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Sacrificing Liberty for Security: North Carolina's Unconstitutional Search and Seizure of Arrestee DNA

*"The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."*¹

INTRODUCTION

Imagine the police bursting into your home in the middle of the night, waking you and your family from peaceful sleep. As the police enter your home unannounced, they rummage through all of your office files and sift through the information stored on your computer. You demand to see a search warrant as the police officers access all of your most personal and confidential information. One officer harshly replies that they do not need a warrant. You are left perplexed: that goes against everything you ever learned about the Fourth Amendment. You can only wonder why the police are allowed to search your home and seize your files without any sort of probable cause or search warrant. You wonder why the police feel entitled to intrude into your *deepest* expectation of privacy. How can they commit this end-run around the Fourth Amendment?

The Fourth Amendment to the United States Constitution is about privacy.² At its very core, the Amendment serves to preserve individual privacy by safeguarding against government intrusions. When the government invades an individual's privacy, it may do so only with specified reasons—reasons that have been well-defined throughout Fourth Amendment jurisprudence and are subject to strict judicial review and scrutiny.³

In July 2010, North Carolina became the twenty-fourth state to pass a law permitting warrantless and suspicionless government intrusion in-

1. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

2. *Schmerber v. California*, 384 U.S. 757, 767 (1966) ("[T]he security of one's privacy against arbitrary intrusion by the police [is] . . . at the core of the Fourth Amendment and basic to a free society." (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (internal quotation marks omitted))).

3. See *Katz v. United States*, 389 U.S. 347, 357 (1967).

to an individual's expectation of privacy.⁴ This law permits law enforcement to seize the private, genetic information of persons arrested for certain crimes and to conduct a highly invasive, continual search of that private information.⁵ This North Carolina law implicates significant Fourth Amendment concerns and runs afoul of the entire purpose of that Amendment. The Fourth Amendment forbids intrusions into the body, and it protects the genetic privacy of people who have never been charged—or even convicted—of *any* crime. Through this law, North Carolina strips the rights of citizens—who are presumed innocent—and redefines them as the rights of convicted felons.⁶ North Carolina's allowance of a warrantless, investigatory search of its citizens' Deoxyribonucleic Acid (DNA) is an "anathema to the Fourth Amendment" and should be held unconstitutional.⁷

This Comment examines the constitutionality of North Carolina's DNA Database Act of 2010.⁸ The Act is a newly passed expansion of the

4. See DNA Database Act of 2010, 2010 N.C. Sess. Laws 94 (codified at N.C. GEN. STAT. §§ 15A-266.2 to -266.8, 15A-266.11 to -266.12, 15A-502.1, 15A-534(a), 7B-2201 (2011)); see also *infra* note 17 for a list of the other states authorizing DNA collection at arrest.

5. See N.C. GEN. STAT. §§ 15A-266.2 to -266.8, 15A-266.11 to -266.12, 15A-502.1, 15A-534(a), 7B-2201.

6. Compare N.C. GEN. STAT. §§ 15A-266.2 to -266.8, 15A-266.11 to -266.12, 15A-502.1, 15A-534(a), 7B-2201, with *Samson v. California*, 547 U.S. 843, 850 (2006) ("[P]arolees are on the 'continuum' of state-imposed punishments. On this continuum, parolees have fewer expectations of privacy . . .") (citations omitted)), *United States v. Lujan*, 504 F.3d 1003 (9th Cir. 2007) (upholding the constitutionality of requiring convicted felons on supervised release to submit blood samples for DNA analysis as a condition of their release), *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004) (upholding the constitutionality of compulsory DNA profiling of certain conditionally-released federal offenders in the absence of individualized suspicion that the offender committed additional crimes because the minimal intrusion on privacy was outweighed by the overwhelming societal interests served by the profiling), *Banks v. Gonzales*, 415 F. Supp. 2d 1248 (N.D. Okla. 2006) (upholding the constitutionality of requiring persons convicted of nonviolent and nonsexual felonies to submit DNA samples for a national database because the minimal intrusion in taking a sample is outweighed by the government interest in DNA collection for identification for purposes of crime solving, supervision of parolees and probationers, and reducing recidivism), and *Miller v. U.S. Parole Comm'n*, 259 F. Supp. 2d 1166 (D. Kan. 2003) (upholding the constitutionality of requiring parolees to submit DNA samples as a condition of parole).

7. *Arizona v. Gant*, 556 U.S. 332, 347 (2009) ("[S]earches 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.") (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

8. N.C. GEN. STAT. §§ 15A-266.2 to -266.8, 15A-266.11 to -266.12, 15A-502.1, 15A-534(a), 7B-2201.

existing state DNA database, and this Comment argues that North Carolina's expansion authorizes a constitutionally impermissible, mandatory, suspicionless, and warrantless search and seizure of DNA and the information contained therein.⁹ With warrantless searches, the default rule is that they are "*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."¹⁰ The Act should not survive Fourth Amendment scrutiny because it does not qualify as a well-delineated exception to the warrant requirement: it is not a search incident to a lawful arrest,¹¹ it authorizes a search without probable cause or exigent circumstances,¹² it is unjustifiable as a special needs search,¹³ and it does not survive basic balancing test scrutiny.¹⁴ Those directly impacted by the Act are arrestees for particular crimes. Although not convicted of the crime, their bodies are invaded, their DNA seized, and their personal, genetic information is given to the state and federal government for further search and analysis.¹⁵

I. THE ENCROACHMENT BEGINS

A. *The Expansion and Popularization of DNA Databases*

Within the past several years, many states have passed laws to expand or establish their DNA databases to include the DNA samples of arrestees for certain crimes.¹⁶ Currently, twenty-five states and the fed-

9. *Id.* § 15A-266.2(2) ("DNA" means deoxyribonucleic acid. DNA is located in the cells and provides an individual's personal genetic blueprint. DNA encodes genetic information that is the basis of human heredity and forensic identification.").

10. *Katz*, 389 U.S. at 357.

11. *United States v. Robinson*, 414 U.S. 218 (1973) (establishing the search incident to a lawful arrest exception to the warrant requirement).

12. *Id.* at 227, 242 (requiring probable cause or exigent circumstances to search without a warrant).

13. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (stating that an agency may invoke the special needs exception "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable").

14. *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999) ("[The Court] must evaluate the search or seizure under traditional standards of reasonableness by [balancing an individual's privacy interests against] legitimate governmental interests.").

15. *See* N.C. GEN. STAT. §§ 15A-266.2 to -266.8, 15A.11 to -266.12, 15A-502.1, 15A-534(a), 7B-2201 (2011)).

16. According to the Council for Responsible Genetics, [Fifty-six] countries worldwide operate national DNA databases from Asia to Europe and the Americas. Some are still in their infancy, while others such as

eral government authorize DNA collection at arrest.¹⁷ In promoting the expansion of these databases, lawmakers cite justifications such as the increased resolution of cold cases or the exoneration of innocent people in jail.¹⁸ Many legislators have simply called the idea of seizing DNA from an arrestee the twenty-first century's version of fingerprinting.¹⁹ Though these justifications are laudible, this Comment illustrates how they are misguided.

While politicians claim to act in the best interest of the criminal justice system, other motives exist. States are prompted to adopt arrestee DNA collection schemes in response to federal programs offering additional funding to laboratories that retain a backlog of DNA samples.²⁰ Essentially, the federal government is willing to give states more money if those states have a backlog of *untested* DNA samples.²¹ In response to the potential receipt of federal money, states are passing laws requiring more DNA samples to be taken in order to allow the state to increase backlog and thereby increase the amount of federal dollars coming into

those in the United States and the United Kingdom are large, highly sophisticated and have been established for at least fifteen years. The growing number of DNA databases differ widely both in the categories of individuals included in the databases and in the allowed usages of the databases themselves. . . .

In the United States, all 50 states and the Federal Bureau of Investigation maintain DNA databases.

Introduction and Summary of Findings, COUNCIL FOR RESPONSIBLE GENETICS, <http://www.councilforresponsiblegenetics.org/dnadata/exec.html> (last visited Feb. 8, 2012).

17. Those states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Illinois, Kansas, Louisiana, Maryland, Michigan, Missouri, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, and Virginia. *Quarterly Forensic DNA Resource Report*, DNARESOURCE.COM (Jan. 2012), http://www.dnaresource.com/documents/2012_1.pdf. North Carolina's law went into effect on February 1, 2011. 2010 N.C. Sess. Laws 94, § 15.

18. Audio recording: North Carolina House Judiciary I Committee Meeting (May 25, 2010) [hereinafter Audio recording: Judiciary I Committee Meeting (May 25, 2010)] (statement of Rep. Wil Neumann) (on file with author).

19. Lynn Bonner, *Perdue Signs DNA Bill*, THE NEWS & OBSERVER BLOG (July 15, 2010, 10:44 AM), http://projects.newsobserver.com/under_the_dome/perdue_signs_dna_bill.

20. DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546 § 2, 114 Stat. 2726, 2726 (2000) (codified as amended at 42 U.S.C. § 14135a). Other similar acts are the Justice for All Act of 2004, 18 U.S.C. § 3600 (2006) and the Fingerprint Act of 2005, 42 U.S.C. § 14132(a) (2006).

21. Mark Nelson, *Making Sense of DNA Backlogs—Myths vs. Reality*, NAT'L INST. OF JUST. SPECIAL REP., June 2010, at 1.

the state.²² Essentially, more samples equals more money. In addition to funding the creation of more state backlogs, the United States House of Representatives passed the Katie Sepich Enhanced DNA Collection Act in May 2010, which creates further incentives for states to collect DNA samples from arrestees.²³

Federal incentives promote the processing of offender DNA samples instead of actual DNA evidence from crime scenes.²⁴ Under these incentives, an estimated 51,000 DNA samples from arrestees move to the head of the testing line while DNA evidence from crime scenes and rape kits go untested.²⁵ The expansion of DNA databases contributes to the continuing backlog of unprocessed rape kits and other evidence so states may fill their coffers.²⁶ While sold as tools for law enforcement, DNA databases are instead used to generate revenue in sluggish economies and fill gaps in states' budgets with the federal dollars coming in because of the creation of the backlog.²⁷ In addition to the financial incentives involved, many opponents believe that the measures to expand DNA collection are nothing but the product of a lobbying push from companies that would profit from increased testing sales and sales in equipment and chemicals utilized in DNA collection and processing.²⁸ Whatever the

22. See DNARESOURCE.COM, *supra* note 17 and accompanying text.

23. Katie Sepich Enhanced DNA Collection Act of 2010, H.R. 4614, 111th Cong. § 2 (2d Sess. 2010).

24. *Id.*

25. SARAH STONE, FISCAL RESEARCH DIV., GEN. ASSEMB. OF N.C., LEGISLATIVE INCARCERATION FISCAL NOTE to DNA Database Act of 2010, 2010 N.C. Sess. Laws 94 (2010).

26. One author noted this problem was already occurring as early as 2001. In examining that year's numbers, he wrote:

[T]here are approximately 500,000 samples . . . waiting to be profiled and entered into databases, and an estimated one million . . . [convicts] who have not yet given samples. With an estimated thirteen to fifteen million arrests in 1998, any expansion of the classes of criminals covered by databases would only compound this problem.

Aaron P. Stevens, Note, *Arresting Crime: Expanding the Scope of DNA Databases in America*, 79 TEX. L. REV. 921, 945 (2001).

27. The Katie Sepich Enhanced DNA Collection Act of 2010, H.R. 4614, increases allocation to certain states with expanded DNA databases by five and ten percent.

28. Ben Protess, *The DNA Debacle: How the Federal Government Botched the DNA Backlog Crisis*, PROPUBLICA (May 5, 2009, 7:40 AM) <http://www.propublica.org/article/the-dna-debacle-how-the-federal-government-botched-the-backlog-crisis-505>. The article states:

The expansion of DNA collection laws has been promoted by a lobbying firm with close ties to both the Justice Department and to companies that profit directly from increased DNA testing, a ProPublica investigation has found.

reasoning, North Carolina has joined the coalition of states that require the search and seizure of DNA samples from arrestees—people who supposedly enjoy a presumption of innocence.

