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"You Have the Right to Remain Silent . . . You Have No Right to Your DNA" Louisiana's DNA Detection of Sexual and Violent Offender's Act: An Impermissible Infringement on Fourth Amendment Search and Seizure, 22 J. Marshall J. Computer & Info. L. 759 (2004)

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COMMENT

"YOU HAVE THE RIGHT TO REMAIN SILENT. . . YOU HAVE NO RIGHT TO YOUR DNA" LOUISIANA'S DNA DETECTION OF SEXUAL AND VIOLENT OFFENDER'S ACT: AN IMPERMISSIBLE INFRINGEMENT ON FOURTH AMENDMENT SEARCH AND SEIZURE

I. INTRODUCTION:

Imagine taking a trip to New Orleans, Louisiana to celebrate Mardi Gras. In the midst of the Friday night Bourbon Street festivities, the celebration gets a little out of hand. You find yourself rounded up with a group of rowdy participants. Upon arrest, the police proceed to take your picture and your fingerprints. Then, unexpectedly, they prick your finger and collect a sample of your blood. The police are acting pursuant to a new Act that requires a DNA sample as part of the booking procedure. You ask, "Why did you take my blood?" The police officer explains that the blood contains your DNA, and that the DNA will be analyzed and placed in a computerized data bank. The officer further explains that it will be used for identification in future crimes or for any other uses as "they" see necessary. You reply, "But doesn't my DNA contain information such as my medical background and potential diseases? Isn't my DNA the only thing that makes me unique from everyone else in the world?" The police officer laughs as he answers, "Yeah, but who cares. The government needs it to aid in future arrests, or to identify your remains if there is another terrorist incident, or maybe even to give it to your employer or insurance company so that they can determine whether you are worth the risk of insurability." You protest, "But I don't want them to have it". . .and the police officer shrugs and says, "You have no choice. . ."

On June 20, 2003, the Louisiana legislature enacted the *DNA Detec-*

tion of Sexual and Violent Offenders Act ("Act").[1] This Act requires arrestees to furnish their DNA for the Louisiana State DNA data bank.[2] The question to address is whether this Act is constitutional under the Fourth Amendment.

This Comment will examine the history and purpose of the Act, and then give an overview of DNA collection methods and uses of DNA.[3] The focus will then shift to the relevant Fourth Amendment right to privacy[4] and search and seizure issues. Specifically, this Comment will review the standards of probable cause, and how the government defends its legitimate interests over the individual privacy interest with the balancing test and the special needs test. Also, the *Katz* test and the minimally intrusive analysis are used in probing this DNA databank issue. This Comment will analyze the constitutionality of the Louisiana Act pursuant to analogous case law concerning technology in general. Finally, this Comment will argue that the United States Supreme Court should find that the Act impermissibly infringes upon the Fourth Amendment[5] and is therefore unconstitutional.

In order to predict how the Supreme Court will rule on this Act, it is relevant to note that the federal judiciary is precluded from addressing an issue unless faced with a case or controversy.[6] Since Louisiana is the first state to implement a DNA Act against arrestees,[7] the courts have not yet had occasion to rule on the constitutionality of such an Act. However, inevitably such an inquiry will be before the Supreme Court.

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1. *DNA Detection of Sexual and Violent Offenders*, La. R.S. 15:609 (2004).

2. *Id.* (DNA is an abbreviation for deoxyribonucleic acid, a more comprehensive explanation of DNA is forthcoming).

3. Debra A. Herlica, *DNA Data Banks: When Has a Good Thing Gone Too Far?*, 52 Syracuse L. Rev. 951, 954 (2002) (explaining that DNA stands for deoxyribonucleic acid). *See also,* Webster's II New College Dictionary 334 (Houghton Mifflin, 2001). Defining DNA as deoxyribonucleic acid

> [a] polymeric chromosomal constituent of living cell nuclei, having two long chains of alternating phosphate and deoxyribose units twisted into a double helix and joined by hydrogen bonds between the complementary bases adenine and thymine or cytosine and guanine, each of which projects toward the axis of the helix from one of the strands where it is bonded in a sequence that determines individual hereditary characteristics.

Id.

4. Herlica, *supra* n. 3, at 958-971 (discussing that the protection of the Fourth Amendment applies equally to all citizens regardless of guilt or innocence, that that the Forth Amendment cannot be waived based on prior conviction of a crime, and further discussing that an unreasonable search for the purpose of Fourth Amendment analysis is a government intrusion that "occurs when an expectation of privacy that society considers reasonable is infringed").

5. U.S. Const. amend. IV.

6. U.S. Const. art. III, § 2.

7. For a discussion that Louisiana is the first state to have this DNA Act to apply to arrestees and the Act came out in June of 2003, consult *infra* note 44.

II. BACKGROUND:

A. THE STATUTE: DNA DETECTION OF SEXUAL AND VIOLENT OFFENDERS ACT[8]

On June 20, 2003,[9] the Louisiana legislature amended and reenacted the Chapter known as the DNA Detection of Sexual and Violent Offenders Act.[10] The crux of the statute at issue is Section 609,[11] which provides that any person arrested for certain offenses are required, in accordance with booking procedure, to submit to a DNA sample extraction.[12]

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8. *DNA Detection of Sexual and Violent Offenders*, La. R.S. 15:609 (2004).

9. 2003 La. Acts 487

Amending R.S 15:603(8),(9),(10)and (11) and 609(A),(B), and (C) and Code of Criminal procedure Art. 572 and to enact R.S. 15:609(F),(G),(H)and(I), and to repeal R.S. 15:615 and 619, relative to DNA detection of sexual and violent offender; to provide relative to the collection of DNA samples from certain offenders; to provide definitions; to add certain offenses to crimes requiring the collection of such samples; to provide relative to juvenile offenders; to requires DNA samples collection of such offenders under certain conditions; to require DNA sample collection after interstate transfer of offenders under certain conditions; to prohibit the invalidation of the prosecution of non-capital offences, to provide for exceptions to such limitations; to require retroactivity of such exceptions, to authorize the use of force under certain circumstances. To repeal provision with respect to the mandatory charge to be imposed on certain persons; to repeal provisions with represent to the DNA detection Fund; to provide for the effectiveness of certain provisions, and to provide for related matters.

Id.

10. *DNA Detection of Sexual and Violent Offenders*, La. R.S. 15:601 (2004).

11. La. R.S. 15:609 (2004).

12. La. R.S. 15:609(A).

(A) A person who is arrested for a felony sex offence or other specified offense on or after September 1, 1999, shall have a DNA sample withdrawn or taken at the same time he is fingerprinted pursuant to the booking procedure;

(B) Any person who is convicted or enters into a plea agreement resulting in a conviction on or after September 1, 1999, for a felony sex offense or other specified offense committed prior to that date shall have a DNA sample drawn as follows:

(1) any person who is sentences to a term of confinement for an offense covered by this Chapter shall have DNA sample drawn upon intake to a prison, jail or any other detention facility or institution. If the person is already confined at the time of sentencing, the person shall have a DNA sample drawn immediately after the sentencing.

(2) A person who is convicted or enters into a plea agreement resulting in a conviction for any offense covered by this Chapter shall have a DNA sample drawn as a condition of any sentence that will not involve an intake into a prison, jail, or any other detention facility or institution.

(3) Under no circumstances shall a person who is convicted or enters into a plea agreement resulting in conviction for an offense covered by this Chapter be released in any manner after such disposition unless and until a DNA sample has been withdrawn.

(C) A person who is convicted or enters a plea agreement resulting in a conviction for a felony sex offense or other specified offense before September 1, 1999, and who is still serving a term of confinement in connection therewith on that date

The extracted DNA is then placed into the State's DNA data bank.[13] The test performed on the DNA sample is "only for law enforcement identification purposes or to assist in the recovery or identification of human remains from disasters or for other humanitarian identification purposes, including identification of missing persons."[14] The sole purpose of the Act is to utilize the DNA samples for law enforcement purposes,[15] as a tool for identification in criminal investigation and in discovering missing persons.[16]

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shall not be released in any manner prior to the expiration of his maximum term of confinement unless and until a DNA sample has been withdrawn.

(D) All DNA samples taken pursuant to this Chapter shall be taken in accordance with regulations promulgated by the state police.

(E) As used in this section the term released means any release, parole, furlough, work release, and prerelease, or release in any other manner from a prison, jail, juvenile detention facility, or any other place of confinement.

13. The State DNA data base – which is administered by the state police and provide DNA records to the FBI or storage and maintenance by CODIS. The State DNA data base shall have the capability provided by computer software and procedures administered by the state police to store and maintain DNA records related to: (1) forensic casework. (2) Offenders required to provide a DNA sample under this Chapter; (3) Anonymous DNA records used for research or quality control.

La. R.S. 15:605 (2004).

14. La. R.S. 15:611(B) (2004) (providing procedures for conduct, disposition and use of DNA analysis).

A. The state police shall prescribe procedures to be used in the collection, submission, identification, analysis, storage, and disposition of DNA samples and typing results of DNA samples submitted pursuant to this Chapter. The DNA sample typing results shall be stored in the state DNA data base and records of testing shall be retained on file with the state police.

B. The state police may contract with third parties to effectuate the purposes of this Chapter.

C. Except as otherwise provided in R.S. 15:612(C), the tests to be performed on each DNA sample shall be used only for law enforcement identification purposes or to assist in the recovery or identification of human remains from disasters or for other humanitarian identification purposes, including identification of missing persons.

D. Any other party contracting to carry out the functions of this Chapter shall be subject to the same restrictions and requirements of this Chapter, insofar as applicable, as apply to the state police, and subject to any additional restrictions imposed by the state police.

La. R.S. 15:611.

15. La. R.S. 15:620 (2004) (explains authority of law enforcement officers, "nothing in this Chapter shall limit or abrogate any existing authority of law enforcement officers to take, maintain, store, and utilize DNA samples for law enforcement purposes").

16. La. R.S. 15:602 (2004) (discussing Legislative findings and objectives).

The Louisiana Legislature finds and declares that DNA data banks are important tools in criminal investigations, in the exclusion of individuals who are the subject of criminal investigations or prosecutions, and in deterring and detecting recidivist acts. More than forty states have enacted laws requiring persons arrested for or convicted of certain crimes, especially sex offenses, to provide genetic samples for DNA profiling. Moreover, it is the policy of this state to assist federal, state, and local criminal justice and law enforcement agencies in the identification and detection of individuals in criminal investigations and in the identification of miss-

According to the Act, the DNA record or profile is removed from the data bank if the "arrest does not result in a conviction or if the conviction is reversed or the case dismissed."[17] If there is any disclosure of the DNA[18] records and/or confidentiality[19] is broken, there is a "minimum penalty of $500 or imprisonment with or without hard labor for less than six months."[20] To cover the costs of the DNA extraction, a mandatory[21] fee of $250 is charged to the arrestee. "This money will be deposited in the state treasury, specifically, the DNA Detection fund."[22]

B. DNA OVERVIEW:

DNA technology has created a major revolution in the criminal justice system, from exonerating death row inmates to holding the government liable for the improper maintenance of evidence.[23] DNA collection and storage leaves the person whose DNA has been extracted wary as to if their privacy has been breached. A comprehensive understanding of DNA is crucial to the foundation of this constitutional analysis. What is DNA, and what does DNA reveal about the person it came from?

