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I. INTRODUCTION

{1} The Fourth Amendment prohibits the government from conducting unreasonable searches and seizures. [1] When claims arise against the government's Fourth Amendment transgressions, usually those claims turn on interpretation of the term "reasonable." Traditionally, a search and seizure conducted under the authority of a judicial warrant for "probable cause" is unquestionably reasonable.[2] In some, albeit very limited, types of searches reasonableness is met with at least "individualized suspicion."[3] When searches intrude into the human body, however, they implicate a person's most deep-rooted expectation of privacy - the right to be left alone.[4]

{2} This comment explores a three-pronged inquiry which addresses how law enforcement authorities come to possess DNA samples from certain individuals. This inquiry includes the following three stages of analysis. First, does DNA sampling constitute a search and seizure within the meaning of the Fourth Amendment?[5] Second, do persons convicted of serious crimes retain a reasonable expectation of privacy? [6] Third, and finally, if DNA sampling does constitute a search and seizure within the meaning of the Fourth Amendment, is it unreasonable? That is, does the government's interest in acquiring DNA information from

persons convicted of serious crimes outweigh its invasion of those persons' expectation of privacy?[7]

II. A Modern Context for Fourth Amendment Transgressions

{3} This expectation of privacy is a "fundamental" right. Fundamental rights are those that exist apart from any constitutional provision that recognizes them. They are "implicit in the concept of ordered liberty."[8] The United States Supreme Court recognizes personal privacy as a fundamental right guaranteed by the Fourth Amendment.[9] However, the exercise of fundamental rights is not absolute, and governmental infringement can occur. Ordinarily, when it does, it triggers the "strict scrutiny" standard of judicial review. Under strict scrutiny, the government must justify its actions with a "compelling" interest and demonstrate that the action is "narrowly tailored" to effectuate that interest.[10]

A. *A Codified Intrusion into the Human Body*

1. Legal Authorization for DNA Sampling

{4} Every state requires certain criminals to submit DNA samples for inclusion into data banks.[11] At the least, these statutes target convicted offenders of sexually-related crimes.[12] Such crimes include rape, sodomy, and molestation. However, states such as Delaware and Georgia, are careful to address all possible sex crimes in their statutory language.[13] Some statutes cast still a wider net. For example, Minnesota's statute, with the broadest approach, authorizes the creation of "systems for identification of criminals" with no further specifications as to which crimes to include.[14] At least six states qualify anyone convicted of a felony.[15] Arkansas requires all "repeat offenders" to submit to sampling.[16] The Wisconsin statute, without reference to any particular crime, requires DNA samples from everyone who is incarcerated, on probation, paroled, or found not guilty by reason of mental disease.[17]

{5} States commonly target other violent crimes as well, particularly murder.[18] However, the statutory interpretation of a "violent" crime is not always clear.[19] In contrast, some state statutes explicitly define the "violent" crimes that qualify perpetrators for DNA sampling.[20] North Carolina, for example, codifies the most specific and extensive list of crimes;[21] whereas, Nebraska's and Pennsylvania's statutes explicitly allow their legislatures to revisit the list of qualifying crimes.[22]

{6} Additionally, inconsistency exists as to when individuals fall within the reach of the sampling requirement. While most states require conviction at the outset of any procedure to acquire a DNA sample, not all states make DNA sampling an immediate result of conviction. At least three states - Louisiana, Mississippi and Kentucky - require DNA samples from individuals who are merely arrested for sexual felony offenses.[23] In contrast, Idaho requires the prosecuting attorney to show that early collection of the individual's DNA is in the best interest of justice before the convicted person must submit to DNA sampling.[24] Not surprisingly, most states extend the DNA sampling requirement to juvenile offenders, as well as to probationers and parolees.[25] In fact, some states make it a condition of parole or release to submit a biological sample.[26]