B. North Carolina Updates its Database

The DNA Database Act of 2010 (Act), a product of contentious debate during the North Carolina General Assembly's 2010 short session, ultimately passed on July 10, 2010 and was signed into law five days later by Governor Bev Perdue.²⁹ With a quick stroke of her pen, the Governor gave effect to massive changes to North Carolina law, changes that arguably constitute one of the greatest intrusions into personal privacy in recent state history. The Act represents not only an unprecedented departure from the protections of personal privacy, but also an unconstitutional authorization of an unreasonable search and seizure under the Fourth Amendment to the United States Constitution.

The DNA Database Act of 2010 completely rewrote and expanded Article 13 of Chapter 15A of the North Carolina General Statutes.³⁰ The most controversial section of the Act requires law enforcement officials to collect DNA samples from suspects upon arrest for certain enumerated crimes.³¹ Additionally, the Act mandates that the magistrate *shall* incarcerate the arrestee *without* bail if the arrestee refuses to submit a DNA sample.³²

The firm, Gordon Thomas Honeywell Governmental Affairs, lobbies the Justice Department and lawmakers on behalf of the world's leading producer of DNA testing equipment.

Id.

29. 2010 N.C. Sess. Laws 94, § 15 (2010).

30. DNA Database Act of 2010, 2010 N.C. Sess. Laws 94, sec. 2–11 (codified at N.C. GEN. STAT. §§ 15A-266.2 to -266.8, 15A-266.11 to -266.12 (2011)). Before the changes in question, the law required DNA samples to be taken from people convicted of certain crimes. N.C. GEN. STAT. § 15A-266.4 (2009). The constitutionality of that portion of the law is not in question, and is a well-settled question due to the diminished expectation of privacy of convicted felons. *Samson v. California*, 547 U.S. 843, 850 (2006) (“[P]arolees are on the ‘continuum’ of state-imposed punishments. On this continuum, parolees have fewer expectations of privacy . . .” (citations omitted)).

31. N.C. GEN. STAT. § 15A-266.3A (2011). The Act supplemented previous North Carolina law, which only required law enforcement to collect DNA information from people upon *conviction* of certain offenses. For a list of these crimes, see *infra* note 67.

32. *Id.* § 15A-534(a). The Act states, “the judicial official *shall* make the collection of the fingerprints or DNA sample a condition of pretrial release” if the arrestee refuses to provide a DNA sample. *Id.* (emphasis added). The implications of this are beyond the scope of this Comment.

Before entering into an examination of the constitutionality of the Act, it is essential to understand the requirements of the Act and the procedures by which DNA information is taken. The Act established the State DNA Databank (Databank) and the State DNA Database (Database), both of which are under the administration of the State Bureau of Investigation (SBI).³³ The Databank serves as the repository for all physical DNA samples collected.³⁴ For example, the physical cheek swab containing the DNA donor's saliva will be stored in the Databank. The Database is the computer record of all DNA profiles collected.³⁵ The DNA records in the Database come from the DNA samples collected from crime scene evidence, arrestees, convicted persons, sex offenders who are required to provide a DNA sample by statute, unidentified persons and body parts, missing persons, relatives of missing persons, and anonymous DNA profiles used for quality control methods.³⁶

After the initial seizure of the biological material, the samples are sent to an SBI laboratory where they are eventually analyzed, and a genetic profile is generated.³⁷ This genetic profile, often erroneously labeled as a DNA fingerprint, is a digital representation of thirteen to fifteen segments of the subject's DNA code.³⁸

After the DNA profile is generated, it is uploaded into the Database, and the physical sample is sent for storage in the Databank.³⁹ After the profile is uploaded into the Database, the SBI must provide the Federal Bureau of Investigation (FBI) with all DNA records contained in the Database to allow the FBI to compare those state DNA records to the records already contained in the Combined DNA Index System (CODIS), a national database.⁴⁰

33. N.C. GEN. STAT. § 15A-266.3.

34. *Id.*

35. *Id.* Section 15A-266.2 states, "The results of all DNA identification analyses on an individual's DNA sample are . . . referred to as the DNA profile of an individual." *Id.* § 15A-266.2.

36. *Id.* § 15A-266.3.

37. *Id.* The biological sample is stored in the Databank, and the resulting profile is stored in the Database. *Id.*

38. See Audio recording: Judiciary I Committee Meeting (May 25, 2010), *supra* note 18 and accompanying text.

39. N.C. GEN. STAT. § 15A-266.3A(e).

40. *Id.* § 15A-266.3.

1. CODIS: What it is, and How it Works

CODIS, a “generic term used to describe the FBI’s program of support for criminal justice DNA databases, as well as the software used to run these databases,”⁴¹ is a centralized database operated by the federal government that is searchable by law enforcement in local, state, and federal jurisdictions.⁴² CODIS includes three tiers of databases: (1) the National DNA Index System, which is maintained by the FBI; (2) a collection of state DNA index systems; and (3) the local DNA index systems.⁴³ CODIS contains two types of profiles: offender profiles, which are the individual samples taken from people; and forensic profiles, which come from crime scene evidence.⁴⁴ As of December 2011, CODIS contained over ten million offender profiles and over 400,000 forensic profiles.⁴⁵

After the DNA profile is uploaded into CODIS, the profile is instantaneously compared to all of the crime scene samples in CODIS.⁴⁶ CODIS is designed to compare a DNA profile against all other DNA profiles in the database, and once a match is identified, the laboratories involved are contacted, and CODIS establishes coordination between the law enforcement agencies.⁴⁷ As long as a profile remains in CODIS, any new DNA samples from crime scenes will be compared to the profile.⁴⁸

41. *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, FBI, <http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet> (last visited Feb. 8, 2012).

42. *Id.*

43. *Id.*

44. *Id.*

45. *CODIS–NDIS Statistics*, FBI, <http://www.fbi.gov/about-us/lab/codis/ndis-statistics> (last visited Feb. 8, 2012).

46. Professor Seringhaus describes the search as follows:

A complete DNA profile contains 26 numerical scores, corresponding to the nucleotide lengths at 26 alleles of the 13 different STR loci on both chromosomal copies.

The FBI CODIS markers are a set of 13 STRs spread across 12 of the 22 autosomal chromosomes. All 13 markers were specifically chosen from stretches of so-called ‘junk DNA,’ non-coding DNA not thought to be ‘associated with any known physical or medical characteristics.’

Michael Seringhaus, *The Evolution of DNA Databases: Expansion, Familial Search, and the Need for Reform*, THE INFORMATION SOC’Y, 12–13 (2009) (quoting *United States v. Kincaid*, 379 F.3d 813, 818 (9th Cir. 2004)), available at http://www.genome.duke.edu/seminars/journal-club/documents/Seringhaus_Oct09.pdf.

47. *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, *supra* note 41.

48. *See id.*

Each week, the FBI performs an entire system search of all crime scene DNA profiles and all known individual profiles.⁴⁹ Once a match between the sample and the database is made, the DNA evidence can lead to the arrest of the person for the unsolved crime, and the DNA evidence can be used in court.⁵⁰

A CODIS search can affect the person whose profile is included in the database in several ways. When a profile in the database matches a profile taken from a crime scene, the agency that provided the DNA sample to the CODIS database is notified because of the implication that the person had, at some point, been present at the crime scene.⁵¹ The providing agency can then notify the agency with jurisdiction over the person of the identity of the person for questioning or arrest.⁵²

2. CODIS: Keeping it in the Family

Perhaps one of the more disturbing ways CODIS can affect a person's life is through familial searching. Familial searches are a relatively new phenomenon, but have been the subject of much scrutiny because many states permit them.⁵³ Familial searches are searches in CODIS where law enforcement uses the database to focus on a person whose DNA does *not* match the crime scene DNA evidence.⁵⁴ The familial search is conducted on the belief that the person with the partial DNA match might be a relative of the culprit who provided the similar DNA sample. Essentially, in a familial search, the law enforcement agency

49. *Combined DNA Index System*, DNA INITIATIVE, <http://dna.gov/dna-databases/codis> (last visited Feb. 20, 2012).

50. *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, *supra* note 41.

51. *See id.*

52. *See id.*

53. *State Rules on Partial/Familial Searching*, COUNCIL FOR RESPONSIBLE GENETICS <http://www.councilforresponsiblegenetics.org/dnadata/usa/usa2.html> (last visited Feb. 8, 2012). Some states explicitly permit familial searching, while other courts implicitly allow it though legislative and judicial silence. *Id.* The states permitting familial searching and/or partial matching are Alabama, California, Connecticut, Florida, Louisiana, Minnesota, Missouri, Montana, Nebraska, North Carolina, Oklahoma, Oregon, South Carolina, Washington, and Wyoming. *Id.* The states prohibiting familial searching, but allowing partial matching are Indiana, Iowa, Kentucky, Maryland, Ohio, and Wisconsin. *Id.* The states prohibiting partial matching and familial searching are Alaska, Georgia, Maine, Massachusetts, Michigan, Nevada, New Mexico, Rhode Island, Tennessee, Utah, and Vermont. *Id.* The policies of the remaining states are unknown. *Id.*

54. *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, *supra* note 41. It should be noted that this person is demonstrably innocent of the crime. *See id.*

searching a DNA database can examine the special inheritance patterns that link siblings, parents, children, and other close relatives to search for an offender's kin.⁵⁵ In 2008, California police used familial searching when investigating the crimes of a serial killer known as the "Grim Sleeper."⁵⁶ In their investigations, the police used some of the killer's DNA, which had been left at a crime scene, and began testing prison inmates to determine whether a family relationship to the killer could be discovered.⁵⁷ In their searches, one close relative was discovered, and using the information obtained, the police constructed a family tree and then "surreptitiously obtained a discarded pizza slice from the convict's father. A DNA match came back."⁵⁸

Familial DNA searching in a database is easy to perform, because the searcher only has to change the threshold on a database search. "Whereas an exact hit requires that all 26 alleles match at all 13 CODIS markers—signifying exact parity between two profiles—searches can also be performed at a lower stringency, reporting profiles that match at some fraction of the 26 alleles."⁵⁹ These near-matches are often useful in the case of degraded DNA, but because first-degree relatives are often a very close match, "a low stringency search with a crime-scene sample can sometimes return the offender's close-matching relatives in the database."⁶⁰ By requiring matches of fewer alleles, the search returns multiple hits with similar, though not exact, DNA profiles: i.e., family.

These low-threshold searches will return thousands of matches, but by restricting the search geographically, law enforcement can, for example, find the DNA profiles of an entire family living in a certain area.⁶¹ In the United Kingdom, where statistical analysis about DNA databases has been conducted, these familial searches provided a useful investigative lead approximately 10% of the time they were used.⁶² The United States has also seen success with familial searching, and as the popularity of

55. Seringhaus, *supra* note 46, at 26.

56. Joel Rubin, *Grim Sleeper: How LAPD Followed the DNA to an Arrest*, LOS ANGELES TIMES (July 8, 2010, 11:11 AM), <http://latimesblogs.latimes.com/lanow/2010/07/how-dna-led-to-the-arrest-of-the-grim-sleeper.html>.

57. *Id.*

58. Eriq Gardner, *Gene Swipe: Few DNA Labs Know Whether Chromosomes Are Yours or If You Stole Them*, A.B.A. J., Aug. 2011, at 55, available at http://www.abajournal.com/magazine/article/gene_swipe_few_dna_labs_know_whether_chromosomes_are_yours_or_if_you_stole_.

59. Seringhaus, *supra* note 46, at 26.

60. *Id.* at 27.

