DNA technology, see *supra* notes 160–69 and accompanying text.

174. For a discussion of the importance of future developments in DNA technology, see *supra* notes 160–69 and accompanying text.

175. See Persky, *supra* note 166, at 16 ("Some legal observers say that the conflicting rulings make the issue ripe for U.S. Supreme Court review."); see also David H. Kaye, *Third Circuit Upholds Federal Arrestee DNA Database Law*, DOUBLE HELIX LAW (July 25, 2011, 5:14 PM), <http://www.personal.psu.edu/dhk3/blogs/DoubleHelixLaw/2011/07/third-circuit-upholds-federal-arrestee-dna-database-law.html> (urging Supreme Court to step in on issue).

176. See Persky, *supra* note 166, at 16 (arguing society's value in crime solving is likely to push Supreme Court to side of law enforcement).

177. For an examination of how small changes in DNA technology could significantly impact current Fourth Amendment analysis, see *supra* notes 138–69 and accompanying text.

178. Preston, *supra* note 35, at 497.