2. Federal Efforts to Integrate DNA Data Banks

{7} In 1994, Congress passed the DNA Identification Act ("the Act").[27] The Act authorizes the Attorney General to grant money to the states to develop DNA collection systems.[28] The grants are contingent on the states collecting, at the minimum, DNA from felony sexual offenders.[29] These state databases will

contribute to a national Combined DNA Identification System ("CODIS").[30] CODIS, operating since 1997, is under the direction of the National Crime Information Center of the Federal Bureau of Investigation ("FBI").[31] While CODIS represents a valuable resource, the integration of the states' data with CODIS is problematic, due to the aforementioned inconsistencies among the states, as well as to the authority of the state to use its discretion as to what information it may choose to pass along to the FBI. A bill currently before Congress seeks to authorize CODIS' expansion.[32] The bill, if passed into law, will give the Director of the FBI the discretion to define what offenses qualify for inclusion in the data bank, and to set standards for analysis and removal of the data.[33] Additionally, there is another bill which addresses the exchange by law enforcement agencies of DNA identification information relating to violent offenders.[34]

3. Mechanics of DNA Sampling

{8} What exactly is DNA? Deoxyribonucleic acid ("DNA") harbors an individual's distinctive pattern of genetic information.[35] Constructed into tightly coiled threads resembling a helix, DNA exists in every nucleus of every cell within the human body.[36] The function of DNA is to house all of the necessary information to create a particular human being along with all of her unique traits.[37] Except for identical twins and bone marrow transplant recipients, every individual's genetic makeup is unique.[38] The collection and analysis of DNA is often referred to as "DNA fingerprinting" because it is second only to actual fingerprinting in the identification of individuals.[39]

{9} Thus, forensic scientists can analyze any particular biological specimen - such as hair, blood, or tissue - to identify the person who is its source.[40] This process consists of dividing a DNA sample into fragments, which form a unique pattern, and then matching this "identity profile" with samples from the DNA database.[41] The sample may come from a variety of bodily fluids and tissue, each providing the same degree of genetic information.[42]

4. Legal Impact of DNA Sampling

{10} The process known as "DNA fingerprinting" first developed in Great Britain in 1985.[43] It is useful in establishing paternity, as well as in identifying human remains from war or disaster.[44] In the last decade, criminal investigation has benefitted from the advent of DNA identification. Virginia is home to the first DNA data bank, the design of which began in 1989.[45] So far, out of the nearly 100,000 samples collected, criminal investigators have identified 100 suspects.[46] Interestingly, many of those suspects were convicted of crimes against property, rather than for crimes against persons.[47] For example, Mark Daigle was imprisoned for burglary and theft in Virginia, where he provided a sample of his DNA, in accordance with Virginia's DNA collection statute.[48] That sample was used to convict him of a rape he committed in Florida years later, after his release for the Virginia conviction.[49]

{11} Convicting and incarcerating otherwise unidentifiable perpetrators is not the only effective criminal use of DNA sampling. In 1983, Calvin Johnson was sentenced to a life sentence in Georgia for rape.[50] Sixteen years later, he was exonerated when, through the use of DNA analysis, scientists were unable to match his DNA sample with the biological evidence remaining from his trial.[51] Probably the most famous case to date on the effectiveness of DNA fingerprinting, in the context of criminal investigation, is that of Ronald Cotton.[52] In 1984, Ronald Cotton was arrested for the rape of two women and burglary to their respective apartments.[53] The Alamance Superior Court in North Carolina convicted and sentenced Cotton to a life term plus fifty-four years for all offenses.[54] In 1995, DNA analysis revealed that Cotton was not the assailant; rather, investigators found a match in the state's DNA database with another convict.[55] Cotton not only was cleared of all charges, but also received $5,000 in compensation from the state.[56]

5. A Threat to Fourth Amendment Protection

{12} Undoubtedly, the federal government's model for CODIS is the extensive database functioning in Great Britain since 1995. Great Britain seeks to include its entire population in its database. In several high profile cases, the British government required entire populations of the citizenry - based on either their geographical location, race, or sex - to submit to sampling.[57]