61. *Id.*

62. *Id.*

DNA databases grows, presumably so too will familial searches. By including more profiles in CODIS, it is likely that familial searching will be used with increasing frequency, resulting in more family members being considered suspects.⁶³

C. *So You've Been Arrested . . . Now What?*

The DNA Database Act of 2010 affects the arrest procedure and the order of events that occur after the arrest of an individual. When arrested pursuant to an arrest warrant, the arrestee's DNA is seized either at the time of arrest or at the time of fingerprinting.⁶⁴ If arrested without an arrest warrant, the arrestee first appears before a magistrate for a probable cause hearing in order to determine whether there was sufficient probable cause for the arrest.⁶⁵ If the magistrate determines that the requisite probable cause existed for the arrest, the DNA sample is seized from the arrestee.⁶⁶

It is essential to note that the probable cause hearing is to determine whether there was sufficient probable cause to justify the arrest, *not* whether there was sufficient probable cause to seize the DNA. Additionally, the crime for which the individual is arrested does not have to be a violent crime, nor does there have to be any DNA evidence involved with the crime at all. Instead, the individual only has to be arrested for commission of one of the enumerated crimes in the statute.⁶⁷ As long as

63. Familial searching is also a flawed tool in that it disproportionately affects the African-American population. In the United States, African-Americans are overrepresented in the prison system, thus their DNA comprises a disproportionately large percentage of the samples in CODIS. According to the Council for Responsible Genetics, "while African-Americans are only 12% of the U.S. population, their profiles constitute 40% of the Federal database." *Introduction and Summary of Findings*, *supra* note 16. Even more alarming are the numbers from the United Kingdom, where "nearly three-quarters of young men of African descent are in the database, as are tens of thousands of juveniles." *Id.*

64. N.C. GEN. STAT. § 15A- 266.3A(b) (2011).

65. *Id.*

66. *Id.*

67. *Id.* § 15A-266.3A(f). The statute provides that DNA must be taken upon arrest for the following crimes:

First and Second Degree Murder. . . . Manslaughter. . . . Any offense in Article 7A, Rape and Other Sex Offenses. . . . Felonious assault with deadly weapon with intent to kill or inflicting serious injury; . . . Assault inflicting serious bodily injury; . . . Assault with a firearm or other deadly weapon upon governmental officers or employees, company police officers, or campus police officers; . . . Assault with a firearm on a law enforcement, probation, or parole officer or on a person employed at a State or local detention facility; . . . Assault

the individual is arrested for one of the enumerated crimes, his DNA will be seized and searched. There is no requirement that the seizure of the arrestee's DNA be predicated by any probable cause or by any need for DNA evidence for the crime for which the arrestee has been arrested.

The Act mandates that the DNA sample be taken by cheek swab, unless there is a court order in place requiring that the sample be a blood sample.⁶⁸ If the arrestee refuses to provide a DNA sample, he "shall" be incarcerated until he complies with the statute and provides his DNA.⁶⁹ The arrestee is jailed without the possibility of bail and will only be released upon his giving of a DNA sample.⁷⁰ When the cheek swab is performed, the technician seizing the DNA must record the date and time of the sample, the name of the person taking the sample, the name and address of the arrestee, and the offense for the arrest.⁷¹ This information stays with the sample throughout its existence.⁷² After the DNA sample has been seized, it is then sent to the appropriate laboratory facility for analysis and testing.⁷³ The physical DNA sample is stored in

or affray on a firefighter, an emergency medical technician, medical responder, emergency department nurse, or emergency department physician; . . . Assault inflicting serious injury on a law enforcement, probation, or parole officer or on a person employed at a State or local detention facility. Any offense in Article 10, Kidnapping and Abduction, or Article 10A, Human Trafficking. . . . First and second degree burglary . . . Breaking out of dwelling house burglary . . . Breaking or entering a place of religious worship . . . burglary with explosives. . . . Any offense in Article 15, Arson. . . . Armed robbery. . . . Any offense which would require the person to register under the provisions of Article 27A of Chapter 14 of the General Statutes, Sex Offender and Public Protection Registration Programs. . . . Cyberstalking. . . . [And] stalking.

Id. Additionally, any person arrested for attempting, solicitation of another to commit, conspiracy to commit, or aiding and abetting another to commit, any of the violations listed above must provide a DNA sample. *Id.* § 15A-266.3A(g). H.B. 483 (2011) sought to expand the list of felonies for which a DNA sample would be taken at arrest. The bill passed the House and was sent to the Senate where it was referred to the Judiciary Committee and never heard.

68. *Id.* § 15A-266.3A(b).

69. *Id.* § 15A-534(a). The Act states, "the judicial official *shall* make the collection of the fingerprints or DNA sample a condition of pretrial release" if the arrestee refuses to provide a DNA sample. *Id.* (emphasis added). In theory, an arrestee—a presumptively innocent person—could be jailed indefinitely if he refuses to provide a DNA sample.

70. *Id.*

71. *Id.* § 15A-266.3A(c).

72. *Id.*

73. *Id.* § 15A-266.3A(b).

the Databank, and the DNA record is stored in the Database, as well as in CODIS.⁷⁴

After the arrestee's DNA sample is seized, the arrestee is then provided a written notice of the procedures required to be taken in order to have his DNA sample and record expunged.⁷⁵ Expunction is warranted only in certain circumstances.⁷⁶ Within thirty days of the occurrence of one of the expunction-qualifying events, the District Attorney must verify that one of the qualifying events has actually occurred and supply that information on a form to be submitted to the SBI.⁷⁷ Within thirty days of receipt of the form, the SBI must verify that the DNA sample and record are not required to be in the Database and Databank based on another statute and then must remove the record and the samples.⁷⁸ After the removal of the record and the samples, the SBI must mail the arrestee a verification form indicating that his DNA record and sample have been expunged.⁷⁹ If for whatever reason there is a denial of the expunction or a failure to act on time by either the SBI or the District Attorney, the arrestee can file a motion with the court to review the denial of the expunction.⁸⁰

During the entire time the arrestee's DNA is in the possession of the government, his DNA is being checked against DNA samples from crime scenes and run in the state Database and in the CODIS database.⁸¹ This perpetual search continues even while the arrestee navigates through the bureaucratic red tape of the expunction process. During this period, even though the arrestee no longer has *any reason* to be in the DNA database, and is technically an innocent person, his DNA is *still* being searched.⁸² The arrestee has not been convicted of any of the enume-

74. *Id.* § 15A-266.3.

75. *Id.* § 15A-266.3A(d).

76. *Id.* § 15A-266.3A(h)–(j). An arrestee's DNA record and sample are eligible for expunction only if the arrestee's charges are dismissed, he is acquitted, or if he is convicted of a lesser included misdemeanor offense. *Id.* Additionally, DNA can be expunged if no charge has been filed within the statute of limitations, or if there is no conviction within three years of the arrest and there is no ongoing prosecution during those three years. *Id.* Also, an expunction will only be warranted if no other law requires the sample or record to exist. *Id.*

77. *Id.* § 15A-266.3A(j).

78. *Id.* § 15A-266.3A(k).

79. *Id.*

80. *Id.* § 15A-266.3A(l).

81. See *Combined DNA Index System*, *supra* note 49.

82. It is notable that in 2008, the European Court of Human Rights ruled unanimously that the retention of the DNA of innocent persons by the UK violated human rights

rated crimes, yet the State still allows the continual warrantless search of his DNA in CODIS.

II. THE CONSTITUTIONAL QUESTION

The DNA Database Act of 2010 expressly permits law enforcement to compel an arrestee to provide a DNA sample despite not having a warrant or probable cause to believe that the DNA sample will provide relevant evidence of the crime for which the arrestee was taken into custody. In addition to the warrantless search and seizure, mandatory DNA testing violates an individual's right to information privacy guaranteed by the Fourth Amendment.⁸³ Basic Fourth Amendment principles prohibit warrantless searches and seizures of DNA samples from individuals arrested for certain offenses. These arrestees have not yet been convicted of any crime, and accordingly still enjoy an expectation of privacy protected by the Fourth Amendment.

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"⁸⁴ This Comment analyzes this constitutional provision by examining first whether the government action constitutes a search, and after concluding that it is, the Comment then examines whether that search is unreasonable. Analysis of these prongs indicates that the DNA Database Act of 2010 is an unreasonable search and seizure, and is therefore unconstitutional.

A. *Is it a Search?*

A search exists when the government intrudes upon a person's reasonable expectation of privacy.⁸⁵ As a corollary, when the defendant does not have a reasonable expectation of privacy, there has been no search that will implicate the Fourth Amendment. Though the Court has declined to provide a bright line rule for whether a person has a reasonable expectation of privacy, it has stated that the Fourth Amendment

law. S. & Marper v. The United Kingdom, 1581 Eur. Ct. H.R. (2008), *available at* <http://www.bailii.org/eu/cases/ECHR/2008/1581.html>.

83. See *Georgia v. Randolph*, 547 U.S. 103, 128 (2006) (Roberts, C.J., dissenting) ("The Fourth Amendment protects privacy."); *Kyllo v. United States*, 533 U.S. 27 (2001); *Schmerber v. California*, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy.").

84. U.S. CONST. amend IV.

85. *Katz v. United States*, 389 U.S. 347, 353 (1967).

“protects people, not places.”⁸⁶ In so stating, the Court established the important distinction between what “a person knowingly exposes to the public”⁸⁷ and the “uninvited ear.”⁸⁸

The Court in *Katz v. United States* made this distinction where the defendant’s conversation in a phone booth was recorded and the Court ruled that the recording of the conversation was a violation of the Fourth Amendment.⁸⁹ The Court’s distinction between the “intruding eyes” of people who saw the defendant in the phone booth and the “uninvited ear” is an important one. There is no Fourth Amendment protection in the *presence* in the phone booth, but the protection instead lies in the *contents* of the private discussion.⁹⁰

Since *Katz*, subsequent cases have adopted a two-step inquiry of whether something classifies as a search: “whether the defendant exhibited an actual (subjective) expectation of privacy,”⁹¹ and whether that expectation was “one that society is prepared to recognize as reasonable.”⁹² Given this understanding of Fourth Amendment protections and reasonable expectations of privacy, it is well settled that the seizure and ensuing analysis of DNA samples implicates the Fourth Amendment.⁹³

Before analyzing whether there is a reasonable expectation of privacy that a person has in his own DNA, there must first be a distinction made similar to the one made in *Katz*—between presence and content. It is not uncommon to expose the general public to DNA, whether it be saliva from drinking, eating, or spitting, or from hair and skin cells that simply fall off the body. These exposures of DNA to the general public are akin to being seen standing in the phone booth. Intruding eyes can readily see a person standing there just like a DNA sample can be taken from a drinking glass or discarded cigarette. However, when the contents of that DNA are exposed, just like eavesdropping on a conversation, the reasonable expectation of privacy is present. As discussed in this Comment, DNA contains a variety of sensitive information that people expect to remain private. When that privacy is intruded upon,

86. *Id.* at 351.

87. *Id.*

88. *Id.* at 352.

89. *Id.* at 359.

90. *Id.* at 354–59.

91. *Id.* at 361 (Harlan, J., concurring).

92. *Id.*

93. *Schmerber v. California*, 384 U.S. 757, 767 (1966); *Vernonia Sch. Dist. 47 v. Acton*, 515 U.S. 646, 665 (1995); *Skinner v. Ry. Labor Excs.’ Ass’n*, 489 U.S. 602, 616 (1989).

the person's reasonable expectation of privacy is implicated, and the Fourth Amendment will be triggered.⁹⁴

Having established this distinction, the inquiry begins with whether an arrestee has a subjective expectation of privacy in his cheek cells. People can easily understand the private nature of DNA, and thanks to television shows such as CSI and Law & Order, many are aware of its use as a powerful tool in law enforcement and investigation.⁹⁵ In examining this prong, the Court asks "whether [the person] has shown that 'he [sought] to preserve [something] as private.'"⁹⁶ In *Cupp v. Murphy*, the Court found that a defendant had a subjective expectation of privacy in the dirt underneath his fingernails.⁹⁷ Given the expectation of privacy in something that mundane, it is certainly not a stretch of the imagination to believe that people wish to keep their genetic makeup, medical history, predispositions for diseases, and other sensitive, highly-personal subjects private.