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ing persons, to assist in the recovery or identification of human remains from disasters, and to assist with other humanitarian identification purposes. It is therefore in the best interest of the state to establish a DNA data base and a DNA data bank containing DNA samples submitted by individuals arrested, convicted, or presently incarcerated for felony sex offenses and other specified offenses.

Id.

17. La. R.S. 15:614(A)(1)(2)(B)(2004) (providing for removal of records, "A person whose DNA record or profile is included in the data base pursuant to this chapter may request removal on the following grounds: (1) the arrest does not result in conviction or plea agreement resulting in a conviction, (2) the conviction was reversed or the case remanded").

18. La. R.S. 15:617 (2004) (discussing "disclosure of information is prohibited, no employee or any person contracting to carry out the functions of this chapter shall obtain individually identifiable DNA information from the state data bank without authorization and shall not disclose any information from the state DNA data bank to any person not authorized to receive the information").

19. La. R.S. 15:616 (2004) (discussing confidentiality of records, "unless otherwise provided, all DNA profiles and samples submitted to the state police pursuant to this Chapter shall be confidential").

20. La. R.S. 15:618 (2004) (discussing "criminal penalties for disclosure of DNA information, any person that violates R.S. 15:617(A)(B) or tampers with any of the DNA samples shall be fined not more that five hundred dollars or imprisoned with or without hard labor for not more than six months, or both").

21. La. R.S. 15:615 (2004) (asserting mandatory cost of two hundred and fifty dollars, unless defendant shows undue hardship, and this cost is in addition to other costs imposed pursuant to law).

22. La. R.S. 15:619 (2004) (explaining the DNA Detection fund).

23. John P. Cronan, *The Next Frontier of Law Enforcement: A Proposal for Complete DNA Databanks*, 28 Am. J. Crim. L. 119, 125 (2000).

There are approximately 100 trillion cells in the human body.[24] In every human cell, a complex molecule called deoxyribonucleic acid ("DNA") is found.[25] Whether detection occurs in blood, saliva, hair, or semen, "one can never lose the unique characteristics found in DNA throughout one's life."[26] "The DNA molecule is comprised of two nucleotide strands coiled around each other and connected by rungs like a twisted ladder consisting of two strands, known as a double-helix structure."[27] DNA consists of a sequence of nucleic acids arranged in a specific order.[28] The unique variations in these sequences make DNA analysis ideal for identification purposes."[29]

There are two procedures used in forensic DNA testing.[30] One is the restricted fragment length polymorphism testing ("RFLP").[31] This test requires a large DNA sample to produce a "DNA fingerprint," known as an audiogram.[32] Audiograms are used to create "lined data that resembles a bar code" to help determine identification.[33] The second test is the polymerase chain reaction ("PCR")[34] test; this requires a smaller sample of DNA.[35] This test uses an enzyme, Taq polymerase, to copy specific regions of DNA for identification."[36] DNA "fingerprinting" involves the comparison of samples to determine identification.[37] Loci, are inspected by an examiner, aided by a computer system, who determines the source or person the samples came from.[38]

DNA tells many stories. Metaphors like "the blueprint of life" and "the future diary" reflect just how much can be revealed about people

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24. Warren R. Webster, Jr., *DNA Database Statutes & Privacy in the Information Age*, 10 Health Matrix 119, 121 (2000).

25. Herlica, *supra* n. 3, at 954.

26. *Id.*

27. *Jones v. Murray*, 962 F.2d 302, 303 (4th Cir. 1992).

28. Herlica, *supra* n. 3, at 954.

29. *Id.*

30. Cronan, *supra* n. 23 (adding that identical twins have the same DNA information, but other than this DNA is unique to every individual).

31. *Id.* RFLP analysis begins with the isolation of the DNA molecule from the known sample, taken from the suspect, and the unknown sample taken from the crime scene. *Id.* Scientists analyze these two samples and decide whether they came from the same person by targeting particular locus of the genome. *Id.* This analysis can take several weeks. *Id.*

32. *Id.*

33. Herlica, *supra* n. 3.

34. Cronan, *supra* n. 23 (discussing PCR analysis, which can analyze smaller DNA samples in twenty-four hours, and basically creates a genetic copy of the DNA sequence and matching can be determined by the copies of the strands).

35. *Id.*

36. *Id.* (discussing Mitochondrial DNA testing).

37. Webster, *supra* n. 24.

38. *Id.*

through their DNA.[39] DNA provides information about an individual's physical traits.[40] Genetic information can be read from DNA.[41] Genetic information is highly sensitive due to the information it contains about "unique and immutable attributes."[42] Scientists can now discern "height, eye color, sex, race, down to the shapes of their toes" from DNA.[43] A DNA sample can contain information regarding disposition of certain illnesses and diseases.[44] "DNA can reveal potentially sensitive information which can have negative effects for the donor if not properly protected."[45]

Moreover, DNA tells prosecutors if a defendant was at a crime scene, or if a defendant committed rape.[46] Most importantly for the innocent, DNA may indicate whether the accused was present at the scene of the crime and committed murder, or that the culprit was someone else.[47] The impact of DNA technology on the criminal justice system has been revolutionary.[48] DNA technology has overwhelmingly helped release persons wrongfully convicted.[49] In 1999, "a total of sixty-eight wrongfully convicted individuals, including death row inmates, have been freed

39. David H. Kaye, Michael E. Smith, & Edward J. Imwinkelreid, *Is DNA Identification Database in Your Future?*, 16 Crim. Just. 4, 6 (2001).

40. Webster, *supra* n. 24.

41. Joanne L. Hustead & Janlori Goldman, *The Genetics Revolution: Conflicts, Challenges, and Conundra*, 28 Am. J. L. and Med. 285 (2002) (discussing how genetic information is a subset of medical information).

42. *Id.*

43. Lindey A. Elkins, *Five Foot Two with Eyes of Blue: Physical profiling and the Prospect of Genetics-based Criminal Justice System,* 17 Notre Dame J.L. Ethics & Pub. 'Policy 269, 282 (2003).

44. Cronan, *supra* n. 23, at 139. DNA can serve a very dangerous purpose if misused or abused or disclosed due to the highly personal information contained within the DNA sample; therefore if this information were to get in the wrong hands may be difficult for an individual to get health insurance or life insurance, or for one's children to get insurance. *Id.* Genetic information can be discriminatory in effect that people the exhibit specific genetic characteristics that are more prone to disease would create higher premiums for health insurers. *Id.*

45. Webster, *supra* n. 24, at 134.

46. Symposium, *The Human Genome Project, DNA Science and the Law: the American Legal System's Response to Breakthroughs in Genetic Science, Criminal Law and DNA Science: Balancing Social Interests and Civil Liberties,* 51 Am. U.L. Rev. 401, 414 (2002) [hereinafter *Symposium Human Genome*] (discussing the Innocence Project, which investigates claims of innocence based on DNA evidence that was never taken because the technology was not available during their trial).

47. *Id.* at 416 (discussing Earl Washington's case were DNA evidence determined that he was never at the crime scene of the murders, yet he is still in jail, despite a gubernatorial pardon).

48. Webster, *supra* n. 24.

49. *Symposium Human Genome, supra* n. 44.

as a result of DNA analysis."[50] However, the vast majority of crimes cannot be resolved by DNA evidence because the criminals do not leave behind physical cellular evidence.[51]

Recently, DNA is currently taken from newborn babies for public health purposes, such as testing for diseases like phenylketonurea[52] and then later placed in state data banks.[53] Other states are trying to figure out ways to accumulate DNA samples in their data banks and the best way they can do so is by taking the samples from newborn babies and convicted criminals. Louisiana's Act wants to extend this class of DNA contributors to include arrestees. The Court has yet to speak about an arrestee's expectations of privacy, which is what this Comment seeks to develop.

C. THE FOURTH AMENDMENT – SEARCH AND SEIZURE:

The Fourth Amendment protects all persons against unreasonable search and seizure of their person and their private property.[54] This protection is granted to the states through the Fourteenth Amendment.[55] An unreasonable search under the Fourth Amendment analysis is a government intrusion that "occurs when an expectation of privacy that society considers reasonable is infringed."[56]

The language of the Fourth Amendment went through various

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50. Cronan, *supra* n. 23, at 131. Modern DNA technology can be beneficial with respect to victims of wrongful conviction, which relates back to Judge Learned Hand's pronouncement seventy-five years ago that, "our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream". *Id.* DNA has now unearthed this all too frequent occurrence of wrongful convictions. *Id.*

51. *Symposium Human Genome, supra* n. 44 (discussing crimes such as tax evasion, which do not require DNA evidence).

52. W. Glanze, *The Signet Mosby Medical Encyclopedia,* 411 (rev. ed., New York: Penguin Books Ltd. 1996).

> PKU, which stands for Phenylketonuria, is an inherited metabolic disease (also called an inborn error of metabolism) that leads to mental retardation and other developmental disabilities if untreated in infancy. With an inborn error of metabolism, the body is unable to produce proteins or enzymes needed to convert certain toxic chemicals into nontoxic products, or to transport substances from one place to another. DNA can detect if newborns are predisposed to this disease and this the proper low-protein diet consisting of foods that have little or no phenylalanine can counter the disease, which is why when babies are born they get a DNA sample to test for this disease. Furthermore, because they already have this sample they put it in their State data bank.

Id.

53. *Id.* at 412.

54. U.S. Const. amend. IV ("The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures shall not be violated and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be search, and the persons or things to be seized").