{13} While nothing of this nature has yet to occur in the United States, DNA sampling has become a routine criminal investigative tool in this country. Treating such sampling as a "search and seizure," American courts are interpreting the validity of statutory and regulatory requirements for DNA sampling under a Fourth Amendment analysis. Specifically, they determine the standard for the reasonableness of the search, and examine the degree to which the search impinges on one's fundamental right to an expectation of privacy.[58] Massachusetts was the first state to rule that DNA sampling was unconstitutional; however, the state's supreme court overturned the decision.[59] Consequently, the American Civil Liberties Union has appealed the decision to the United States Supreme Court.[60] The Supreme Court, however, has not addressed this inquiry per se, although it has ruled on issues of bodily intrusion and privacy rights of those within the state's custody or authority.[61] Several of the circuit courts have addressed this particular issue. An analysis of their holdings, and a forecast for the High Court follows.

B. *History of Supreme Court Rulings on Bodily Intrusion*

{14} In 1966, the Supreme Court held, in *Schmerber v. California*,[62] that the taking of a blood sample is a search within the meaning of the Fourth Amendment.[63] However, the Court also held that taking a blood sample without a warrant, but in the context of an arrest for probable cause and by commonplace medical procedures, "involves virtually no risk, trauma, or pain" and is thus considered a reasonable intrusion.[64] Therefore, police may, without a warrant, seize evidence likely to disappear before they can obtain a warrant, such as a blood sample containing alcohol.[65] Two years later, in *Terry v. Ohio*,[66] the Court was willing to weigh law enforcement's discretion in a test for reasonableness in the context of a warrantless search - thus, establishing a guiding principle for "individualized suspicion." The Court was careful, however, to disallow an officer's "subjective 'good faith'" as sufficient;[67] rather, judicial scrutiny employs an objective standard.[68] Moreover, the scope of such warrantless searches must reasonably relate to the circumstances which justify them.[69] More than a decade later, the Court incorporated these "manner" and "scope" parameters in its holding in *Bell v. Wolfish*.[70] In *Bell*, the Court affirmed that a federal custodial facility could conduct a visual body cavity searches on inmates for less than probable cause,[71] and reiterated that the test for reasonableness in such circumstances requires a balancing of the need for the particular search against the invasion of a person's rights that the search entails.[72] Within this balance, "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."[73] The *Bell* balancing test rests on the presumption that, while prison inmates may retain certain constitutional rights, those rights are subject to restrictions and limitations.[74]

{15} The factual scenarios of these prior decisions, however, included individuals merely suspected of criminal behavior, at most. *Hudson v. Palmer*[75] broke new ground by establishing that a prisoner has no reasonable expectation of privacy in his prison cell.[76] Still, *Hudson* stopped short of drawing the same conclusion with respect to "in person" searches. In 1987, the Court, reviewing a Wisconsin regulation permitting a probation officer to search a probationer's home on mere "reasonable grounds,"[77] as opposed to probable cause or individualized suspicion, validated the regulation under a "new principle of law."[78] Specifically, when the state is acting as the regulator of some industry, such as the operation of a probation system, there may be "'special needs beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."[79] Two years later, the Court extended the "special needs" standard to searches of the person in *Skinner v. Railway Labor Executives' Association*.[80] The *Skinner* Court ruled that a collection and subsequent analysis of the requisite biological samples, while constituting a

search under the Fourth Amendment, is reasonable if justified by special needs beyond normal law enforcement.[81] A recent application of the "special needs" analysis exists in *Vernonia School District v. Acton*,[82] where the Court upheld random drug urinalysis screening of high school athletes as reasonable.[83] The Court found that existing drug problems in the school were severe enough to suffice as a special need for suspicionless searches of individuals who were role models in the student community.[84]

III. THE LATEST FEDERAL CIRCUIT OPINION ON DNA AS A SPECIAL NEEDS EXCEPTION

{16} A recent case from the Court of Appeals for the Second Circuit addresses the constitutionality of DNA collection, specifically for the purpose of data banking biological information on convicted felons. In *Roe v. Marcotte*,[85] the Attorney General of Connecticut sought a court order to compel Thomas Cobb to comply with a state statute that required him to submit a blood sample for analysis and inclusion in Connecticut's DNA data bank.[86] Cobb was sentenced to twenty-five years for a sexual offense conviction. The statute at issue provides, in relevant part, --