The next question is whether there is an objective expectation of privacy in an arrestee's DNA. Here, such an objective expectation of privacy does exist. In *Schmerber*, the Court states, "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained."⁹⁸ As discussed throughout this Comment, there are significant implications of a person's dignity and privacy through the seizure and search of DNA, and the power of the information that can be exposed through those searched makes that interest even more compelling. Additionally, the purpose of the search is to uncover evidence of past crimes and solve cold cases. Though these reasons are certainly compelling, the mere chance that evidence could be obtained is an impermissi-

94. *Katz*, 389 U.S. at 361

95. *Strengthening Forensic Science Oversight*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=20055> (last visited Feb. 13, 2012). The article states:

According to the National Academy of Sciences, most Americans believe that forensic science practices are comparable to the flawlessly executed procedures seen on television programs such as CSI and Law & Order. While it is true that forensic investigative techniques have largely benefited the criminal justice system, some troubling deficiencies have emerged.

Id.

96. *Bond v. United States*, 529 U.S. 334, 338 (2000) (quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979)).

97. *Cupp v. Murphy*, 412 U.S. 291, 295 (1978).

98. *Schmerber v. California*, 384 U.S. 757, 769–70 (1966).

ble purpose.⁹⁹ With these considerations, there is certainly an objective expectation of privacy in one's DNA.

The actual seizure and searches of the DNA are numerous. The taking of a DNA sample "plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment."¹⁰⁰ Additionally, a separate search occurs after the government sends the DNA sample to an SBI lab for testing. There, the physical sample is analyzed and the genetic profile is generated. "Such testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of [the Fourth] Amendment."¹⁰¹ A third search occurs when the DNA profile is uploaded into CODIS and then compared against other DNA samples in the Database.¹⁰² Lastly, subsequent searches occur when the DNA is subjected to continuous searches after its initial addition to the Database. The Database is searched on a weekly basis for matches to new profiles,¹⁰³ with this weekly search potentially exposing the DNA to an infinite number of warrantless searches.

There is no question that the taking of a person's DNA and continuous and constant analysis of that DNA constitutes a search and seizure under the meaning of the Fourth Amendment. Because the search and analysis is considered a search and seizure, it is entitled to Fourth Amendment protections. In order for the search and seizure not to run afoul of the Fourth Amendment, the search and seizure must be reasonable.

B. *Is it an Unreasonable Search and Seizure?*

In addressing the reasonableness of a warrantless search, the default rule is, "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."¹⁰⁴ If there is some justification, then the

99. *Id.* at 769–70 ("The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained.").

100. *Id.* at 767.

101. *Id.*

102. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616 (1989) ("The ensuing chemical analysis of the sample . . . is a further invasion of the . . . privacy interests.").

103. *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, *supra* note 41.

104. *Katz v. United States*, 389 U.S. 347, 357 (1967).

scope of the permissible warrantless activity by the police will be determined by that justification.¹⁰⁵ When the government exceeds the scope determined by the justification, the default rule returns.¹⁰⁶ There are several exceptions by which North Carolina may seek to justify the Act, but ultimately, each exception is inapplicable and the Act should be held unconstitutional.

1. *Search Incident to a Lawful Arrest*

As stated previously, the default rule is that warrantless searches are *per se* unreasonable, so the burden is on the government to demonstrate some particular justification for dispensing with the warrant requirement. One such justification is the search incident to a lawful arrest. North Carolina's DNA Database Act of 2010 involves a search incident to a lawful arrest, one of the traditionally recognized exceptions to the warrant requirement.¹⁰⁷

The Court in *United States v. Robinson* examined the constitutionality of the warrantless search incident to arrest.¹⁰⁸ The Court there stated that the Fourth Amendment permits a warrantless search incident to a lawful arrest only when the justifications of officer safety and preservation of the evidence are present.¹⁰⁹ These two justifications are often

105. See, e.g., *Gustafson v. Florida*, 414 U.S. 260, 268–69 (1973) (Marshall, J., dissenting). Justice Marshall explained:

The only need for a search in this case was to disarm petitioner The search conducted by Officer Smith went far beyond what was reasonably necessary to achieve that end. It therefore fell outside the scope of . . . [the] exception to the Fourth Amendment's warrant requirement.

Id.

106. *Id.*

107. See *Weeks v. United States*, 232 U.S. 383, 392 (1914).

108. *United States v. Robinson*, 414 U.S. 218, 235 (1973).

109. *Id.* at 230–234; see also *Arizona v. Gant*, 556 U.S. 332, 339, (2009). The Court in *Gant* indicated:

[A] search incident to arrest may only include the arrestee's person and the area within his immediate control—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. . . . [S]earches incident to arrest are reasonable in order to remove any weapons the arrestee might seek to use and in order to prevent the concealment or destruction of evidence If there is no possibility that an arrestee could reach into the

implicated in arrest situations, and the scope of this warrantless search is limited to the person and anything in that person's immediate control.¹¹⁰

In order for the Act to classify as a search incident to a lawful arrest, the concerns giving rise to this exception to the warrant requirement must be present.¹¹¹ According to the *Robinson* rationale, the only justifications for a warrantless search and seizure at arrest are officer safety and the threat of the destruction of evidence.¹¹² These justifications have no application to the extraction and analysis of DNA. Neither saliva from the cheek of an arrestee, nor the arrestee's DNA, are harmful to the arresting officer, and no stretch of the imagination can fathom a single scenario in which they would be. The justification of officer safety is irrelevant here. Additionally, no threat of destruction of the DNA evidence exists at the time of the arrest.¹¹³ DNA is something that is with a person his entire life, and it will not change. Also, the government still has access to the DNA of individuals upon conviction. There is simply no justification for shifting the timetable forward because the DNA evidence will never be destroyed.

area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply. *Id.* (citations omitted) (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)) (internal quotation marks omitted). These justifications are generally applicable and police are not required to make these showings each time they perform a search incident to arrest. *Id.*

110. See *Robinson*, 414 U.S. at 230–34; *Chimel*, 395 U.S. at 763.

111. The search incident to a lawful arrest exception comes from *Robinson*, 414 U.S. 218. In that case, Robinson was arrested for operating an automobile without a valid permit, and at the time of the arrest, the arresting officer frisked Robinson, discovering a crumpled cigarette package containing heroin. *Id.* at 220–23. The Supreme Court upheld the warrantless search and seizure and allowed the search incident to arrest based on two justifications—the threat to the safety of the arresting officer, and the threat of the destruction of the evidence. *Id.* at 219–24.

112. *Id.* at 226. The Court quoted *Chimel*, saying:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

Id. at 226 (quoting *Chimel*, 395 U.S. at 762–763).

113. Or even at any time *after* the arrest.

The *Robinson* line of cases dealt with the search incident to arrest of a person or of the person's home and immediate surroundings.¹¹⁴ As recently as 2009, the Court continued to recognize the search incident to lawful arrest as a legitimate justification for dispensing with the warrant requirement. In *Arizona v. Gant*, the Court considered the exception's application to the warrantless seizure and search of vehicles and effects, and reiterated that the two justifications for a search incident to a lawful arrest are officer safety and evidence preservation.¹¹⁵

In *Gant*, the Court maintained its restriction on a search of a car incident to arrest and stated that a search incident to arrest is only lawful to the extent that it is done to protect officer safety or to prevent the destruction of evidence.¹¹⁶ As mentioned previously, neither justification applies here. Perhaps even more notably, the *Gant* rule arose from the search of a car—an area where our expectations of privacy are lowest.¹¹⁷

Without *Gant*'s limitation on the search of a vehicle incident to arrest, law enforcement would be allowed to search every car upon the arrest of a driver. Under this Orwellian police privilege, there is no doubt police would uncover large amounts of drugs and other contraband; however, the Fourth Amendment does not allow these unfettered searches. The search of an arrestee's car without the justifications of officer safety or evidence preservation "would serve no purpose except to provide a police entitlement, and it is an anathema to the Fourth Amendment to permit a warrantless search on that basis."¹¹⁸

Gant can be viewed as a restriction of the search incident to lawful arrest exception. The cases considering the exception prior to *Gant* operated under a sort of legal fiction: that arrestees who are not left in their cars can still injure an officer or destroy evidence. While operating under this premise, the Court in *New York v. Belton* extended the allowance

114. See *Maryland v. Buie*, 494 U.S. 325 (1990); *New York v. Belton*, 453 U.S. 454 (1981); *Chimel*, 395 U.S. 752; *United States v. Rabinowitz*, 339 U.S. 56 (1950).

115. *Gant*, 556 U.S. at 332. The Court hinted at a third justification, which will be discussed later in this Comment.

116. *Gant*, 556 U.S. at 339–43. *Gant* had been arrested for driving with a suspended license, and was then handcuffed and locked in the back of a police car while the arresting officers searched his car and discovered cocaine in the car. *Id.* at 335. The government attempted to justify the search of the car as a search incident to arrest, but the Court denied the exception's application to *Gant* because neither of the two traditional justifications for a search incident to arrest were present. *Id.* at 344–45.

117. This is a well-established assumption. *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) ("Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars.").

118. *Gant*, 556 U.S. at 347.

of *California v. Chimel* that permitted a search of the grab area in a vehicle after the driver's arrest.¹¹⁹ This allowance was based on the protection of officer safety and the preservation of evidence.¹²⁰ In *Gant*, the Court recognized that arrestees are not left in their cars during an arrest and have no way to injure an officer or destroy evidence.¹²¹ Thus, the Court significantly restricted the exception that was expanded in *Belton*, and held that search of a vehicle incident to arrest is only permissible when the occupant is *not* secured *and* is within reaching distance of the passenger compartment.¹²²

Gant can also be viewed as an expansion of the search incident to arrest exception in that it creates a third justification. The Court in *Gant* stated that there are some circumstances completely unique to the vehicle context that justify a search incident to lawful arrest when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle.¹²³ In *Gant*, the Court clearly indicated that law enforcement may dispense with the warrant requirement for the purpose of collection of the evidence, but only when it is reasonable to believe that evidence of that crime leading to the arrest might be found.¹²⁴ In citing this third justification for a search incident to lawful arrest, Justice Stevens, the author of the *Gant* opinion, cited Justice Scalia's concurring opinion in *Thornton v. United States*.¹²⁵ In *Thornton*, whose rationale was later applied to *Gant*, Justice Scalia opined, "there is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested. The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search of evidence of his crime from general rummaging."¹²⁶ All of this was based on the idea that evidence of a crime is more likely to be found where the suspect was actually apprehended. Through this third justification, a limited warrantless search for evidence of the crime for which the arrestee was arrested is allowed, but only at arrest.

While it may seem that this justification will allow the search and seizure of DNA from arrestees as evidence of the crime for which they

119. *Belton*, 453 U.S. at 460.

120. *Id.* at 464 ("The *Chimel* exception to the warrant requirement was designed with two principal concerns in mind: the safety of the arresting officer and the preservation of easily concealed or destructible evidence.").

121. *Gant*, 556 U.S. at 341–44.

122. *Id.* at 351.

123. *Id.* at 345–47.

124. *Id.*

125. *Id.* at 342–49.

126. *Thornton v. United States*, 541 U.S. 615, 630 (2004) (Scalia, J., concurring).

were arrested, it will not stand. Based on the government's justification of solving past crimes, it is an incredibly difficult argument to make that the evidence for a present crime will reveal the perpetrator of a past crime. Simply because a person has been arrested for one crime does not mean the person has committed the past crimes. Additionally, under the justification from *Gant*, DNA collection is unlikely to yield evidence of many crimes for which some arrestees are arrested. For example, how can DNA be useful evidence in crimes of cyberstalking?¹²⁷ The mere chance that evidence of prior crimes might be obtained is not sufficient to justify DNA extraction. "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained."¹²⁸ The government's purported justification that the Act will provide evidence to solve past crimes is unrealistic.