55. U.S. Const. amend. XIV; *see also Wolf v. Colo.*, 338 U.S. 25 (1949).

56. Herlica, *supra* n. 3, at 959.

changes as it passed through Congress.[57] James Madison introduced a version that provided:

> The rights to be secured in their persons, their houses, their papers, and their property, from all unreasonable search and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation or not particularly describing the places to be searched and the persons or things to be seized.[58]

At common law, property was held in the highest regard and received greater protection than one's body.[59] Over time, however, the principal object of the Fourth Amendment became the protection of privacy rights.[60] The Fourth Amendment protects people, not property.[61]

In *Kyllo v. U.S.*, the U.S. Supreme Court held that a federal agent's use of infrared thermal imaging to detect the lights used to grow marijuana plants was an unconstitutional search.[62] The Court reasoned that inspecting materials on the surface was not a search.[63] However, once the walls of someone's home have been penetrated, one may be able to observe intimate moments. Therefore, this search was found worthy of Fourth Amendment protection.[64] The dissent claimed there was a distinction between "off-the-wall" observations and "through-the-wall surveillance, and that off-the-wall surveillance did not require Fourth amendment protections because no privacy was impeded."[65] The distinction between property protection and bodily protection tends to blur, and the Court focuses on both when discussing Fourth Amendment analysis.

1. *Probable Cause*

Probable cause[66] is required before an arrest may be made.[67] Probable cause must be demonstrated in order to obtain a search warrant and

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57. Findlaw, *U.S. Constitution Fourth Amendment*, http://caselaw.lp.findlaw.com/data/constitution/amendment04 (accessed Oct. 27, 2003)

58. *Id.* (discussing 1 Annals of Congress 434-35 (June 8, 1789)).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Kyllo v. U.S.*, 533 U.S. 27, 30 (2001).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Black's Law Dictionary* 1219 (Bryan A. Garner Ed., 7th ed., West, 1999) (defining probable cause as a reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime. Under the Fourth Amendment, probable cause – which amounts to more than a bare suspicious but less than evidence that would justify a conviction – must be shown before an arrest warrant or search warrant may be issued).

67. *U.S. v. Robinson*, 354 F.2d 109, 110 (U.S. App. 1965).

conduct a search.[68] The Courts have long established that a finding of probable cause is the standard rule recognized by the Fourth Amendment because the "overriding function is to protect personal privacy and dignity against unwanted intrusion by the state."[69] In *Schmerber v. California,* the defendant was involved in an accident and subsequently convicted of driving under the influence of alcohol.[70] While at the hospital, the police ordered a blood sample taken from the defendant to determine his blood alcohol level.[71] The report of his blood alcohol level was admitted at trial over the defendant's objection that the test was nonconsensual.[72] The Supreme Court found probable cause existed to take the blood test because the police officer noticed symptoms of drunkenness, and the blood test was substantive to the crime.[73] "Probable cause is something more than mere suspicion and must carefully be considered when determining whether to conduct a search or seizure."[74]

In *U.S. v. Kincade,* the state of California enacted the DNA Analysis Backlog Elimination Act of 2000[75] that required those in federal custody, on parole, on probation, or on supervised release to provide a DNA sample for its state databank.[76] The Act required these individuals to submit to the nonconsensual withdrawal of blood by governmental authorities.[77] No suspicion was required, nor was there any requirement that the sample be taken to aid in an investigation of a particular crime.[78] The defendant pled guilty to armed bank robbery, but was released on August 4, 2000.[79] Pursuant to the DNA Act, the defendant's probation officer ordered him to submit to a blood extraction for DNA

68. *U.S. v. Kincaid,* 345 F.3d 1095, 1104 (9th Cir. 2003) (asserting that individualized suspicion / probable cause should be required for searches of parolees' bodies. "Although forced blood extractions constitute searches. . .as a general rule, every search must be based upon probable cause, even without a warrant. The compulsory extraction of blood for a law enforcement purpose is reasonable only if the search is supported by individualized reasonable suspicion").

69. *Schmerber v. Cal.,* 384 U.S. 757, 767 (1966).

70. *Id.* at 770.

71. *Id.*

72. *Id.*

73. *Id.* at 769. At the scene shortly after the accident, the officer smelled liquor on defendant's breath, his eyes were "bloodshot, watery, sort of a glassy appearance". *Id.* Later the officer informed defendant "that he was under arrest and that he was entitled to the services of an attorney, and that he could remain silent, and that anything that he told me would be used against him in evidence." *Id.*.

74. *Brinegar v. U.S.,* 338 U.S. 160, 176 (1949) (finding that probable cause is what protects citizens from "unreasonable interferences with privacy from unfounded charges of crime").

75. *DNA Analysis Backlog Elimination Act of 2000,* 42 U.S.C. § 14135a.

76. *Kincaid,* 345 F.3d at 1098.

77. *Id.*

78. *Id.*

79. *Id.*

analysis.[80] The defendant refused to comply and his probation officer recommended that the defendant violated probation.[81]

The Ninth Circuit in *Kincade* held that probable cause is required for a forced extraction of blood.[82] As a general rule under the Fourth Amendment, a search, even if conducted lawfully without a search warrant, must be based on probable cause.[83]

2. *Balancing Test*

To determine what constitutes a reasonable search under the Fourth Amendment, courts impose a balancing test[84] between the government's interests in the search to the level of intrusion on the individual's privacy.[85] In *Schmerber,*[86] the defendant argued that withdrawing his blood was an unreasonable search under the Fourth Amendment.[87] The U.S. Supreme Court stated in *Schmerber* that "the interest in human dignity and privacy is protected by the Fourth Amendment, including the mere chance that desired evidence might be obtained."[88] The Court further stated that "the integrity of an individual's person is a cherished value of our society."[89]

There must be a compelling government need for the search to override the individual's privacy interest.[90] The Court found in *Schmerber* that the police officer believed there was limited time to obtain a warrant for the blood. The officer believed that if he did not get the sample at the hospital, the alcohol would dissipate from the blood, and the evidence would be destroyed.[91] The Court's ruling in this case was very narrow; the search was reasonable under the Fourth Amendment because the

80. *Id.*

81. *Id.*

82. *Kincaid*, 345 F.3d at 1101.

83. *Id.* at 1098 (citing *N.J. v. T.L.O.*, 469 U.S. 325 (1985)).

84. *Jones v. Murray,* 763 F. Supp. 842, 844 (W.D. Va. 1991) (holding that Fourth Circuit upheld statutory requirement that all convicted felons have a DNA test taken because they now enjoy diminished privacy rights that do not exceed the government's interest in preserving an identification record).

85. Herlica, *supra* n. 3.

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

87. *Id.*

88. *Id.* (discussing issue of blood taken from the defendant to determine his alcohol content was not a violation because time was of the essence in obtaining the blood sample, and probable cause was present in this situation to justify this police action).

89. *Id.* at 772.

90. *Id.* at 759.

91. *Id.* at 770. The percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. *Id.* In this case time was of the essence, the accused had to be taken to a hospital and in order to investigate what happened at the scene of the accident, the blood test was essential. *Id.* No time was available to seek out a magistrate and secure a warrant. *Id.*

search entailed a minor intrusion.[92]

In *Winston v. Lee*,[93] the State of Virginia compelled a crime suspect to undergo surgery to remove a bullet which would prove that his involvement in a robbery.[94] Whether the surgery should be granted was determined at an evidentiary hearing.[95] The trial judge granted the motion to compel the surgery and the U.S. Supreme Court granted certiorari to determine whether such a surgery or "search" was constitutional under the Fourth Amendment.[96] The Supreme Court found that to "compel surgical intrusion into an individual's body for evidence implicates expectations of privacy and security of such magnitude that the intrusion may be "unreasonable" even if likely to produce evidence of a crime."[97] The Court explained that in order to balance the two competing interests, the test is to weigh the individual's privacy interests against society's interests in conducting the procedure.[98] On the one

92. *Schmerber*, 384 U.S. at 771 (holding that because the blood test was taken while he was in a hospital and by this point in time taking a blood sample was considered routine, the search was reasonable and minimally intrusive).

93. *Winston v. Lee*, 470 U.S. 753, 757 (1985).

94. *Id.* at 755. Watkinson was closing up his shop for the night, when he observed someone armed with a gun coming toward him from across the street. *Id.* Watkinson was also armed and when he drew his gun, the other person told him to freeze. *Id.* Watkinson then fired at the other person, who returned his fire. *Id.* Watkinson was hit in the legs, while the other individual, was wounded in his left side, and ran from the scene. *Id.* Watkinson was taken by to the emergency room. *Id.* And approximately twenty minutes later, police officers found Lee suffering from a wound to his left chest area. *Id.* He was taken to the same hospital Watkins was taken to. *Id.* And at the hospital Watkinson identified Lee as the "man that shot me." *Id.* After an investigation, the police decided that respondent's story of having been himself the victim of a robbery was untrue and charged respondent with attempted robbery, malicious wounding, and two counts of using a firearm in the commission of a felony. *Id.* The government moved in state court for an order directing Lee to undergo surgery to remove an object thought to be a bullet lodged under his left collarbone. *Id.*

95. *Id.* The court conducted several evidentiary hearings on the motion, calling experts to testify on the length of the surgical procedure (which would take 45 minutes) and what the chances of damages and death would be (three to four percent chance of temporary nerve damage, a one percent chance of permanent nerve damage, and a one-tenth of one percent chance of death). *Id.* Other experts testified that the bullet was not "back inside close to the nerves and arteries," instead the bullet located "just beneath the skin." *Id.* at 756. He testified that the surgery would require an incision of only one and one-half centimeters (slightly more than one-half inch), could be performed under local anesthesia, and would result in "no danger on the basis that there's no general anesthesia employed." *Id.*

96. *Id.* at 757.

97. *Id.* at 759.

98. *Id.* The court found that the reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. *Id.* In a given case, the question whether the community's need for evidence outweighs the substantial privacy interests at stake is a delicate one. *Id.*

hand, the government claimed it needed the bullet to demonstrate that the defendant was the robber who confronted the victim.[99] On the other hand, the defendant's privacy interest was at stake because he was going to be subjected to medical risks by undergoing surgery.[100] This balance was found unreasonable and the Court held that the "Fourth Amendment is a vital safeguard of the right of the citizen to be free from unreasonable governmental intrusions into any area in which he has a reasonable expectation of privacy."[101]

3. *Special Needs Test*

The Supreme Court carved out an exception to the balancing test.[102] The exception usually involves searches conducted for the purposes going beyond the ordinary needs of law enforcement.[103] This exception applies to a set of cases known as the "special needs" cases.[104] These cases deemed constitutional those searches that would otherwise require probable cause. This type of search is permissible because it serves "special needs, beyond the normal need for law enforcement."[105]

In special need cases, the Supreme Court has found that something that goes beyond a law enforcement purpose would include: taking random urine tests of students participating in extracurricular activities in order to deter drug use and prevent injury;[106] taking random blood and

99. *Id.* at 765.

100. *Winston,* 470 U.S. at 765.

101. *Id.* at 767.

102. *Kincaid,* 345 F.3d at 1101.