> (a) any person who (1) is convicted of a violation of section 53a-70, 53a-70a, 53a-70b, 53a-71, 53a-72a or 53a-72b on or after October 1, 1994, and is sentenced to the custody of the Commissioner of Correction or (2) has been convicted of a violation of [the previously referenced sections] and on October 1, 1994, is in the custody of the Commissioner of Correction shall, prior to release from such custody, have a sample of his blood taken for DNA . . . analysis to determine identification characteristics specific to the person. (b) Any person convicted of a violation of [the previously referenced sections] on or after October 1, 1994, who is not sentenced to a term of confinement shall, as a condition of such sentence, have a sample of his blood taken for DNA . . . analysis to determine identification characteristics specific to the person.[87]

{17} In the U.S. District Court of Connecticut, Cobb argued, *inter alia*, that the statute authorized an unreasonable search and seizure in violation of the Fourth Amendment and thereby violated his right to privacy.[88] Specifically, Cobb contested the state's authority to take evidence from his person, with neither probable cause nor reasonable suspicion, and to use this evidence in future criminal investigations.[89] The state did not dispute that the intrusion was a search. Therefore, the district court addressed the issue of whether or not this particular type of search is reasonable.[90] The state argued that the intrusion is minimal and justified by significant government interests.[91] In its counterclaim, the state asked the district court to declare the statute constitutional and to enjoin Cobb from refusing to submit a blood sample - allowing the use of force, if necessary.[92] The district court heard cross-motions for summary judgment and granted the state's motion in part, declaring the statute constitutional, and denying Cobb's motion. In its ruling, the court relied on the rationale supplied by the Fourth Circuit in *Jones v. Murray*,[93] which considered probable cause already supplied by virtue of an individual's presence within the criminal justice system, and considered "at least some, if not all" of an individual's rights to privacy to be lost upon arrest.[94]

{18} The U.S. Court of Appeals for the Second Circuit, reviewing the lower court's grant of summary judgment de novo, affirmed the trial court's judgment, defeating Cobb's constitutional challenge.[95] Its rationale, however, was different from that of the court in *Jones*.[96] Rather, the Second Circuit concluded that a reasoned interpretation of the "special needs"[97] doctrine supports the constitutionality of the DNA statute.[98] In applying the "special needs" standard, the court balanced the government's interests in controlling recidivism[99] among sexual offenders, aiding in the efficiency of criminal investigations of sex crimes, solving past and future crimes, and deterring repeat offenders against Cobb's interest in preventing his blood from being drawn for testing.[100]

{19} The "special needs" test determines the "reasonableness" of searches into the body by weighing the government's need for the evidence against the magnitude of the intrusion on the individual.[101] Such a balancing test is a step down from traditional strict scrutiny analysis of government infringement on fundamental rights. In fact, should the government prevail, the result is a diminished privacy right for the individual. In contrast to the presentation required for showing the "compelling interest"[102] for intrusion, under a "special needs" analysis, the government must only show that its interest outweighs the degree to which it impinges on the individual's fundamental right. Put differently, instead of proving the need for the invasion, the government must merely disprove its severity.

IV. A CONSTITUTIONAL ANALYSIS OF DNA SAMPLING STATUTES

A. *Identifying the Individual*

{20} An analysis of these types of statutes begins with identifying the class of individuals to whom they apply. The Connecticut statute at issue in *Marcotte* pertains to individuals who possess three qualifications. The qualifications are that the individuals must be convicted sexual offenders, who are incarcerated as of the statute's effective date.[103] Determining the characteristics of the qualifying class is important because those characteristics bear on the degree to which members of the class retain a reasonable expectation of privacy. The reasonableness of a search ultimately rests on the results of balancing this expectation against the government's interest in collecting the DNA sample. The arguments either for, or against, DNA sampling are more or less palpable depending on whether the "individual" is convicted or merely accused, and to what degree the crime is deemed "serious." A review of the relevant case law yields an understanding of the term "serious," as applied to both violent and nonviolent crimes.[104]