If the Fourth Amendment does not allow a warrantless intrusion incident to arrest into our cars where we enjoy the *lowest* expectations of privacy, the Fourth Amendment certainly should not permit the government to forcibly intrude into our bodies without a warrant and without probable cause to search and seize our genetic blueprint. North Carolina's allowance of searches and seizures of DNA incident to arrest, based on a rationale that does not even allow a search incident to arrest of a *car*, is unreasonable, unjustifiable, and untenable.¹²⁹

2. *Probable Cause and Exigent Circumstances*

The Fourth Amendment prohibits law enforcement from intruding into the body of an arrestee in order to seize a biological sample unless they have either a warrant to do so, or both probable cause to believe the sample will provide evidence of the crime *and* exigent circumstances exist that make obtaining a warrant impracticable.¹³⁰ Because the DNA Da-

127. N.C. GEN. STAT. § 15A-266.3A(f)(10) (2011).

128. *Schmerber v. California*, 384 U.S. 757, 770 (1966).

129. It should be noted that eventually law enforcement *will* obtain the arrestee's DNA. Under the previous version of the law, law enforcement would be entitled to seize and continuously search the arrestee's DNA upon his conviction of one of the enumerated crimes. The constitutionality of this is not in question. Thus, we are not dealing with a case of whether the government *will* get the DNA, but instead *when* the government will get the DNA. Additionally, law enforcement may have access to an arrestee's DNA upon a showing of probable cause and a warrant. The constitutionality of this is not in question either.

130. *See Schmerber*, 384 U.S. at 769–70. The Court indicated:

The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence

tabase Act of 2010 amounts to a warrantless search and seizure, one possible way the warrantless intrusion could be permitted is if both sufficient probable cause and exigent circumstances exist that allow for dispensing with the warrant requirement. An application of this exception to the Act demonstrates that because there is no probable cause to search and seize the arrestee's DNA, nor are exigent circumstances present, the warrantless and suspicionless search and seizure of an arrestee's DNA violates the Fourth Amendment.¹³¹

In *Schmerber v. California*, the Court explained the role of the Fourth Amendment when a state directs that biological samples be seized and searched.¹³² In that case, the defendant was hospitalized after being involved in a traffic collision while driving under the influence of alcohol.¹³³ The officer at the scene of the wreck noted the smell of alcohol and other symptoms of drunkenness.¹³⁴ After the defendant was admitted to the hospital where he received treatment, the officer placed him under arrest and ordered a physician to collect a blood sample, despite a lack of consent.¹³⁵ The ensuing chemical analysis performed on the blood sample confirmed that the defendant had been driving under the influence of alcohol.¹³⁶ The blood test was admitted in court, and the defendant was convicted.¹³⁷

The Court considered the question of "whether the chemical analysis introduced in evidence in this case should have been excluded as the product of an unconstitutional search and seizure."¹³⁸ In answering this

might be obtained. In the absence of a clear indication 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.

Id.

131. It should be noted that "whether or not a search is reasonable within the meaning of the Fourth Amendment . . . has never depended on the law of the particular state in which the search occurs." *Virginia v. Moore*, 553 U.S. 164, 172 (2008) (citations omitted). Additionally, a state cannot legislate away the Fourth Amendment's protections. *Cooper v. California*, 386 U.S. 58, 61 (1967) ("Just as search authorized by state law may be an unreasonable one under that amendment . . ."). Accordingly, the mere fact that the North Carolina legislature has authorized this search and seizure carries no weight in the balancing test.

132. *Schmerber*, 384 U.S. 757.

133. *Id.* at 759.

134. *Id.* at 769.

135. *Id.* at 758.

136. *Id.* at 759.

137. *Id.*

138. *Id.* at 766–67.

question, the Court explained that “the Fourth Amendment’s proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.”¹³⁹ Essentially, if the police are justified in requiring the defendant to submit to the blood test, then it will be reasonable under the Fourth Amendment. That justification comes from the existence of probable cause and exigent circumstances because the seizure was performed without a warrant.

State intrusions into the human body are distinct from state interferences with property relationships or private papers.¹⁴⁰ As such, the traditional rules applying to searches and seizures of papers are not instructive in the context of a physical intrusion into the body.¹⁴¹ According to the Court in *Schmerber*, the Fourth Amendment is a bar against intrusions into the human body that are made in an improper manner.¹⁴² Essentially, when confronted with a physical intrusion into the body, the police must be justified in their actions, and the means and procedure employed by them must conform to Fourth Amendment standards of reasonableness.¹⁴³

The *Schmerber* principle controls in an analysis of the DNA Database Act of 2010. The principle is that “establishing probable cause to arrest a person is not, by itself, sufficient to permit a biological specimen to be taken from the person without first obtaining a search warrant.”¹⁴⁴ Exigent circumstances must also exist that will make obtaining a warrant impracticable.¹⁴⁵

Proponents of the Act argue that the statute itself satisfies the probable cause requirement because the DNA sample will not be taken with-

139. *Id.* at 768.

140. *Id.* at 767–68.

141. *Id.* at 768 (“Limitations on the kinds of property which may be seized under warrant, as distinct from the procedures for search and the permissible scope of search, are not instructive in this context.”).

142. *Id.* at 768.

143. *Id.* Ultimately, both probable cause and exigent circumstances existed to allow the warrantless search and seizure. *Id.* at 770–71. The probable cause was the odor of alcohol and the defendant’s drunken state. *Id.* at 768–69. The exigent circumstances present to make obtaining a warrant impracticable were the disappearance of alcohol in the blood as time passed. *Id.* at 770 (“[T]he delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence.”). Despite this outcome, the principle nevertheless controls the analysis here.

144. *In re Welfare of C.T.L.*, 722 N.W.2d 484, 490 (Minn. 2006).

145. *Schmerber*, 384 U.S. at 769.

out a magistrate's determination of probable cause.¹⁴⁶ This argument is flawed because probable cause to support a criminal charge is not equivalent to probable cause to issue a search warrant.¹⁴⁷

The Act impermissibly uses a judicial determination of probable cause for the arrest as a substitute for the probable cause required to issue a search warrant. But, just as in *Schmerber*, no such dual use of probable cause is permissible. Probable cause to arrest is not sufficient to intrude into the body without a warrant. In *Schmerber*, the probable cause to seize the blood sample arose from the officer's belief that it would reasonably produce evidence related to the crime for which the defendant was arrested.¹⁴⁸ The fact that a magistrate has determined probable cause exists for the individual to be arrested does not signify that the magistrate has also determined that there is a fair probability that evidence of the crime will be found in the biological specimen taken from the defendant.¹⁴⁹ These two determinations are distinct.¹⁵⁰

146. This sort of argument is found throughout the committee hearings on the bill, but these arguments misunderstand what the magistrate is determining. See generally Audio recording: North Carolina House Judiciary I Committee Meeting (June 1, 2010) [hereinafter Audio recording: Judiciary I Committee Meeting (June 1, 2010)] (on file with author). The magistrate determines whether there was sufficient probable cause to arrest, not whether there is probable cause to take the arrestee's DNA and subject it to a continuous search for links to past crimes for which the arrestee has not been arrested.

147. *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003) (holding that probable cause to support a criminal charge exists when "the evidence worthy of consideration brings the charge against the prisoner within reasonable probability") (citations omitted); see also *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995) (holding that probable cause to issue a search warrant exists when, given the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place") (citations omitted).

148. Justice Brennan observed that:

The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant.

Schmerber, 384 U.S. at 770 (citations omitted) (internal quotation marks omitted).

149. Compare N.C. GEN. STAT. § 15A-604(a) (2011) ("The judge must examine each criminal process or magistrate's order and determine whether each charge against the defendant charges a criminal offense within the original jurisdiction of the superior court."), with N.C. GEN. STAT. § 15A-245 (describing the requirements for a search warrant).

The Act is applied indiscriminately to all of the enumerated crimes, regardless of whether DNA evidence is relevant to the crime charged. The mere chance that the desired evidence might be obtained with a search is not sufficient to support probable cause for a search.¹⁵¹

The Act dispenses with the requirement that law enforcement must obtain a warrant prior to a search or seizure.¹⁵² Under the Act, it is unnecessary to consider whether the DNA sample will relate to the charged crime or to any other criminal activity. For example, an individual could be arrested for a crime in which DNA plays no role, but his DNA will still be sampled under the Act.¹⁵³ While there may be probable cause for the arrest, there is no probable cause to take the DNA incident to the arrest. In this situation, there would be no possibility, nor any probable cause to believe, that the DNA could reveal evidence related to the crime committed. If such probable cause did exist—probable cause that the DNA would provide evidence of the person who committed the crime for which the arrestee is in custody—law enforcement would be free to obtain a warrant.

Because there is no probable cause, the question of exigent circumstances is inapplicable. Even if probable cause existed, there still would be no exigency because DNA is immutable.¹⁵⁴ As in *Schmerber*, there is no threat of destruction of the evidence. The Act authorizes a search and seizure without probable cause or any sort of reasonable suspicion. Such an authorization certainly should not pass constitutional muster.

In sum, because there is no probable cause to search and seize the DNA for evidence relating to crimes for which the arrestee has not been arrested, and there are not exigent circumstances that may permit the unwarranted search and seizure, the Act should be viewed as an unconstitutional search and seizure. *Schmerber* can be analogized to the North Carolina DNA Database Act of 2010 because both *Schmerber* and the Act address the warrantless search and seizure of bodily material upon arrest for a crime. Given their factual similarities, the principles dictating the outcome of *Schmerber* should control an analysis of the DNA Database

150. Each is subject to different determinations and is addressed in different sections of the North Carolina statutes.

151. *Schmerber*, 384 U.S. at 770.

152. N.C. GEN. STAT. § 15A-266.3A(b) (“The arresting law enforcement officer shall obtain, or cause to be obtained, a DNA sample from an arrested person at the time of arrest, or when fingerprinted.”).

153. There is no requirement that the crime for which the person is arrested have a possibility of DNA evidence being involved. For a list of crimes triggering DNA collection, see *supra* note 67.

154. *Barlow v. Ground*, 943 F.2d 1132, 1138 (9th Cir. 1991).

Act of 2010. Thus, mandatory arrestee DNA sampling should be ruled unconstitutional under *Schmerber*.

3. *Special Needs*

In a number of circumstances, the Supreme Court has allowed searches in the absence of probable cause or even individualized suspicion.¹⁵⁵ The Court's allowance of these searches predicates on the search's special needs justification for something other than detecting crime and stopping criminals.¹⁵⁶ Proponents of the Act cite this special needs exception to justify the collection of the DNA; however, the special needs exception to the warrant requirement is inapplicable to this Act.

In order for a special needs search to pass Fourth Amendment scrutiny, it must be unrelated to traditional law enforcement because of the balancing test imposed by the Court.¹⁵⁷ Under this balancing test, special needs searches are permissible where the government interests and the effectiveness of the government activity outweigh the intrusion into personal privacy and the individual.¹⁵⁸ The Court has never found a special needs search which furthers traditional law enforcement goals that balances correctly.¹⁵⁹ The Court has allowed these suspicionless

155. *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.'" (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring))).

156. *Ferguson v. City of Charleston*, 532 U.S. 67, 81 n.17 (2001) ("[I]f there was a proper governmental purpose other than law enforcement, there was a 'special need,' and the Fourth Amendment then required the familiar balancing between that interest and the individual's privacy interest." (quoting *Chandler v. Miller*, 520 U.S. 305, 325 (1997) (Rehnquist, C.J., dissenting))).

157. *Id.* at 78; *Chandler*, 520 U.S. at 313–14 (stating that "to be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing [but that] particularized exceptions to the main rule are sometimes warranted based on special needs, beyond the normal need for law enforcement"); *Griffin*, 483 U.S. at 873; see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (random drug testing of student-athletes); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (drug tests for United States Customs Service employees seeking transfer or promotion to certain positions); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1989) (drug and alcohol tests for railway employees involved in train accidents or found to be in violation of particular safety regulations).