103. *Id.* at 1105 (citing *Bd. of Educ. v. Earls,* 536 U.S. 822, 833 (2002) (holding that urine testing of students for extracurricular activities to prevent health and safety risks from drug use was a special need); *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646,(1995) (holding that random urine testing of student athletes to prevent injury and drug dependency was a special need); *Skinner v. Ry. Labor Execs.' Assn.,* 489 U.S. 602 (1989) (holding that blood and urine tests of railroad employees to prevent railway accidents was a special need); *Natl. Treas. Employees Union v. Von Raab,* 489 U.S. 656, (1989) (holding urine tests of U.S. Customs Service employees seeking transfer or promotion to insure the officials' fitness to interdict drugs and handle firearms was a special need); *U.S.v. Gonzalez,* 300 F.3d 1048 (9th Cir. 2002) (holding searches of employee backpacks to prevent inventory loss was a special need). The Court also has permitted suspicionless searches in certain roadway checkpoint programs, *Michigan Department of State Police v. Sitz, 496* U.S. 444, (1990) (holding that highway sobriety checkpoints for public safety was a special need), and has authorized routine searches absent individualized suspicion at the national border; *U.S.v. Montoya de Hernandez,* 473 U.S. 531, (1985) (holding that routine border searches to prevent entry of contraband was a special need); *U.S. v. Martinez-Fuerte,* 428 U.S. 543, (1976) (holding that fixed checkpoint routine border search to deter illegal immigration was a special need).

104. *Id.*

105. *City of Indianapolis v. Edmond,* 531 U.S. 32, 37 (2000) (emphasis added).

106. *Bd. of Educ. v. Earls,* 536 U.S. 822, 833 (2002). *See also* *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646 (1995).

urine tests of railroad employees to prevent railroad accidents;[107] and taking urine tests of U.S. customs service employees seeking transfer or promotion to ensure fitness to interdict drugs and handle firearms.[108] In addition, searching employees' backpacks to prevent inventory loss has been held as a special need;[109] suspicionless searches are permitted at certain roadway checkpoints in order to check highway sobriety for public safety;[110] routine border searches pass the special needs test because the purpose is to prevent the smuggling of contraband;[111] and to deter illegal immigration.[112] The Court has also approved suspicionless searches for the administrative regulation of business,[113] including inspecting residential building codes to prevent hazardous conditions.[114]

In *Kincade,* the purpose of the DNA Analysis Backlog Elimination Act of 2000[115] was expressly for law enforcement.[116] The DNA use was specifically for identification of suspects.[117] Also, the California Act's purpose was to "help law enforcement officials solve unresolved and future cases," and to "increase accuracy in the criminal justice system."[118] The searches would collect DNA samples for Combined DNA Identification System (CODIS), so those samples may be used in future criminal investigations to help solve crimes, prosecute culprits, and to enable law enforcement agencies to be more accurate and effective in achieving their law enforcement objectives.[119] The Court in *Kincade* found the California Act to include a valid law enforcement purpose and thus, did not qualify as a special need exception.[120]

4. Katz *Test*[121]

In *Katz v. U.S.*,[122] the Court announced a twofold requirement to determine whether a search is constitutional under the Fourth Amendment.[123] First, the individual being searched must have an actual sub-

107. *Skinner v. Ry. Lab. Execs. Assn.*, 489 U.S. 602 (1989).
108. *Natl. Treas. Employees Union v. Von Raab*, 489 U.S. 656 (1989).
109. *U.S. v. Gonzalez*, 300 F.3d 1048 (9th Cir. 2002).
110. *Mich. Dept. of St. Police v. Sitz*, 496 U.S. 444 (1990).
111. *U.S. v. Montoya de Hernandez*, 473 U.S. 531 (1985).
112. *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976).
113. *N.Y. v. Burger*, 482 U.S. 691 (1987).
114. *Camara v. Municiple Ct.*, 387 U.S. 523 (1967).
115. *DNA Analysis Backlog Elimination Act of 2000*, 42 U.S.C. § 14135a.
116. *Kincaid*, 345 F.3d at 1111.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 1112.
121. *Katz v. U.S.*, 389 U.S. 347, 361 (1967).
122. *Id.*
123. *Id.*

jective expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable.[124] In *Katz*, the defendant was convicted of transmitting wagering information by telephone in violation of a federal statute.[125] The evidence used to convict him was obtained by an electronic listening and recording device the FBI attached to the outside of the public telephone booth from which the defendant had placed his calls.[126] The Supreme Court found that the eavesdropping constituted a search.[127] The Court held that the Fourth Amendment protected the defendant from the warrantless eavesdropping because he "justifiably relied" upon the privacy of the telephone booth.[128] However, the Court added to this standard by instructing that a reasonable person must also have expected privacy. Katz did not meet this test, because reasonable people would not have an expectation of privacy in a phone booth.

In *Kyllo v. U.S.*, the Court found the use of a thermal imaging device by the FBI to scan his home was a search.[129] The device was used to determine if the amount of heat emanating from the house was consistent with the high-intensity lamps typically used for growing marijuana indoors. The Court applied the *Katz* test and found there was an expec-

124. *Id.* A man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the plain view of outsiders are not protected because no intention to keep them to himself has been exhibited. *Id.* On the other hand, conversations in the open would not be protected against being overheard for the expectation of privacy under the circumstances would be unreasonable. *Id.*

125. *Id.* at 348.

126. *Id.*

127. *Id.*

128. *Id.* at 353. A person who occupies a phone booth and then shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. *Id.* To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication. *Id.*

129. *Kyllo v. U.S.*, 533 U.S. 27, 30 (2001). The government used an Agema Thermovision 210 thermal imager to scan the defendant's home. *Id.* The Thermal imagers detected infrared radiation, which virtually all objects emit but which is not visible to the naked eye. *Id.* The imager converts radiation into images based on relative warmth black is cool, white is hot, shades of gray connote relative differences; it operates somewhat like a video camera showing heat images. *Id.* The scan of Kyllo's home took only a few minutes and was performed from the passenger seat of Agent Elliott's vehicle across the street from the front of the house and also from the street in back of the house. *Id.* The scan showed that the roof over the garage and a side wall of petitioner's home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes. *Id.* The agent concluded that the defendant was using halide lights to grow marijuana in his house. *Id.* Based on tips from informants, utility bills, and the thermal imaging, a Federal Magistrate Judge issued a warrant authorizing a search of petitioner's home, and the agents found an indoor growing operation involving more than 100 plants. *Id.* Petitioner was indicted on one count of manufacturing marijuana. *Id.*

tation of privacy in one's home.[130] The Court declared the search unconstitutional.[131] The Court found that, because the thermal imaging detector was not something available for general public use, there is an assurance of the preservation of privacy under the Fourth Amendment.[132] If certain technology is not available to the public, then the intrusion of the government using the same technology is seemingly greater.[133] Therefore, the Fourth Amendment helps to guard against use of such intrusive devices.[134]

5. *Minimally Intrusive Factor*

The Court announced in *Schmerber*[135] that extraction of blood samples was reasonable because the search was minimally intrusive and because the procedure involved "virtually no risk of trauma or pain."[136] In addition, a blood test is recognized as a *de minimis*[137] search with little invasion on the individual's privacy interest even though it requires penetration under the skin.[138] In *Rochin v. California*,[139] the Court announced a "shock the conscience"[140] unconstitutional standard of intrusion. The police went into the defendant's home with "some suspicion" that the defendant may have been selling narcotics.[141] The police took the defendant to the hospital to have his stomach pumped in order

130. *Id.* at 34.

131. *Id.* Withdrawing protection from one's home would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. *Id.* Obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," (*see Silverman*, 365 U.S. at 512), and thus constitutes a search. *Id.*

132. *Id.* at 35. Because the technology in question is not in general public use, it could not have been obtained without an intrusion that is constitutionally protected. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. *Id.* On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search. *Id.*

133. *Id.*

134. *Id.*

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

136. *Id.* at 771 (quoting *Breithaupt v. Abram*, 352, U.S. 432, 436 (1957).

> The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such test before permitting entrance and literally millions have voluntary gone through the same process as blood donors.

Id.

137. *Black's Law Dictionary* 1219 (Bryan A. Garner Ed., 7th ed., West, 1999) (defining de minimis 1. Trifling, minimal. 2. of a fact or thing so insignificant that a court may overlook it in deciding an issue or case).

138. *Schmerber*, 384 U.S. at 771.

139. *Rochin v. Cal.*, 342 U.S. 165, 166 (1952).

140. *Id.* (Justice Frankfurter's famous and widely used quote: "shock the conscience").

141. *Id.*

to get two capsules they saw him swallow.[142] The Court found that pumping the defendant's stomach was so intrusive that it "shocked the conscience," "offended a sense of justice," and ran "counter to the decencies of civilized conduct." Consequently, the Supreme Court ruled that without a search warrant, this type of search was unconstitutional.[143]

Moreover, the basic understanding of whether a search is minimally intrusive is based on the individual's expectation of privacy.[144] Also, the expectation of privacy may be based upon the status of the person to be searched.[145] The Ninth Circuit held that convicted criminals lose their expectation of privacy in their DNA information based on their status; they are not free persons.[146] The Fourth Circuit held that there is an assumption that prisoners forfeit certain rights because of their criminal acts, and, as a consequence, retain a diminished expectation of privacy.[147] The Massachusetts Supreme Court held that a convicted person has diminished privacy rights and that the minimal intrusion of a blood test does not outweigh the governmental interests of obtaining DNA for future criminal investigations.[148] In *In re Nicholson*,[149] the Ohio court

142. *Rochin*, 342 U.S. at 166.

143. *Id.* at 175 (discussing how the actions taken by the California Supreme Court sanctioned a force so brutal and offensive to human dignity in securing evidence from Rochin).

144. *Id.*

145. Cronan, *supra* n. 23, at 147-148. The court ruled that allowing "expanded collection from persons convicted of certain crimes would lead to a greater privacy intrusion." *Id.* Prior cases have found convicted felons enjoy diminished privacy interest and government's interest supercedes their rights. *Id.* The status indications shows that courts can constitute for a certain hierarchy of privacy protection can be indicated as a person that is an arrestee, a convicted person, a parolee, or a person on probation. *Id.* at 149.

146. *Rise v. Or.*, 59 F.3d 1556, 1560 (1995). The court reasoned that blood samples were being acquired from convicts and:

> not from free persons or even mere arrestees, but only from certain classes of convicted felons in order to create a record for possible use for identification in the future. These persons do not have the same expectations of privacy in their identifying genetic information that "free persons" have. Once a person is convicted of one of the felonies included as predicate offenses under Chapter 669, his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sampling.

Id.