B. *Distinguishing the Intrusions*

{21} DNA sampling involves two intrusions: first, the initial extraction of the sample, and second, the subsequent analysis of the sample.[105] The court, in *Marcotte*, concluded that the Connecticut statute provides adequate safeguards to ensure that the subsequent intrusion is minimal.[106] In reaching its holding, the *Marcotte* court accepted the notion that a subsequent chemical analysis of the sample to obtain physiological data is a further invasion of the individual's privacy interest. Prior to *Marcotte*, the Court of Appeals for the Ninth Circuit, in *Rise v. State*,[107] reviewed a Colorado statute requiring convicted murderers, sexual offenders, and conspirators of those offenses to submit a blood sample to the state's data bank, and likened the information derived from the blood sample to that derived from fingerprinting.[108] The court continued the analogy with fingerprinting in asserting that interference in an individual's privacy was minimal because the procedures necessary for drawing blood are no more intrusive than inking and rolling a person's fingertips.[109]

{22} Admittedly, one can argue that providing a DNA sample to government officials is not unlike providing a fingerprint - something which the government already possesses for most of the individuals within its borders, and which is used merely as a tool for ensuring proper identification.[110] However, the capture of fingerprints and photographic images does not involve bodily intrusions, and the information gleaned from them is not subject to further analysis that yields information about the individual beyond the human eye's capability of recognition. For example, Judge Nelson, dissenting over forced extraction in *Rise*, defined DNA sampling as an invasion that is not minimal. Rather, sampling is "an intrusion of a scope fundamentally different from the capture of visual images or fingerprints, in which there is a minimal expectation of privacy because that information ordinarily is held out to the public."[111]

C. *Defining the Scope of the Individual's Reasonable Expectation of Privacy*

{23} The weight of the government's interest in procuring the DNA sample for inclusion in a database is offset by the degree to which the individual retains a constitutionally-protected, reasonable expectation of privacy. Based upon the fingerprint analogy from *Rise*, this expectation is limited for convicted individuals, who should not expect a greater level of privacy than those merely accused. The latter group, nevertheless, are required to undergo fingerprinting, regardless of whether the investigation of the crime involves fingerprint evidence.[112] Fingerprinting, however, is a far less intrusive search than DNA sampling. It seems individuals would retain a greater expectation of privacy with respect to their blood than to their fingerprints. While no court has gone so far as to say convicted felons retain no reasonable expectation of privacy, the Fourth and Ninth Circuits assert that convicted felons retain, at most, a diminished privacy right.[113]

D. *Determining the Government's Interest*

{24} The proffered rationale for the statute in Marcotte is that DNA data banks serve as a tool to address recidivism because the data bank will assist in preventing future crimes and deterring repeat offenders.[114] These are strong reasons from a public policy standpoint, but they are weak under constitutional scrutiny. The Supreme Court's stance on the reasonableness of searches of a person for grounds less than individualized suspicion does not extend to the criminal context, but stops instead at "special needs" beyond the normal degree of law enforcement. However, the Tenth Circuit, in *Boling v. Romer*,[115] deemed the government's interest in investigating and prosecuting unsolved and future crimes as legitimate, and asserted that DNA sampling, like fingerprinting, is a rational means for achieving this interest.[116]

E. *Applying the Appropriate Standard*

1. Expanding the "Special Needs" Exception into the Criminal Context

{25} Within the criminal context, the Supreme Court's standard for a reasonable search and seizure is individualized suspicion. Even searches under this minimal standard must balance the "need for the particular search against the invasion of personal rights that the search entails" and consider the scope, manner, justification, and place.[117] The Connecticut statute, and others like it, take a blanket approach to DNA sampling, regardless of the individualized suspicion standard articulated by the Supreme Court. Moreover, by allowing the retrieval of evidence for future use in criminal investigations, the Connecticut statute seems to preclude the standard of probable cause.[118] The court in *Marcotte* is mindful of this standard in rationalizing the constitutionality of the statute, but it invokes another of the High Court's standards - that articulated in *Skinner*, where circumstances outside of law enforcement exist where a reasonable search is predicated on "special needs."[119]