158. See, e.g., *Vernonia*, 515 U.S. at 652–53; *Nat'l Treasury Emps. Union*, 489 U.S. at 665.

159. *Vernonia*, 515 U.S. at 652–53.

special needs searches for automobiles¹⁶⁰ and in some school situations,¹⁶¹ with the most common special needs searches being security searches at airports and courthouses.

In upholding various forms of DNA collection laws, federal courts have turned to the special needs exception. Federal courts have upheld statutes authorizing warrantless DNA searches and seizures from individuals on supervised release,¹⁶² parolees,¹⁶³ and convicted felons.¹⁶⁴ Though these cases may seem compelling, each case turns on the status of the offender. Because the person has been convicted, was a parolee, or somehow had his rights previously restricted, the individual had a reduced expectation of privacy. An arrestee's status as an arrestee—someone presumed innocent until proven guilty—does not reduce his expectation of privacy; the expectation of privacy of an arrestee is the same as a non-convicted person. In other cases, it was the status as a convicted person and the correlating lower expectation of privacy that allowed the government's interests to weigh more heavily and justify the special need necessary to subject that person to the suspicionless search and seizure of their DNA.¹⁶⁵ No such special status exists here.

In *Ferguson v. City of Charleston*, the Court examined the special needs exception in holding a particular law unconstitutional.¹⁶⁶ In that case, the issue presented was “whether the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant.”¹⁶⁷ To answer this question, the Court applied the special needs exception to the warrant requirement of the Fourth Amendment.¹⁶⁸ Under the special

160. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (holding that random stops of automobiles for generalized crime fighting are impermissible without reasonable suspicion, but fixed checkpoints for DWI or drivers' licenses are acceptable).

161. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009) (limiting the scope of permissible searches); *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (upholding student drug testing policy); *Vernonia*, 515 U.S. at 665 (noting that schools may also require neutral drug tests for extracurricular activities); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that a school official may search individual students if he has reasonable suspicion the student is violating a school rule).

162. *United States v. Lujan*, 504 F.3d 1003 (9th Cir. 2007).

163. *Banks v. Gonzales*, 415 F. Supp. 2d 1248 (N.D. Okla. 2006); *Miller v. Parole Comm'n*, 259 F. Supp. 2d 1166 (D. Kan. 2003).

164. *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004).

165. *E.g., id.*

166. *Ferguson v. City of Charleston*, 532 U.S. 67, 69 (2001).

167. *Id.*

168. *Id.* at 76.

needs exception, “a search unsupported by either warrant or probable cause can be constitutional when ‘special needs’ other than the normal need for law enforcement provide sufficient justification.”¹⁶⁹ The Court will only apply the special needs exception “[I]f there is a proper governmental purpose other than law enforcement.”¹⁷⁰ The *Ferguson* Court held that because the primary purpose of the law was to use prosecution to force women into treatment, and because of the extensive involvement of law enforcement in each state of the policy, the law did not fall within the special needs exception.¹⁷¹ There is no comparable special need to justify the warrantless search and seizure of an arrestee’s DNA.

Under the DNA Database Act of 2010, the primary purpose of the expanded DNA database is to solve crimes—a law enforcement purpose.¹⁷² The entire legislative history of the Act focuses on law enforcement and solving unsolved crimes.¹⁷³ Throughout the legislative debates and committee hearings on this Act, proponents cited the necessity of this Act in solving past crimes, unlocking cold cases, preventing recidivism of violent offenders, preventing crimes, and reducing investigatory costs.¹⁷⁴ Many proponents of the Act invoked stories of past violent crimes that would have purportedly been prevented by this Act.¹⁷⁵ Each of these factors unequivocally demonstrate that the Act’s relation to law enforcement was the dominant, if not the only, factor that determined its passage. The Act is inextricably related to law enforcement and serves the needs of law enforcement. The United States Court of Appeals for the Ninth Circuit recognized in a dissent the obvious problem in attempting to apply the special needs justification to DNA acts:

The unequivocal purpose of the searches performed pursuant to the DNA Act is to generate the sort of ordinary investigatory evidence used by law enforcement officials for everyday law enforcement purposes. . . . [I]n passing the DNA Act, Congress’s primary concern was the swift and accurate solution and prosecution of crimes as a general matter. The legislative history is littered with approving references to DNA evidence’s ability to solve past and future crimes and thereby assist prosecutions. See, e.g., DNA Act House Report, at 8–11, 23–27, 32–36 (2000).

169. *Id.* at 76 n.7.

170. *Id.* at 81 n.18.

171. *Id.* at 76.

172. Audio recording: Judiciary I Committee Meeting (May 25, 2010), *supra* note 18.

173. These topics were heartily discussed in all committee hearings.

174. See, e.g., Audio recording: Judiciary I Committee Meeting (May 25, 2010), *supra* note 18 (statement of Rep. Wil Neumann).

175. Audio recording: Judiciary I Committee Meeting (June 1, 2010), *supra* note 146 (statements of Karen Foster and Joan Berry of the Surviving Parents Coalition).

For example, the Department of Justice argued to Congress that “one of the underlying concepts behind CODIS is to create a database of convicted offender profiles and use it to solve crimes for which there are no suspects.” *Id.* at 27. Members of Congress made similar arguments. See 146 CONG. REC. S11645-02, at S11647 (daily ed. Dec. 6, 2000) (arguing that the purpose of adding DNA profiles into CODIS is to “solve crimes and prevent further crimes”) (statement of Sen. Leahy); 146 CONG. REC. H8572-02, at H8575-6 (daily ed. Oct. 2, 2000) (statement of Rep. Canady) (“The purpose of [CODIS] is to match DNA samples from crime scenes where there are no suspects with the DNA of convicted offenders. Clearly, the more samples we have in the system, the greater the likelihood we will come up with matches and solve cases.”).¹⁷⁶

There is no doubt that the North Carolina Act has a purely law enforcement purpose. Applying the special needs justification of *Ferguson*, law enforcement purposes do not constitute special needs for a warrantless search and seizure. Because the cited needs here are for law enforcement, the special needs justification is inapplicable to the Act.

4. *Balancing Test*

Even if a court were to accept an argument that the Act fits the special needs exception—despite its prohibited application to the needs of law enforcement—the Act should still be held unconstitutional. “When special needs . . . are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests.”¹⁷⁷ After an examination of the competing privacy and public interests, the Act should still fail because an arrestee’s interests in bodily integrity and genetic privacy greatly outweigh any legitimate government interest in seizing and searching DNA.

In examining the constitutionality of DNA testing of convicted felons, many courts have imposed a balancing test.¹⁷⁸ These courts weigh the convict’s privacy interests against the government’s need to super-

176. *United States v. Kincade*, 379 F.3d 813, 855–56 (9th Cir. 2004) (Reinhardt, J., dissenting). This case addressed the federal DNA Act, but the same constitutional issues are implicated with the North Carolina Act.

177. *Chandler v. Miller*, 520 U.S. 305, 314 (1997); *see also Samson v. California*, 547 U.S. 843, 860 (2006).

178. *Chandler*, 520 U.S. at 325 (“Under our precedents, if there was a proper governmental purpose other than law enforcement, there was a ‘special need,’ and the Fourth Amendment then required the familiar balancing between that interest and the individual’s privacy interest.”).

vise, rehabilitate, and control such persons.¹⁷⁹ As previously stated, when applying the balancing test, courts have found that the government's interests outweigh the privacy interests of the convicts because of the convicts' diminished privacy expectations.¹⁸⁰ The constitutionality of DNA analysis of convicts is not at issue here. Instead, we must balance the government's purported interests against the privacy interests of people in a free society—people with no diminished expectation of privacy.

In upholding Virginia's collection of arrestee DNA, the Virginia Supreme Court applied unsuitable precedent that led to its holding.¹⁸¹ In that case, the defendant challenged the collection-at-arrest of his DNA.¹⁸² The Virginia Supreme Court relied on the Fourth Circuit case of *Jones v. Murray*, which examined the collection of DNA at conviction.¹⁸³ Though the Virginia court recognized that there is a distinction between arrest and conviction, it nevertheless concluded that the collection at arrest did not violate the Fourth Amendment.¹⁸⁴ The court focused its discussion on comparing genetic profiles to fingerprints, but did not address the differing privacy interests of arrestees and convicts.¹⁸⁵

An overwhelming distinction exists between the privacy interests of someone who has been convicted of a crime and someone who has not yet been tried, yet the Virginia Supreme Court and numerous other courts have dismissed this critical distinction.¹⁸⁶ Depending on an individual's status in the criminal justice system, there are varying degrees of privacy. For example, a detained person awaiting a trial has a dimi-

179. See *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987) (considering the state's need to "exercise . . . supervision to assure that [probation] restrictions are in fact observed"). In *Griffin*, the Supreme Court upheld a warrantless search of the probationer's home by applying the "special needs" exception. *Id.* The Court justified the departure from the traditional warrant and probable cause requirements based upon a "special need" to effectively operate a probation system. *Id.* The Court also found, however, that reasonable grounds existed to support the search; therefore, the search of the probationer's home was not completely without suspicion. *Id.*

180. *Id.* at 872.

181. See *Anderson v. Commonwealth*, 650 S.E.2d 702 (Va. 2007).

182. *Id.* at 704–05.

183. *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992).

184. *Anderson*, 650 S.E.2d at 705 ("While Code [section] 19.2-310.2:1 requires a DNA sample after an arrest for specific offenses, as opposed to a conviction, like Code [section] 19.2-310.2, it too does not violate the Fourth Amendment.").

185. *Id.* at 705–06.

186. See, e.g., *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011); *Myles v. State*, 54 So. 3d 509 (Fla. Dist. Ct. App. 2010); *State v. Banks*, 790 N.W.2d 526 (Wis. Ct. App. 2010).

nished expectation of privacy,¹⁸⁷ but an inmate in a prison cell has no expectation of privacy.¹⁸⁸ Plainly stated, the Virginia Supreme Court and other courts that have upheld similar state statutes have applied unsuitable precedent because of the varying expectations of privacy that an individual enjoys based upon his status in the criminal justice system. An arrestee still has an expectation of privacy, and the compulsory seizure and search of his DNA intrudes upon that reasonable expectation.

Compulsory DNA testing implicates an individual's interest in bodily integrity, and arrestees, as well as all other people, have a significant interest in their rights to bodily integrity and genetic privacy. The body is entitled to the Fourth Amendment's strongest protections and it has long been recognized that intrusions into the body, like intrusions into the home, require more justifications than simple searches of one's clothing or possessions.¹⁸⁹ North Carolina should not diminish an arrestee's expectation of privacy based solely on his status as an arrestee because of the significant need to protect the complex and highly personal information contained in a DNA specimen.

DNA sampling and testing requires a *physical* intrusion into the body. Each arrestee is compelled to provide a sample, and upon refusal, the sample can be taken forcibly, and the arrestee jailed without the ability to post bond for a potentially indefinite term.¹⁹⁰ Ultimately, when the sample is taken, the arrestee's jaw is opened, a swab is forcibly inserted into the mouth, and the insides of the mouth are scraped and grinded against by the swab until the sampling agent feels the sample has been sufficiently taken. Certainly this type of invasive procedure—both physically invasive and informationally invasive—is what the Fourth Amendment protects against. “The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusions by the State.”¹⁹¹ Such testing without a warrant, without judicial review, and without probable cause constitutes serious intrusions into the interests of personal privacy and dignity.

There are few areas that are more private, more personal, and more likely to implicate individual privacy interests than one's genetic makeup because it contains extensive amounts of information. A person's DNA is his genetic blueprint. This blueprint contains every single piece of genetic information about a person, and every year the information that

187. *Bell v. Wolfish*, 441 U.S. 520 (1979).

188. *Hudson v. Palmer*, 468 U.S. 517 (1984).

189. *See Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1989).