147. *Jones v. Murray*, 962 F.2d 302 (4th Cir. upheld Virginia's DNA databank statute because convicted criminals lose a certain amount of privacy interest).

148. *Landry v. AG*, 429 Mass. 336, 347 (Mass. 1999) (discussing the Massachusetts database statute, St. 1997, c. 106, codified for the most part at G. L. C. 22E, § § 1-15) and holding:

> [W]hile obtaining and analyzing the DNA [under the Act] is a search and seizure implicating Fourth Amendment concerns, it is a reasonable search and seizure because a convicted person's has diminished privacy rights . . . the minimal intrusion of . . . blood tests; and the legitimate government interest in the investigation and prosecution of unsolved and future criminal acts by the use of DNA in a manner not significantly different from the use of fingerprints.

Id.

of appeals held that a juvenile can have a DNA sample taken because his/her privacy rights were outweighed by the "state's legitimate interest in creating a DNA identification data bank to deter a juvenile[150] from committing future sex offenses, and to aid the police in the investigation of past and future crimes."[151] These examples were considered legitimate state interests that outweighed the minimally intrusive drawing of blood.[152] Furthermore, the Ohio court of appeals found that taking a DNA sample under the statute[153] was analogous to taking a fingerprint.[154] In *Mayfield v. Dalton*, the district court found that the military taking DNA samples from its marines for the Department of Defense DNA Registry in order to identify remains were not in violation of the Fourth Amendment because of the compelling government interest involved.[155]

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149. *In re Nicholson,* 132 Ohio App. 3d 303, 308-309 (1999) (case concerns a DNA statute R.C. 2151.315(B)(2) that takes a sample when an individual is leaving custody pursuant to if the individual refused to provide a sample during the intake procedure pursuant to R.C. 2151.315(B)(1), defendant claim this violated right to be free from unreasonable searches and seizures provided by the Fourth Amendment of the U.S. Constitution).

150. *Id.* (discussing what a juvenile is, and explaining that before a DNA sample can be collected under R.C. 2151.315, a child must first be adjudicated a delinquent child for committing acts listed in division "D" of that section. Therefore, the determination of whether to draw blood for a DNA sample is either based upon an adjudication of delinquency which is based upon the reasonable doubt standard or a constitutionally safeguarded admission by the juvenile that the act was committed).

151. *Id.*

152. *Id.* The court held Statute R.C. 2151.315 to be sufficiently narrow in scope to apply only to those individuals adjudicated a delinquent child for committing specific acts. *Id.* Thus, taking the sample minimally intrusive to analyze the DNA of a juvenile in custody, who admitted to committing gross sexual imposition, as a reasonable search and seizure under the Fourth Amendment when considering the nature of the intrusion and legitimate governmental interest of keeping a DNA data bank. *Id.*

153. *Id.*

154. *In re Nicholson,* 132 Ohio App. at 308-309.

155. *Mayfield v. Dalton*, 901 F. Supp. 300, 305 (U.S. Dist. 1995). Plaintiffs Marines refused to give their DNA samples and were later charged with violating an order from a superior officer. *Id.* The Marines claimed that taking DNA samples without their consent violated their Fourth Amendment rights. *Id.* The military asserted that the DNA would not be used except to identify the Marines' remains if necessary. *Id.* They argue that even though the current purpose of the DNA was for identification, the military could, at some point in the future, use the DNA samples for some less innocuous purpose, such as the diagnosis of hereditary diseases or disorders and the use or dissemination of such diagnoses to potential employers, insurers and others with a possible interest in such information. *Id.* The court held that the military demonstrated a compelling interest in both its need to account internally for the fate of its service members and in ensuring the peace of mind of their next of kin and dependents in time of war. *Id.* And also that when measured against this interest, the minimal intrusion presented by the taking of blood samples and oral swabs for the military's DNA registry, though undoubtedly a "seizure," is not an unreasonable seizure and is thus not prohibited by the Constitution. *Id.*

Even certain classes of people with diminished expectations possess privacy rights that cannot be violated. In *Hudson v. Palmer*, the U.S. Supreme Court explained that "even a prisoner, who has no legitimate expectation of privacy in his cell, retains an expectation of privacy in his body unless there is probable cause to violate his body and a legitimate penological interest in doing so."[156] The Ninth Circuit found that a parolee under house arrest has a greater privacy interest that of an inmate.[157] The Supreme Court has yet to speak on an arrestee's expectations of privacy, which again, is what this Comment seeks to find.

D. Applying Fourth Amendment Search and Seizure Standards to DNA:

In examining the DNA controversy, certain courts have maintained that the probable cause standard, the balancing test, the special needs test, the *Katz* test, and the minimally intrusive tests are readily applicable to DNA databank cases.[158] According to various case law, the collection of DNA constitutes a search under the Fourth Amendment.[159] Several federal courts have found it constitutional for DNA databank acts to require convicted criminals to give a sample of their DNA.[160] However, in *U.S. v. Kincade*,[161] (a case of first impression), the Ninth Circuit determined that the federal DNA Analysis Backlog Elimination Act of 2000[162] requiring those in federal custody, on parole, on probation, or on supervised release to provide a DNA sample, violated the Fourth

156. *Hudson v. Palmer*, 468 U.S. 517, 526 (1984). *See Tribble v. Gardner*, 860 F.2d 321, 325 (9th Cir. 1988) (stating that digital rectal searches of prisoners must be justified by legitimate penological need).

157. *See Sepulveda v. Ramirez, 967 F.2d 1413, 1416 (9th Cir. 1992)* (stating that the constitutional rights of parolees "are even more extensive than those of inmates").

158. Webster, *supra* n. 24, at 123-127.

159. Cronan, *supra* n. 23, at 143 (discussing *Schmerber v. California*, where the Supreme Court discusses that taking blood "plainly constitutes a search of persons" and thus it depends antecedently upon seizures of persons within the Fourth Amendment").

160. *Id.* at 143 ((discussing *Jones v. Murray*, 763 F. Supp. 842, 844 (W.D. Va. 1991), the Fourth Circuit upheld statutory requirement that all convicted felons have a DNA test taken because they now enjoy diminished privacy rights that do not exceed the government's interest in preserving an identification record); (discussing *State v. Olivas*, 856 P.2d 1076 (Wash, 1993), court held that the extraction of blood and its subsequent testing qualified as an exception to the Fourth Amendment warrant requirement); (discussing *People v. Wealer*, 636 N.E. 2D 1129 (Ill. App. Ct. 1994), court upheld the State's DNA collection Act because the government interest exceeded the privacy interest that a convicted sex offender has in his or her identity")).

161. *Kincaid*, 345 F.3d at 1095.

162. 42 U.S.C. § 14135a(a)(2) ("*The DNA Act* simply states that "the probation office responsible for the supervision under Federal law of an individual on probation, parole, or supervised release shall collect a DNA sample from each such individual who is, or has been, convicted of a qualifying Federal offense").

Amendment because there was no special need and the taking of DNA was intrusive.[163] Prior to this Louisiana Act, most jurisdictions utilized post-conviction DNA database acts, therefore making the timing of DNA sample extraction important in constitutional analysis.[164] If DNA is taken post conviction, there are minimal privacy rights.[165] But, if DNA is taken before an indictment, preliminary hearing, or trial, it is unconstitutional because of the presumption of innocence until proven guilty.[166] Regardless, in the Louisiana's rush to create databanks, there has been little attention on the issue of "quality control, quality assurance and most importantly privacy."[167]

Again, courts have not yet spoken on the constitutionality of applying the Louisiana DNA Databank Act to mere arrestees.[168] When taking into consideration both the historical background behind the Fourth Amendment and the continuous advancement of modern technology, there is an obvious need to apply the 200 year-old Fourth Amendment to current issues. Without a contemporary interpretation of the Constitution, "what limits are there upon this power of technology to shrink the realm of guaranteed privacy?"[169]

III. ANALYSIS:

Technological advances frequently raise new constitutional concerns and threaten basic liberties. "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."[170] Here, the challenge involves a compulsory DNA collection act that poses a threat to one of the most fundamental and traditional preserves of individual privacy, the human body.[171] Needless to say, plenty of controversy surrounds the purpose of the Louisiana DNA Act and the rationale behind taking DNA solely for identification.[172]

An imbalance exists between the substantial need for the DNA sample for identification and the rights of the individual to protect their genetic information. The true issue here is the fact that, in America, those arrested are presumed innocent. Yet, even with this presumption, certain rights are minimized and seemingly diminished. This Act does not

163. *Kincaid,* 345 F.3d at 1095.
164. Webster, *supra* n. 24 at 128.
165. *Id.*
166. *Id.*
167. *Id.* at 130.
168. *Symposium Human Genome, supra* n. 44, at 414.
169. *Kyllo,* 533 U.S. at 34.
170. *Id.*
171. *Kincaid,* 345 F.3d at 1095.
172. La. R.S. 15:602, 15:620 (2004).

pass constitutional muster on several grounds. The most important reason is the capitulation of natural human rights; or simply put, the right to restrain the government from accessing the blueprint of an individual without probable cause or permission.

The U.S. Supreme Court has yet to decide a case concerning DNA databank acts, specifically one concerning taking DNA from arrestees.[173] However, the Supreme Court has recently ruled on a case pertinent to the issue of technology in the realm of criminal justice in *Kyllo v. U.S.*[174] *Kyllo*, along with the recent Ninth Circuit case *U.S. v. Kincade*,[175] will be utilized to envisage how the U.S. Supreme Court would analyze this issue of the Louisiana Databank Act as applied to arrestees.

A. THE DNA "SEARCH"

In order to analyze a Fourth Amendment search and seizure issue, we have to determine whether taking a person's DNA constitutes a search.[176] The Supreme Court has held that blood extractions used for testing procedures is a search and is restricted by the Fourth Amendment.[177] Likewise, under the Act, DNA is defined as a "blood, tissue, or bodily fluid sample taken from person,"[178] and would constitute a search. Other sources of DNA may include saliva, skin cells, bone, teeth, tissue, urine, and feces.[179] In *Schmerber*, the Court found that taking blood to determine whether the defendant was driving while intoxicated was a search.[180] Therefore, in extracting any of these materials for a DNA test, the Supreme Court would undoubtedly hold that such removal involves a constitutional search of one's person and property.[181] One has a "possessory interest in [his or her] own bodily fluids."[182] Therefore, in order to obtain DNA, the government must have a search warrant based

173. *Symposium Human Genome, supra* n. 44, at 411 (explaining how Louisiana has a law that permits DNA to be taken at the point of arrest, although that has yet to be implemented largely, I believe, for cost reasons. "The validity of these laws have yet to be tested in the courts").

174. *Kyllo*, 533 U.S. at 34.

175. *Kincaid*, 345 F.3d at 1095.

176. Cronan, *supra* n. 23 at 143.

177. *Schmerber*, 384 U.S. at 767.

178. *DNA Detection of Sexual and Violent Offenders, Drawing and Taking of DNA Samples*, La. R.S. 15:603 (2004) (defining "DNA sample").

179. *Kincaid*, 345 F.3d at 1095 (citing Victor Walter Weed and John W. Hicks, U.S. Dep't of Justice, *The Unrealized Potential of DNA Testing* 2 (1998)).

180. *Schmerber*, 384 U.S. at 767.

181. *Skinner v. Ry. Lab. Execs.' Ass'n.*, 489 U.S. 602, 617 (1989).

182. *Id.*

on probable cause pursuant to the Fourth Amendment.[183]

In applying recent technological advances into the realm of a search, the U.S. Supreme Court found in *Kyllo* that use of an infrared thermal imaging detector to search for infrared halide light used to grow marijuana plants was an unconstitutional search.[184] A person's home being invaded by a thermo imaging detection device is analogous to a person's DNA being compulsively mandated by this Act. First, arguably no search exists when you inspect materials on the surface of the body or off of the surface of a house.[185] DNA is not an inspection above the surface. DNA is collected from the deepest depths of the human body, well below the surface on a cellular, microscopic level.[186] DNA is taken from the skin, blood, and is extracted from the body.[187] This is not a mere brushing off of paint to test its color; this is a porous incision into one's identity. The information requested from the DNA is broken down from within the sample to a microscopic level that requires complicated tests.[188] This testing procedure is not something that any member of the public can do, which is critical in the *Kyllo* analysis. The technology of analyzing DNA is not readily available for public use. In *Kyllo*, a thermal imaging device was something only the government has access to, while similarly with this Act, DNA identification technology is only available to the state, not the public. There is a reasonable expectation that DNA is private since the technology is not readily available to the public; therefore, this search is constitutionally protected under the Fourth Amendment and probable cause is required.

Second, DNA information is similar to the Court's analogy in *Kyllo* to revealing the intimate details, the "hour each night the lady of the house takes her daily sauna and bath."[189] DNA reveals intimate details of genetic information, such as the propensity for certain diseases and thus, such a search is intrusive. Third, a DNA search is not "off the wall," DNA analysis perforates the surface of a wall to find a rat.[190] As in *Kyllo*, the search through the walls was to find a crime and a crimi-

183. *Furgusen v. City of Charleston*, 532 U.S. 67, 83-86 (2001) (holding that a non-consensual search is unconstitutional if not authorized by a valid search warrant).

184. *Kyllo v. U.S.*, 533 U.S. 27, 30 (2001).

185. *Id.* (dissent asserting that a fundamental difference exists between what it calls "off-the-wall" observations and "through-the-wall surveillance, and that anything learned through "an inference" cannot be a search).

186. Herlica, *supra* n. 3, at 955.

187. *Id.*

188. Webster, *supra* n. 24, at 121 (discussing the intricacies of the determining an identification match pursuant to a DNA sample analysis).

189. *Kyllo*, 533 U.S. 27.

190. Herlica, *supra* n. 3, at 973 (analogizing how DNA databanks are not means of preventing crime, but are used for deterring future crime).

nal.[191] Similarly, the Act will later be used to identify criminals and potential crimes.[192] The purpose of the DNA is to make law enforcement investigation easier, while at the same time providing the possibility of the ultimate intrusion into one's genetic privacy.[193] Such intrusion is exactly what the balancing test and the special needs test seek to prohibit.[194]

B. THE UNREASONABLENESS OF THE DNA SEARCH:

1. *The Balancing Test:*

The balancing test requires two basic elements: a governmental need and a privacy interest.[195] With this DNA Act, a privacy concern exists, but not a substantial governmental need. Therefore, the balancing scales should be tipped on the side with the most weight, in this case, the privacy of a person's DNA. A person's DNA, their biological blue print, whether used for inculpatory evidence or for identification, is private information.

What is the compelling government need behind this Act? In *Kincade,*[196] "the government's expressed interest in the search was to prevent, solve, and prosecute future crimes, and to complete the CODIS database."[197] The court said that the identification need was not enough without probable cause or a search warrant.[198] In *Winston v. Lee,*[199] the government expressed that its need was to get the bullet to obtain as evidence that the defendant was the robber.[200] The court said that this was not enough of a need, even with probable cause.[201]

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191. *Kyllo,* 533 U.S. 27.

192. La. R.S. 15:602 (2004).

193. Herlica, *supra* n. 3, at 963 (arguing that privacy is violated by the DNA testing due to potential uses of information and characteristics revealed by DNA). *See also Jones,* 763 F. Supp. at 847.

194. Herlica, *supra* n. 3, at 962 (discussing how the balancing test refers to the balancing of the governmental need for the action against the individuals privacy and how the special needs tests proves that the governmental interest superceded the individuals privacy concern because it goes further to go beyond law enforcement).

195. *Schmerber,* 384 U.S. at 759.

196. *Kincaid,* 345 F.3d at 1103.

197. *Id.*

198. *Id.*

199. *Winston,* 470 U.S. at 757.

200. *Id.* at 766.

201. *Id.* at 764. The court found that the State plainly had probable cause to conduct the search. *Id.* All parties apparently agreed that respondent had a full measure of procedural protections and had been able fully to litigate the difficult medical and legal questions necessarily involved in analyzing the reasonableness of a surgical incision of this magnitude. *Id.* The court found that the Fourth Amendment's command for searches to be "reasonable" requires that when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to

Here, the governmental need behind searches under the Louisiana DNA Act is "only for law enforcement identification purposes, to assist in the recovery or identification of human remains from disasters, and for other humanitarian identification purposes, including identification of missing persons."[202] Is this need for identification more forceful than the need to keep sensitive genetic information on file with the government; especially if this information has potential to show whether a person is predisposed to diseases?[203] The information obtained from DNA is not going to be used as evidence in the arrestees' case, unlike in *Winston*,[204] where the bullet was needed to prove an element of the offense. Furthermore, in *Winston*, probable cause was found in order to extract the bullet; yet the Court said this need for evidence was not enough to overturn his right not to be subject to medical risks.[205] Therefore, the search was unconstitutional.[206] Likewise, through this Act, the governmental need for identification of a person does not outweigh the privacy right of arrestees to keep their genetic information to themselves, and be free from undergoing risk of their DNA information being disclosed.

Courts have found that taking fingerprints for identification without probable cause or a search warrant is a violation of the Fourth Amendment.[207] DNA, like fingerprints, identifies an individual. DNA identification results from a forced intrusion within an individual's body[208] whereas a fingerprint is an on the surface mechanism for identification.[209] However, a qualitative difference exists between taking finger-

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make the search "reasonable." *Id.* Applying these principles, the court held that the proposed search in the case would be "unreasonable" under the Fourth Amendment. *Id.*

202. La. R.S. 15:602 (2004).

203. Kaye, *supra* n. 38, at 943.

204. *Winston,* 470 U.S. at 757 (1985).

205. *Id.* at 764.

206. *Id.*

207. *Kincaid*, 345 F.3d at 1103. (citing *Davis v. Miss.,* 394 U.S. 721, 727 (1969) (holding detention for sole purpose of obtaining fingerprints without probable cause or warrant violates *Fourth Amendment*)). In *Kincade*, the court found that law enforcement did not question Kincade's true identity; it merely sought to obtain evidence for future criminal investigations. *Id.*

208. *Id.* at 1100.

209. *Id.* The court analogized the difference between invasive procedures of the body that necessitate penetrating the skin, and an examination or recording of physical attributes that are generally exposed to public view. *Id.* An individual cannot hold the same expectation of privacy for this latter category of information that he does for his internal properties, including blood. *U.S. v. Dionisio,* 410 U.S. 1, 5-6, (1973) (discussing that "fingerprinting is not entirely free from Fourth Amendment concerns). Fingerprints taken pursuant to an arrest are part of so-called "booking" procedures, designed to ensure that the person who is arrested is in fact the person law enforcement officials believe they have in custody. *See Smith v. U.S.*, 324 F.2d 879, 882 (D.C. Cir. 1963) ("It is elementary that a person in lawful custody may be required to submit to photographing and fingerprinting as part of routine identification processes"). In *Napolitano v. U.S.,* 340 F.2d 313, 314 (1st Cir.

prints or a mug shot for identification when compared to taking DNA. The difference in the taking of DNA is that a reasonable expectation of privacy exists when one's genetic information is involved. DNA information is a privacy interest that a government need for identification cannot trump. In *Kincade*, the court held that the taking of DNA to meet the government's need for a comprehensive databank did not outweigh the defendant's reasonable expectation of privacy in his body without a warrant.[210] Accordingly, taking DNA under this Act without probable cause or without a warrant is likewise a violation of the Fourth Amendment.

Courts have previously found that there must be probable cause to take bodily fluids, specifically for DNA samples.[211] Probable cause has been a foundation in the Fourth Amendment principle of reasonable searches.[212] The government's desire to create a DNA databank for identification is arguably not a great enough need when the potential for disclosure of private genetic information is at risk.[213] Even if the need was great enough, the government will have to receive consent from the individual or produce a search warrant in order to get the DNA sample.[214] Therefore, without such permission by the person or by the court, the constitutionality of obtaining a DNA sample pursuant to booking procedure is suspect. However, Louisiana may attempt to defend the Act by using the special needs doctrine"[215] as an exception to the balancing test.

2. *Special Needs Doctrine*

The special needs doctrine seeks to create an exception to the balancing test requirement for probable cause or even reasonable suspicion where the search is independent of a law enforcement purpose.[216] How-

1965), the court stated that taking of fingerprints upon admission to bail is "universally standard procedure, and no violation of constitutional rights." This administrative procedure affirms that law enforcement has the right person in its custody. When law enforcement officials detain individuals for the purpose of obtaining fingerprints in furtherance of a criminal investigation, however, that detention violates the Fourth Amendment unless supported by probable cause or a warrant. *Id.*

210. *Id.* at 1104.

211. *Id.* (asserting that individualized suspicion should be required for searches of parolees' bodies. "Although forced blood extractions constitute searches. . .as a general rule, every search must be based upon probable cause, even without a warrant. The compulsory extraction of blood for a law enforcement purpose is reasonable only if the search is supported by individualized reasonable suspicion").

212. *Brinegar v. U.S.*, 338 U.S. 160, 176 (1949).

213. *Kincaid*, 345 F.3d at 1104.

214. *Id.* at 1103.

215. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

216. *Id.*

ever, in light of the distinct purpose of the Louisiana DNA Act at issue, the only function of the Act is a specific law enforcement purpose.[217] The strict construction of Section 611 of the Act disclaims that the purpose of this act is "only for law enforcement identification purposes. . ."[218] Louisiana even goes so far as to concede that the DNA is irrelevant to the arrested act, so much so that the Act allows arrestees who are not convicted to have their DNA removed from the bank.[219]

In applying *Kincade*, the court found that the California Act's[220] immediate purpose and the enforcement and legislative history showed a clear law enforcement purpose.[221] The searches are conducted in order to collect DNA evidence samples for CODIS, so that those samples may be used in criminal investigations, to help solve crimes and prosecute the culprits, and to enable law enforcement agencies to be more accurate and effective in achieving their law enforcement objectives.[222] In *Kincade,* the Ninth Circuit found that the DNA search of parolees violated the Fourth Amendment because it constituted a suspicionless search with the objective of furthering law enforcement purposes.[223] At a minimum, such searches require probable cause.[224] Undoubtedly, a clear parallel exists between the *DNA Analysis Backlog Elimination Act of 2000* in *Kincade*, and the Louisiana Act at issue. Accordingly, when a court reviews the Louisiana Act, it will also find the compulsory DNA search to be one that requires probable cause due to its strong similarity in purposes between this Act and the California Act in *Kincade*.

Furthermore, no special need is present because DNA is taken when arrested and then given back if not convicted.[225] This is a convenience for the State to hold the DNA in escrow at arrest so that it can be put in the bank later upon conviction. The State admits that is has no justification for taking the DNA now, which is unreasonable and not a special need.

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217. La. R.S. 15:611(C) (2004).

218. La. R.S. 15:611(C) (2004).

219. La. R.S. 15:614(A)(1)(2)(B)(2004) (providing for removal of records: "A person whose DNA record or profile is included in the data base pursuant to this chapter may request removal on the following grounds: (1) the arrest does not result in conviction or plea agreement resulting in a conviction. (2) the conviction was reversed or the case remanded").

220. *DNA Analysis Backlog Elimination Act of 2000*, 42 U.S.C. § 14135a.

221. *U.S. v. Kincaid*, 345 F.3d at 1111.

222. *Id.*

223. *Id.* at 1113.

224. *Id.*

225. La. R.S. 15:614(A)(1)(2)(B)(2004).

3. *The Intrusion:*

The intrusion of the Act occurs in several forms. First, an intrusion exists in taking the DNA by incision of a needle or swabbing a cotton ball in the arrestee's mouth. Second, an intrusion exists by taking the DNA for purposes other than evidentiary reasons. Third, an intrusion exists by delving into the potentially sensitive genetic information and the possibility of this DNA information being disclosed. Lastly, an intrusion exists if the government establishes that an arrestee, by virtue of being arrested, loses all rights to his or her body or genetic information.

a. The Intrusive Swab or Incision

If a search horrifically interferes with a person's privacy interest so as to "shock the conscience," then an unconstitutional search took place.[226] In analogizing this long-standing stomach pumping case (*Rochin*)[227] to this Act, the DNA extraction from arrestees is arguably just as intrusive and "shocking to the conscience"[228] as the pumping of a person's stomach without a warrant. One can argue that the imposition of a cotton swab inside one's mouth for the purpose of extracting cells from an arrestee's cheek is outweighed by the government need for identification.[229] However, the Supreme Court held in *Schmerber*[230] that taking of blood for a blood test was minimally intrusive even though it required the taking of blood under the skin with a needle.[231] "The Supreme Court has noted repeatedly that the drawing of blood constitutes only a minimally intrusive search."[232] Therefore, a court is likely to find that under this Act, taking a sample of DNA from a cotton swab in an arrestee's mouth or from a needle is unlikely to be an intrusive action.

b. The Non-Evidentiary Use

Additionally, in *Schmerber*, taking a blood test in order to ascertain whether the suspect's blood alcohol level is above the legal limit is sub-

226. *Rochin,* 342 U.S. at 175.

227. *Id.* (spotting Justice Frankfurter's famous quote concerning police officers having the suspects stomach pumped to the point where they induced him to throw up two capsules he had swallowed to show evidence of drugs).

228. *Rochin,* 342 U.S. at 175.

229. It is the author's opinion that removing DNA by taking blood through a needle is highly intrusive; especially if someone is phobic of needles and or of seeing blood. Furthermore, taking a cotton swab and placing it in someone's mouth is also a protrusion that may be beyond embarrassing and private. People generally do not want perfect strangers to place objects in their mouth without permission. I'm not sure you can do this because of the Supreme Court's holding in *Schmerber* that a blood/needle test is a *de minimis* intrusion. It's almost as if you're overriding a Supreme Court decision.

230. *Schmerber,* 384 U.S. at 767.

231. *Id.*

232. *Rise v. Or.*, 59 F.3d 1556, 1560 (1995).

stantively related to the crime charged. However, even this is only allowed if probable cause is found.[233] Unlike in *Schmerber*, the information obtained from the DNA is not used as evidence in the crime. According to *Schmerber*, in order to search for evidence there at least needs to be probable cause;[234] yet with the Act, there is no probable cause needed to search for the DNA, since the DNA is not being used as evidence of the crime. Louisiana even concedes this argument through the text of the Act because Louisiana is willing to give back the DNA if the arrestee is not convicted.[235] The Supreme Court held that arrested individuals may be subject to extremely intrusive searches of their body cavities and their jail cells for evidence of the crime, but only if they are "lawfully arrested on probable cause."[236] Louisiana uses the DNA obtained through this Act for non-evidentiary purposes. Thus, at the very least, Louisiana must maintain a separate probable cause requirement in order to obtain DNA independent of the arrest.

Taking DNA and placing it in a databank for future identification purposes may be useful in identifying a suspect in a future crime.[237] However, if taking the DNA has no concrete use for the arrestee's current case then probable cause has not been proven to search for the arrestee's DNA. The arrestee is forced to give their DNA for something that potentially has nothing to do with what they are being charged with and this is unconstitutional under the Fourth Amendment. Probable cause is needed to arrest an individual, but a subsequent DNA search used to identify culprits of future crimes requires separate probable cause. The initial probable cause to arrest does not extend as far as a DNA search. Probable cause for an arrest cannot be used to search for future crimes. Probable cause from an arrest does not translate to probable cause to search unless the search involves the substance of the crime.[238] The purpose of taking DNA under the DNA Act is arguably intrusive since the reasoning behind the taking of DNA is not substantive.[239]

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233. *Id.*

234. *Id.*

235. La. R.S. 15:614(A)(1)(2)(B)(2004).

236. *Bell v. Wolfish,* 441 U.S. 520, 558 (1979).

237. La. R.S. 15:602 (2004).

238. *Rise*, 59 F.3d at 1560 (discussing that although the "drawing of blood from free persons generally requires a warrant supported by probable cause to believe that a person has committed a criminal offense, that blood must reveal evidence relevant to that offense").

239. Herlica, *supra* n. 3, at 964-965. (discussing *Landry v. Attorney General*, 709 N.E.2d at 1091, where the court found that as long as the DNA was not used for the extraction of evidence). *See also Rise v. Or.*, 59 F. 3d 1556, 1560 (1995).

c. The Potential Disclosure and Mishandling of DNA Information

Moreover, beyond the fact that the DNA information obtained through this Act is not substantive, the intrusive part of the Act is the identification purpose in relation to the private information discernable from the test. The true intrusion comes from the removal of the DNA information, not necessarily the method of extraction. No matter how non-invasive the removal procedure is,[240] the importance of the information contained in the DNA sample is disconcerting. In applying the *Kyllo* standard, DNA analysis is not something to which the general public has access to,[241] and therefore, a court may find that a reasonable expectation of privacy exists. Regardless of whether the information is used solely for identification purposes, the true intrusion is the potential that an arrestee's DNA sample can later be used to unearth predisposition to disease, toe length, current illness and other genetic information. The personal information held within DNA can result in serious non-criminal ramifications, such as life insurance companies becoming aware of certain diseases and hiking up premiums, or denying life insurance to one's children, or a person finding out at age sixty they are going to develop certain illnesses.

Additionally, in analyzing this intrusiveness of the Louisiana DNA Act, the *Kyllo* case discussing technological intrusions parallels with this Act. In the *Kyllo* case, the Court expressed fear that threat to privacy "will grow, rather than recede, as the use of intrusive equipment becomes more readily available."[242] This case is ripe for analogy to this DNA Act because in *Kyllo*, while there was no privacy intrusion found within the taking of the thermal imaging picture, meaning no "intimate details" were revealed, the court still found that the potential of intimate details being revealed was enough of an intrusion.[243] With DNA samples only being taken from arrestees for the purpose of identification, the likelihood that potentially intimate information could be disclosed is apparent, so much so that the Act creates criminal liability if such disclo-

240. La. R.S. 15:609 (2004) (describing taking a cotton swab or drawing blood or taking a hair sample to extract DNA sample).

241. *Kyllo,* 533 U.S. at 35.

242. *Id.* at 48.

243. *Id.* at 39. The court found that "no necessary connection between the sophistication of the surveillance equipment and the "intimacy" of the details that it observes—which means that one cannot say (and the police cannot be assured) that use of the relatively crude equipment at issue here will always be lawful). *Id.* The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider "intimate"; and a much more sophisticated system might detect nothing more intimate than the fact that someone left a closet light on." *Id.*

sure of personal DNA genetic information were revealed.[244] What this insinuates is that the legislature finds the possibility of this occurrence strong enough to provide a provision that enforces punishment of those that can disclose sensitive genetic information.[245] This demonstrates that the DNA identification information sought can go beyond identification to the disclosure of sensitive genetic information. For instance, the genetic information could be given to insurance companies, employers, investigators, and intrude on the privacy of the donor.

Moreover, the penalties described in the Act for such disclosure[246] seems highly disproportionate to the irreparable harm caused by the disclosure of sensitive genetic information or the tampering or mislabeling of DNA information. Five hundred dollars and six months in jail[247] seems slight compared to the government having a monopoly on an arrested person's (with a presumption of innocence) genetic information. Such information can be highly destructive, not only because medical information may be given to insurance companies, but the fact that the government can track the person and clone them or perform whatever conspiracy theories anyone can think of.

Public policy demands keeping genetic information out of the wrong hands.[248] The Health Insurance Portability and Accountability Act ("HIPPA") seeks to prevent genetic information from being disclosed to insurance groups.[249] However, even in light of HIPPA, there have been criticisms that "Americans cannot be assured that their DNA will not be taken or used against their will without their knowledge."[250] In a CNN

244. La. R.S. 15:618 (2004) (discussing criminal penalties for disclosure of DNA information, any person that violates R.S. 15:617(A)(B) or tampers with any of the DNA samples shall be fined not more than five hundred dollars or imprisoned with or without hard labor for not more than six months, or both).