190. N.C. GEN. STAT. § 15A-502.1 (2011).

191. *Schmerber v. California*, 384 U.S. 757, 787 (1966).

can be gleaned from a DNA blueprint expands.¹⁹² The potential for abuse of this personal information is staggering.¹⁹³

North Carolina's Act seeks to make that personal information available despite the fact that a compulsory seizure of DNA by law enforcement constitutes a serious intrusion into a person's genetic privacy. The mere collection of the DNA implicates an individual's interest in his bodily integrity.

In examining the constitutionality of the law, one's interests in his own privacy must be compared with those legitimate interests advanced by the government.¹⁹⁴ Only if the government's purported interests outweigh the individual's interests will the law be upheld as constitutional.¹⁹⁵ Upon an examination of these government interests, it becomes clear that the scales do not tip such that the government's interest in taking DNA from arrestees can outweigh the arrestee's interests in his own privacy and dignity.

The first governmental interest in the seizure of DNA from arrestees is that the DNA serves as a sort of identification of the arrestee.¹⁹⁶ Pro-

192. One could argue that we only need to consider the technology presently available, but this argument is misguided. The Supreme Court has indicated a willingness to consider future technology issues when examining Fourth Amendment concerns. In *Kyllo* the Court stated, "The rule we adopt must take account of more sophisticated systems that are already in use or in development." *Kyllo v. United States*, 533 U.S. 27, 36 (2001). Additionally, the D.C. Circuit Court of Appeals also stated a concern for future DNA technology. *Johnson v. Quander*, 440 F.3d 489, 499 (D.C. Cir. 2006). In *Johnson v. Quander*, the court stated, in passing, "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." *Id.*

193. DNA is the master molecule of every cell that serves as a blueprint for how every cell in the body is created. Craig Freudenrich, *How DNA Works*, HOWSTUFFWORKS, <http://science.howstuffworks.com/environmental/life/cellular-microscopic/dna.htm> (last visited Mar. 7, 2012). It contains vital information that gets passed on to each successive generation of cells and it coordinates the making of itself as well as other molecules. *Id.* DNA carries all of the information for one's physical characteristics and contains all genetically predetermined information about a person. *Id.* Even the "junk" DNA which is used in DNA testing implicates a wealth of information. *Id.* This junk DNA may contain instructions essential for the growth and survival of humans, and may hold keys to understanding complex diseases like cancer, strokes and heart attacks. *Id.*

194. *Chandler v. Miller*, 520 U.S. 305 (1997).

195. *Id.* at 312 (1997) (citing *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989)).

196. Audio recording: North Carolina House of Representatives Floor Debate on H.B. 1403 (July 10, 2010) [hereinafter Audio recording: Floor Debate on H.B. 1403] (statement of Rep. Dan W. Ingle) (on file with author).

ponents of the Act often draw comparisons between DNA seizures as a form of fingerprinting and the requirement that an arrestee have his picture taken and be fingerprinted during the booking process.¹⁹⁷ According to these proponents, the government's interests in solving crime and administrative matters outweigh the arrestee's right to privacy and bodily integrity.¹⁹⁸ This argument is flawed.

This argument that DNA serves as a means of identification assigns two distinct meanings to the word "identification." The first meaning of identification is in an administrative context that views DNA testing as a method of verifying who the person is and having that identity entered into administrative bookkeeping. The second meaning given to identification arises in an investigative setting and views DNA testing as a way of seeing what the person has done—whether that person has a criminal record and whether that person has committed an unsolved crime. While the two definitions of "identification" have totally different meanings, proponents of the law treat them as the same.¹⁹⁹ For proponents, the analysis of DNA to connect the arrestee to unsolved crimes implicates only an arrestee's interest in hiding his identity under the first definition, a practically non-existent interest.

While an arrestee may lack a privacy interest in concealing his name and date of birth, he still certainly retains his privacy interest in his own bodily integrity, his genetic makeup, and his past actions. The arrestee undoubtedly has a very low interest in concealing his identity under the first definition, but the second definition implicates a much greater interest. The dissenting judges in *United States v. Kincade* identified this flawed dual usage of the two definitions of identification.²⁰⁰ The

197. *Id.*

198. *Id.*

199. Recently, a deeply divided Third Circuit Court of Appeals, sitting *en banc*, upheld the federal DNA collection law after applying a balancing test to the totality of the circumstances. *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011). The majority in this court conflated the two definitions of identification in upholding the law. *Id.* at 398–416. More recently, in examining a similar California law, the California Court of Appeals rejected the reasoning in *Mitchell* because it failed to distinguish the two types of identification. *People v. Buza*, 129 Cal. Rptr. 3d 753 (Cal. Ct. App. 2011), *petition for review granted, depublished by* 262 P.3d 854 (Cal. 2011).

200. *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004). The court in *Kincade* examined the constitutionality of a law requiring individuals who have been convicted of certain crimes to be subject to DNA testing for identification purposes. *Id.* The question for the court was "whether the Fourth Amendment permits compulsory DNA profiling of certain conditionally-released federal offenders in the absence of individualized suspicion that they have committed additional crimes." *Id.* at 816.

judges rejected the combination of the two definitions of identification that proponents of the Act urge. They wrote:

Claiming that DNA profiles are designed to “identify[,]” . . . much like fingerprints, is disingenuous. Kincade, for instance, was identified and booked with fingerprints, and his identification was confirmed by a criminal conviction before a court of law, long before his DNA sample was taken. The collection of a DNA sample thus does not “identify” . . . any more than a search of his home does—it merely collects more and more information about . . . [him] that can be used to investigate unsolved past or future crimes.²⁰¹

The United States Supreme Court has consistently distinguished between administrative identifications and identifications for other contexts.²⁰² Cases in which the distinction between the two definitions of “identification” has been upheld demonstrate that the government has a legitimate administrative interest in determining who it has in custody, but this administrative interest is wholly distinguished from the government’s investigatory interest in determining whether a person has committed a crime. The government’s claim that it is simply seizing the DNA for identification purposes is plainly disingenuous; the government is only attempting to mask investigation by calling it identification.

It is also essential to highlight that a common statement is that a DNA profile is just like a fingerprint.²⁰³ This assertion is neither sup-

201. *Id.* at 857 n.16 (Reinhardt, J., dissenting).

202. See *Hibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177 (2004); *Ferguson v. City of Charleston*, 532 U.S. 67, 67 (2001).

203. See *Nicholas v. Goord*, 430 F.3d 652, 671 (2d Cir. 2005) (“The collection and maintenance of DNA information, while effected through relatively more intrusive procedures such as blood draws or buccal cheek swabs, in our view plays the same role as fingerprinting.”); *United States v. Sczubelek*, 402 F.3d 175, 185–86 (3d Cir. 2005) (“The governmental justification for [DNA] identification, therefore, 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.”); *Rise v. State*, 59 F.3d 1556, 1560 (9th Cir. 1995) (“That the gathering of DNA information requires the drawing of blood rather than inking and rolling a person’s fingertips does not elevate the intrusion upon the plaintiffs’ Fourth Amendment interests to a level beyond minimal.”); *State v. Raines*, 857 A.2d 19, 33 (Md. 2004) (“The purpose [of the DNA profile] is akin to that of a fingerprint.”); *State v. O’Hagen*, 914 A.2d 267, 280 (N.J. 2007) (“We harbor no doubt that the taking of a buccal cheek swab is a very minor physical intrusion upon the person . . . [It] is no more intrusive than the fingerprint procedure and the taking of one’s photograph that a person must already undergo as part of the normal arrest process.”); *State v. Brown*, 157 P.3d 301, 303 (Or. Ct. App. 2007) (“Because the procedure that occurred in this case [buccal cheek swab] is akin to the fingerprinting of a person in custody, we conclude that the

ported by science nor common sense, and “to compare the fingerprinting process and the resulting identification information obtained therefrom with DNA profiling is pure folly.”²⁰⁴

To begin, fingerprinting does not trigger Fourth Amendment protections, nor is it even considered a search,²⁰⁵ but collection of a DNA sample does trigger the Amendment’s protections.²⁰⁶ Fingerprinting is a relatively non-intrusive matter and the only information gleaned from a fingerprint is the unique pattern on the fingerprint. Conversely, obtaining DNA is a highly disruptive process that not only involves a physical intrusion into the body, but also yields a wealth of highly personal information including a person’s entire genetic blueprint.

Additionally, DNA samples and the genetic blueprints contained therein reveal astoundingly private information regarding genealogy, predisposition to over four thousand types of diseases, and arguably genetic markers for numerous traits like aggression, sexual orientation, and substance addiction.²⁰⁷ As DNA technology continues to develop, so will the information able to be gleaned from a DNA sample. By comparison, fingerprints only identify the name of the person who left them. “The extraction of DNA, then, is much more than a mere progression to taking fingerprints and photographs, it represents a quantum leap that is entirely unnecessary for identification purposes.”²⁰⁸

A second governmental interest used in a balancing test is the interest in solving past crimes.²⁰⁹ This generalized interest in solving crime simply cannot trump the interests in privacy that an arrestee holds. Courts have found that the interest in accurate criminal investigations and prosecution outweighs the interests of the individual.²¹⁰ However, while this is the balance that may strike for a convicted person, as mentioned above, a free person has a greater expectation of privacy. The law in *United States v. Sczubelek*, for example, required DNA samples to be

seizure of the defendant’s DNA did not constitute an unreasonable seizure under either constitution.”).

204. *United States v. Mitchell*, 681 F. Supp. 2d 597, 608 (W.D. Pa. 1999).

205. *Davis v. Mississippi*, 394 U.S. 721, 724 (1969).

206. See *Vernonia Sch. Dist. 47 v. Acton*, 515 U.S. 646, 665 (1995); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 616 (1989); *Schmerber v. California*, 384 U.S. 757, 767 (1966).

207. Leigh M. Harlan, *When Privacy Fails: Invoking a Property Paradigm to Mandate the Destruction of DNA Samples*, 54 DUKE L.J. 179, 188 (2004).

208. *Mitchell*, 681 F. Supp. 2d at 608–09.

209. Audio recording: Judiciary I Committee Meeting (May 25, 2010), *supra* note 18 (statement of Rep. Wil Neumann).

210. See *United States v. Sczubelek*, 402 F.3d 175, 185 (3d Cir. 2005).

collected from “individuals in custody and individuals on release, parole, or probation to give a DNA sample if they are, or have been, convicted of a qualifying federal offense.”²¹¹ This rationale, based on the plaintiff’s status as a parolee and the need for intense supervision comes from *Samson v. California*.²¹²

Under the North Carolina Act, there is no need for any type of supervision because of the differing expectations of privacy. There is simply no compelling reason to unduly burden an arrestee’s reasonable expectation of privacy.

A damning blow to North Carolina’s claim that DNA databases help solve crime comes from the United Kingdom, where the British system provides an accurate telling of the future of the United States and DNA testing.²¹³ Since the United Kingdom enacted a system of mandatory DNA analysis of all arrestees in 2004, the British government has added 4.5 million DNA profiles to its database.²¹⁴ Of those 4.5 million profiles, “[a]s of March 2008, 857,000 people in the British database, or about one-fifth, have no current criminal record.”²¹⁵

A recent report on the success of the British DNA database revealed that putting innocent people in DNA databanks is *ineffective* in solving past crimes.²¹⁶ Since the inception of the British system of collecting

211. *Id.* at 181.

212. *Samson v. California*, 547 U.S. 843 (2006).

213. It should be noted the United Kingdom’s law was invalidated by the Grand Chamber of the European Court of Human Rights. *S. & Marper v. United Kingdom*, 1581 Eur. Ct. H.R. (2008), available at <http://www.bailii.org/uk/cases/ECHR/2008/1581.html>. That opinion stated:

In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of . . . DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants’ right to respect for private life and cannot be regarded as necessary in a democratic society.

Id. ¶ 125.