245. La. R.S. 15:618 (2004) (committee comments).

246. La. R.S. 15:618 (2004) (stating that "any person that violates R.S. 15:617(A)(B) or tampers with any of the DNA samples shall be fined not more that five hundred dollars or imprisoned with or without hard labor for not more than six months, or both").

247. La. R.S. 15:618 (2004).

248. 45 C.F.R. 164.502 (discussing HIPPA Act - The Health Insurance Portability and Accountability Act of 1996 (HIPAA) created valuable new protections for millions of Americans - including those with pre-existing medical conditions - who change jobs, become self-employed or lose their jobs. The Act also protects patient privacy and records security).

249. Hustead, *supra* n. 41, at 287-289 (HIPPA privacy regulation seeks to prohibit "Protected Health Information" (PHI) from being disclosed, and protected health information is broadly defined as information past, present, and future physical and mental health or condition of an individual and also health care, past, present and future of an individual. And of course this PHI includes genetic information).

250. *Id.* at 285 (explaining "The United States has no coherent policy for when or how genetic testing should be encourage, facilitated, discourage, or prohibited. Instead a lack of uniformity exists and some people in some places have such testing under some circumstances").

poll, seventy-five percent of people said that they would not want their health insurer to have genetic information on them.[251] Sixty-three percent of people would not take genetic tests if health insurers required it.[252] Eighty-five percent of people believe that employers should be prohibited from obtaining information about their employee's genetic conditions.[253] The "repercussions of having genetic information distilled may include: loss of insurance, loss of employment, having a mortgage recalled or denied, using genetic information in child custody disputes (pick the healthier parent over the parent with more predisposed diseases) or personal injury lawsuits."[254]

Also, beyond the fact that the Act's DNA indicator will be used only for the purpose of identification,[255] other fears exist. Those fears include the potential for human error to cause incorrect labeling of samples, or additional, unnecessary DNA probing done on the sample. No one knows what really is involved with the DNA samples besides the scientist, technicians, and the government, and DNA samples do contain more information than just the identity of a person.[256] Moreover, the unfortunate reality of human error is disturbing because the arrestee could have his DNA mistaken with another arrestee who is charged with a more serious crime. The potential for mistaken identification in a DNA databank is a risk that may concern the unwilling arrestee whose rights may be encroached by this unreasonable and intrusive search to get his DNA.[257] The Fourth Amendment stands to protect the arrestee from such risk of

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251. Hustead, *supra* n. 41, at 287.

252. *Id.*

253. *Id.*

254. *Id.* at 288.

255. La. R.S. 15:611(C) (2004).

256. Hustead, *supra* n. 41, at 287 (stating that there is "no comprehensive federal law in place for protecting the privacy of medical or genetic information;" instead there is just a patchwork of federal and state laws that extend protection to health information based on the type of entity that collects or creates the information).

257. Kaye, *supra* n. 38, at 940-941. The author discusses what would happen if a false match could arise because either the databank sample or the trace evidence sample has been mischaracterized:

> Suppose that in creating the databank, Jones's DNA was switched with Smith's, and Jones is the true source of the evidence sample. The database search then will falsely incriminate Smith. But the database search should be the beginning, not the end of the investigation. Even in the unlikely event that the police have no other evidence against Smith, a confirmatory DNA test of a new sample taken from Smith will exclude him as a possible source of the evidence sample. Furthermore, the state has every incentive to keep its database accurate. If mistyping of databank samples is common, perpetrators of crimes who are represented in the database will be missed. If samples are frequently mislabeled, subsequent exclusions should cause officials to grow frustrated with the system and to take corrective action.. The resulting feedback makes DNA database searches more reliable than forensic techniques that typically involve unverified subjective assessments.

Id.

disclosure and error, just as the court found that the Fourth Amendment prevented the defendant in *Lee* from having to undergo the risk of surgery in *Winston v. Lee*.[258]

d. The Arrestee's Status - No Rights to Their DNA

Arguably arrestees are not entitled to a minimal privacy interest after being arrested. This is only true if there is probable cause to do the search, and yet even without such cause, there is a presumption of innocence.[259] In *Kincade*, the Court found that there was a "constitutional difference between probation and parole for purposes of the Fourth Amendment."[260] Regardless of whether a person's status under the law as a parolee, arrestee, or even a convict, there is some degree of privacy afforded to the human body in the way of searches.[261] Arrestee status alone does not eradicate one's privacy interest in their body or their bodily fluids.[262] The U.S. Supreme Court has claimed that "even a prisoner, who has no legitimate expectation of privacy in his cell, retains an expectation of privacy in his body unless there is reasonable cause to violate his bodily integrity and a legitimate penological interest in doing so."[263] "Many courts have relied on the assumption that prisoners, because of their criminal acts, forfeit certain rights and as a consequence retain a diminished expectation of privacy."[264] Given these findings, the Court is likely to find that arrestee to have a legitimate expectation of privacy of his or her DNA information.

Furthermore, in light of the recent *Kincade* decision whereby the Ninth Circuit found that parolees do have a higher expectation of privacy than those of convicted inmates, logically arrestees have an even higher privacy interest concerning searches on and of their bodies (because they enjoy the presumption of innocence). Based on *Kincade*, the Supreme

258. *Winston*, 470 U.S. at 765.

259. *Bell v. Wolfish*, 441 U.S. 520, 546 (1979) (discussing that "a detainee simply does not possess the full range of freedoms of an unincarcerated individual").

260. *Kincaid*, 345 F.3d at 1095 (citing *U.S. v. Harper*, 928 F.2d 894, 896 (9th Cir. 1991)).

261. *Kincaid*, 345 F.3d at 1095 (quoting *Schmerber*, 384 U.S. at 772, the "integrity of an individual's person is a cherished value of our society," the *Kincaid* court also discusses the preeminent zone of constitutionally recognized privacy and that although parole may reduce the degree of constitutional protection afforded an individual's body, it does not eradicate it. *Id.*

262. *Id.*

263. *Kincaid*, 345 F.3d at 1096 (citing *Hudson v. Palmer*, 468 U.S. 517, 526 (1984)). *See Tribble v. Gardner*, 860 F.2d 321, 325 (9th Cir. 1988) ("stating that digital rectal searches of prisoners must be justified by legitimate penological need"). The expectation of privacy of a parolee, who is released to live at home, in preparation for reintegration into society, is even greater. *See Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (stating that the constitutional rights of parolees "are even more extensive than those of inmates").

264. Cronan, *supra* n. 23, at 146-147.

Court is likely to find that the DNA Act is an unconstitutional search because it seeks to diminish privacy rights of arrestees an create an intrusive search.

All in all, taking DNA information is highly intrusive. . . regardless of the identification purpose. The DNA search analysis is consistent with the Court's reasoning in *Kyllo*, where by a search is exceedingly intrusive because the technology has the capability of presenting intimate secrets within a person's home.[265] Likewise, a DNA search is just as intrusive because it has the capability of presenting intimate secrets about a person's body. Furthermore, the DNA search may "shock the conscience" due to the sensitivity of the information obtained and the intrusion into the body.[266] Arrestees have a justifiable expectation to have their DNA information be kept private under the *Katz* reasonable expectation test. Lastly, because in *Kincade*, parolees were found to not have diminished privacy rights so that their DNA may be taken, arrestees should be afforded that adequate right to privacy and against such an unreasonable search.[267] Therefore, without an independent search warrant and probable cause the mandatory taking of DNA pursuant to the Louisiana *DNA Detection of Sexual and Violent Offenders Act* is unconstitutional under the Fourth Amendment.

IV. CONCLUSION

"Where the government mandates a collection of DNA and retains control over the information contained therein, the provisions for privacy protection must be scrutinized carefully."[268] DNA is a mystery to many people and many people are terrified by it.[269] Most people would not consent to having their DNA injected into state databanks.

Unquestionably, DNA databanks have proven effective with law enforcement and has made a substantial impact on the criminal justice system.[270] However, what is the price but the intimate portrait of one's genetics. The retention of DNA samples by the government creates an eerie problem that skeptically asks, "what if the purpose of the DNA is really for something other than identification. . .who has control but the government? The crux of this argument is that these banks may be "un-

265. *Kyllo*, 533 U.S. at 48.

266. *Rochin*, 342 U.S. at 175.

267. U.S Const. amend V (conceptualizing the ideology of innocent until proven guilty. Arrestees are presumed innocent and thus are afforded greater privacy protection).

268. Webster, *supra* n. 24, at 133.

269. *Id.*

270. *Kincaid*, 345 F.3d at 1113 (discussing recent experience has proven the efficacy of DNA testing to exonerate the wrongfully convicted, and we do not doubt the importance of DNA collection for this worthwhile purpose).

fettered government sponsored bio invasion."[271]

The Louisiana *DNA Detection of Sexual and Violent Offenders Act* must be administered in a way that fully appreciates the expectations of an arrestee's privacy. The only way this can be done is through consent of the people who are giving samples or through a valid search warrant that requires probable cause.[272] The importance of DNA collection to exonerate the wrongfully convicted is a worthwhile purpose; but, those who claim wrongful conviction or even wrongful accusation, *volunteer* their DNA to prove their innocence.[273] However, the proposal here is for the government to at least make it permissible to take one's DNA (either by asking the person or asking the court through a warrant) and not mandatory.

The Act's identification purpose is not going to pass constitutional muster under the Fourth Amendment.[274] First, the governmental purpose does not outweigh the right to one's genetic information. Second, the special need defense is unascertainable because clearly the Act's purpose is for law enforcement. Third, a real intrusion exists with the potentiality that sensitive DNA information could be exposed beyond the identification purpose. A fair prediction is that the Louisiana Act will be struck down. The Court seems reluctant to accept technologies that allow real and potential intrusion into the body of human beings without permission. Accordingly, the only way the government should get someone's genetic information is simply. . .to ask. The government must ask the arrestee or ask the court for a warrant. . . the point is that Louisiana must ask.

Reneé A. Germaine†

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271. Kaye, *supra* n. 38, at 937.

272. Herlica, *supra* n. 3, at 954 (explaining how DNA databanks do not fit under any of the exceptions to the probable cause requirements, such as the balancing test or special needs tests and could be found unconstitutional).

273. *Kincaid*, 345 F.3d at 1113.

274. Herlica, *supra* n. 3, at 954 (DNA databanks do not fit under a probable cause exception and could be found unconstitutional. They do not pass the balancing test or special needs test. Furthermore, States keep expanding to cover more and more individuals which in turn, makes the banks less justifiable and legitimate).

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