214. The United Kingdom has a population of 61,000,000.

215. Solomon Moore, *F.B.I. and States Vastly Expand DNA Databases*, N.Y. TIMES, Apr. 18, 2009.

216. Additionally, it is very troubling that the North Carolina General Assembly was aware of the ineffectiveness of DNA testing in solving crimes. On July 1, 2010, Rep. Paul Luebke presented the House Judiciary I committee with an issue brief from the Duke University Institute for Genome Science and Policy that explicitly stated, “The usefulness of an expanded DNA database for preventing crimes is unknown and poorly docu-

DNA samples from arrestees, there has “been little evidence as to the system’s effectiveness in attaining felony convictions.”²¹⁷ *The Independent* reports, “According to one recent estimate, less than one per cent of recorded crime is solved using the database.”²¹⁸ An analysis of the numbers from the United States is not available because the FBI does not keep statistics on the number of matches that lead to convictions, though there is no reason to believe the statistics would lead to a different conclusion. Given the history of the DNA database in the United Kingdom, expansion of North Carolina’s database to include arrestees will most likely fail to increase its efficacy in solving crime.

Considering the Fourth Amendment’s strict application to intrusions into the body and each relevant exception, North Carolina’s DNA Database Act of 2010 should not pass constitutional muster. The Act is a warrantless, suspicionless and unreasonable search and seizure. The Fourth Amendment should not permit this physical intrusion into the body, seizure of genetic matter, and perpetual search of private genetic material containing highly sensitive information.

5. *No Exceptions*

No exception to the Fourth Amendment will permit the continuation of the DNA Database Act of 2010. The Act seeks to search and seize physical materials and personal information from arrestees without any sort of probable cause to justify the search and seizure. The Act cannot be justified as a search incident to a lawful arrest because the search and seizure are unrelated to the two justifications giving rise to this exception. Nor can the Act be upheld as a special needs exception to the warrant requirement because the Act’s primary purpose is law enforcement. Lastly, the Act will not survive balancing test inquiry because the interests a person has in his bodily integrity and informational privacy greatly outweigh any governmental interests in identifying his past actions. Given each of these reasons, the North Carolina DNA Database Act of 2010 should be found unconstitutional as a violation of the Fourth Amendment.

mented.” Audio recording: North Carolina House Finance Committee Meeting (July 1, 2010) (statement of Rep. Paul Luebke) (on file with author).

217. Sarah Grantham and Sara Katsanis, *Expansion of CODIS to Include Arrestees*, DUKE INST. FOR GENOME SCI. & POL’Y (2010).

218. Bigel Morris, *The Big Question: Why is Britain’s DNA Database the Biggest in the World, and is it Effective?*, THE INDEPENDENT, Nov. 12, 2009, <http://www.independent.co.uk/news/uk/home-news/the-big-question-why-is-britains-dna-database-the-biggest-in-the-world-and-is-it-effective-1818878.html>.

III. WHAT DOES THE FUTURE HOLD?

While debating this bill on the final night of the legislative session, Representative Kelly M. Alexander, Jr. asked a question at around two o'clock in the morning. He pondered, "Will we be debating a bill one day where we incarcerate people before they commit a crime simply because they carry a trait that will make them have a disposition to antisocial behavior?"²¹⁹ Representative Kelly understood the significance of the DNA Database Act of 2010. An often-overlooked point, despite its major importance, is what exactly the future holds for both DNA technology and North Carolina's Act. Should this Act survive constitutional challenges, what will its future forms resemble? Which crimes will it include? Not only that, but how will the Act be expanded, and how will law enforcement use the Act? These issues are of immense concern.

To begin, there can be no doubt that the Act will expand to cover more crimes. In its present state, the Act is one of the narrower laws among the states with similar legislation. California, for example, collects DNA from all persons who are arrested for any felony, regardless of the "seriousness" of the felony, or the felony's propensity to lead to or be connected to other violent crimes.²²⁰ Originally, the Act required DNA samples to be taken from all persons arrested for any felony, but the list of offenses was ultimately shortened.²²¹

Though the list of crimes was shortened, there remains a desire from the North Carolina General Assembly and the North Carolina Attorney General to add more crimes to the list.²²² A co-sponsor of the Act, Representative Larry Hall, stated during a committee hearing that the drafters had to narrow down the crimes to ones that would likely produce hits in the database. In his words, presently there is simply "not enough money to cast a wide net."²²³ North Carolina wants to "cast a wide net." Representative Hall indicated that the drafters only included the crimes they felt would produce results—they wanted to include violent crimes thinking that the perpetrator of one violent crime had likely committed others, and hopefully there would be some cold case DNA in

219. Audio recording: Floor Debate on H.B. 1403, *supra* note 196 (statement of Rep. Kelly M. Alexander, Jr.).

220. Audio recording: Judiciary I Committee Meeting (May 25, 2010), *supra* note 18, (explanation of selected crimes by Hal Pell).

221. DNA Database Act of 2010, H.B. 1403 § 1(4), 2009-2010 Sess. (as filed, Apr. 9, 2009).

222. Audio recording: Judiciary I Committee Meeting (June 1, 2010), *supra* note 146.

223. *Id.* (statement of Rep. Larry D. Hall).

the database.²²⁴ This reasoning may explain the crimes presently included in the Act, but it does not cover the other crimes the legislature will include in the future. In the coming years, the legislature will undoubtedly “cast a wide net” to include more crimes, and collect more DNA. North Carolina seeks to collect the DNA of its citizens who are presumed innocent, despite not having probable cause to do so.

Not only are the acts of future legislatures of major concern, but so is the future of DNA technology. The Fourth Amendment protections must take into consideration the development of more sophisticated methods of DNA testing and the growing number of uses of DNA. The Supreme Court is sensitive to these changes in technology: “It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.”²²⁵ We must consider what limits “there are upon this power of technology to shrink the realm of guaranteed privacy.”²²⁶

The major advances in DNA technology are too numerous and well known to discuss here, but with these advances come questions about abuses of our DNA. While a DNA profile is only a series of numbers, what people can do with those numbers is concerning. Those numbers can be used to identify a person and implicate a person in a crime. As DNA technology expands, so too will the amount of information able to be gleaned from those numbers. In addition to the numbers that make up a person’s DNA profile, North Carolina also keeps the physical DNA sample.²²⁷ The sample contains one’s entire genetic code and reveals every personal detail about the individual. These samples are kept as long as the profile exists—an entire lifetime for many people. How safe are these samples and what can be done with them?

One significant and troubling advance in DNA technology has allowed scientists to fabricate DNA evidence.²²⁸ This is certainly an advance that greatly undermines the credibility of DNA evidence. Scientists have been able to fabricate both blood and saliva samples that replicate the DNA of a person other than the original donor of the blood

224. *Id.*

225. *Kyllo v. United States*, 533 U.S. 27, 33–34 (2001).

226. *Id.* at 34.

227. N.C. GEN. STAT. § 15A-266.3 (2011).

228. Andrew Pollack, *DNA Evidence Can Be Fabricated, Scientists Show*, N.Y. TIMES, Aug. 17, 2009, <http://www.nytimes.com/2009/08/18/science/18dna.html?scp=1&sq=fabricate%20dna&st=cse>. The full scientific report mentioned in the article is available online at [http://www.fsigenetics.com/article/S1872-4973\(09\)00099-4/abstract](http://www.fsigenetics.com/article/S1872-4973(09)00099-4/abstract).

and saliva.²²⁹ In addition to creating samples, scientists can duplicate samples.²³⁰ Scientists have shown that if they have access to a DNA profile in a DNA database, they will be able to create a duplicate of that sample.²³¹ In the near future, will the North Carolina criminal justice system be compelled to investigate allegations of DNA fabrication, lapses in DNA sample security, or dishonest SBI lab technicians? With the ability of scientists to duplicate already existing DNA samples, will juries soon be considering whether the DNA found at a crime scene was real, or a planted sample? These false DNA samples are much easier to plant at crime scenes than actual fingerprints, and as our court system's reliance on DNA technology increases, so should our fears that we rely too heavily on this evidence.

One of the most troubling concerns is the seeming public embrace of DNA technology and laws similar to North Carolina's based on the erroneous belief that a DNA sample is nothing more than the 21st century's fingerprint. With a public acceptance of these forms of highly invasive technology and the disregard for probable cause and individualized suspicion, there is a legitimate fear that the law will see an unprecedented expansion.

In the future, is it possible that the DNA checkpoint will become as commonplace and as widely accepted as the DWI checkpoint? In order to solve cold cases or search for killers on the loose, will courts permit law enforcement to set up a DNA checkpoint in the neighborhood to look for the killer? In March 2010, Raleigh police performed the equivalent of a DNA checkpoint in a neighborhood to look for a murderer. In that case, law enforcement officers went door-to-door asking each neighbor in a neighborhood to submit DNA samples in order to eliminate suspects.²³² Those who refused samples were automatically considered suspects.²³³ While the police in that investigation took samples only from those who were willing, perhaps one day state statutes will authorize law enforcement to take samples from the unwilling.

Why does a person's invocation of his Fourth Amendment rights against unreasonable searches and seizures automatically make him a suspect? Some people refuse an officer's request to search their car without probable cause on a matter of principle. DNA sampling should

229. *Id.*

230. *Id.*

231. *Id.*

232. Dan Bowens, *Police Collect DNA Samples from Neighbors in Taft Investigation*, WRAL, Mar. 24, 2010, <http://www.wral.com/news/local/story/7293676/>.

233. *Id.*

be no different. The next time someone is pulled over for speeding, in addition to asking for the license and registration, will that person be asked for a DNA sample as well? Will the legislature collect the DNA of speeding motorists on the off chance the motorist had committed an unsolved crime in the past? This idea seems absurd, but it is exactly what the DNA Database Act of 2010 authorizes—a suspicionless and warrantless search of a person and a seizure of his DNA to be used as evidence not of the present crime, but of crimes in the past he might have committed.

CONCLUSION

Every year, thousands of people are arrested on suspicion of a felony, but they are never convicted of anything. The government, through the North Carolina DNA Database Act of 2010, is using arrest as an entitlement to seize and search an arrestee's DNA. The Act involves a warrantless search and seizure, without any individualized suspicion or probable cause, of an arrestee's entire genetic profile, family history, personal information, and medical information in the form of a DNA profile. There is no question that the buccal cheek swab constitutes a search under the Fourth Amendment. Additionally, there is no question that the search is conducted without a warrant. A warrantless search is *per se* unreasonable unless the government can demonstrate that it falls within certain well-defined exceptions to the Warrants Clause of the Constitution. Unless North Carolina can establish that the warrantless, suspicionless, forcible taking of a buccal swab satisfies one of the exceptions to the warrant requirement, the search is unconstitutional. Because the Act does not fall under one of the well-defined exceptions, it should be *per se* unconstitutional.

This is the perfect example of how people lose their freedom. Slowly, people give up their freedom little by little in search of answering to the higher callings of justice, crime prevention, and technology. The DNA Database Act of 2010 is the quintessence of North Carolinians gradually giving up their freedom. If a person is arrested for a certain crime, regardless of whether he actually committed the crime, he must provide a DNA sample. If as a matter of principle, that innocent person refuses to provide his DNA sample, he is thrown in jail without bond, for a potentially indefinite term. This person is in judicial limbo.

Judicial limbo, the sacrifice of individual freedoms, and quantum leaps to trample on the Constitution are not the American way. North Carolina must find a way to balance the ability to use the awesome power of DNA technology in some way that will solve the state's problems,

but it must be a way that does not require citizens to cede their liberty. North Carolina must return to the principle of innocent until proven guilty. This Act requires us to ask, “Who sets the expectation of privacy—the government, or us?” The good intentions of the North Carolina General Assembly are to be commended, but their product in the form of the DNA Database Act of 2010 greatly endangers individual liberty and reasonable expectations of privacy. The innocent should not be suspect in the eyes of the government. The North Carolina DNA Database Act of 2010 should be struck down as an unreasonable search and seizure and as an anathema to the Fourth Amendment.

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