{26} The court in *Marcotte*, while deferring to the persuasiveness of the Fourth Circuit's ruling in *Jones,* based its rationale on that utilized by the Washington Supreme Court in *State v. Olivas*.[120] In *Olivas*, the court also upheld the constitutionality of DNA sampling of violent offenders, but unlike the court in *Jones*, the Washington State judiciary concluded that the application of the "special needs" balancing test was a better reasoned approach because it does not diminish the privacy rights of convicted persons.[121] Under this test, to justify a search on less than individualized suspicion, the government's interest - be it the maintenance of institutional security, public safety, or order - must be significant enough to prevail over a minimal intrusion on an individual's privacy rights.[122] This reasoning rests on the significance of the government's interest and scope of the intrusion. The former consideration must be greater than the latter disruption in order to allow for DNA sampling. The court's holding in *Marcotte* reasserted the Supreme Court's declaration that the extraction of blood is a minimal intrusion, and deferred to the Fourth Circuit's

interpretation that this assertion applied to the DNA sampling of convicted felons, as well as to drug and alcohol testing of railroad employees.[123] Thus, the court in *Marcotte* maintains that the "special needs" exception to the Fourth Amendment also applies to the prison setting where concerns for institutional security, order, and discipline restrict the constitutional protections of prisoners.[124]

2. Defining the Government's "Special Need" Outside of Law Enforcement

{27} Making a tenuous extension, the court in *Marcotte* compares Connecticut's DNA sampling statute to the regulation scenario defined in *Griffin*. In *Griffin*, the Supreme Court relied on extensive research that indicated more intensive supervision of probationers reduced recidivism and concluded that "supervision" was a "special need" of the State.[125] The *Griffin* holding established that non-law enforcement interests can exist even within the context of the criminal justice system. Subsequently, *Marcotte* contends that because a high rate of recidivism exists among sexual offenders, the DNA database will assist authorities in regulating that recidivism.[126]

{28}A disconcerting aspect of the *Marcotte* rationale, however, is the nexus that it establishes between DNA data banking and the regulatory interests associated with running a prison (i.e., institutional security, order, and discipline rationale) and with controlling recidivism among sexual offenders.[127] Despite Marcotte's argument that the statute is a regulation, the statute, on its face, authorizes a pure law enforcement search.[128] The "special needs" exception exists only for government interests outside of law enforcement. As explained in *Skinner*, the "special needs" exception was not meant to assist in prosecution, but to merely identify impaired individuals and to prevent their unsafe operation of trains.[129] Additionally, "special needs" is a standard that allows the state to further the goals of a statute that is otherwise thwarted by a necessity for probable cause or individualized suspicion. In *Skinner,* individuals who must succumb to searches predicated on special needs face no threat of ultimately being prosecuted for what is found in their sample; rather, they only face restriction from working in a certain industry.[130] In order for Marcotte's reasoning to sustain constitutional scrutiny, the court must accept the Fourth Circuit's contention that merely "ascertaining and recording one's identity" is not necessarily within the realm of law enforcement.[131] The court must also accept that the uniqueness of DNA in identifying individuals makes it the best means by which the government can achieve this purpose.[132] The court, in *Jones*, reaches this conclusion by systematically segregating prison inmates into a separate category of individuals to whom the usual requirement of probable cause does not apply,[133] but *Jones* is criticized by its blanket diminishment of Fourth Amendment rights.[134]

3. Comparing the Circuit Court Rulings

{29} Prior to the *Marcotte* decision, but subsequent to *Jones*, two other U.S. Court of Appeals ruled on the constitutionality of DNA sampling of convicted felons. First, the Ninth Circuit, in *Rise v. State*,[135] cleverly turned the government's interest from that of criminal investigation to that of public interest. The DNA database would serve the public in aiding authorities to get and to keep criminals off the streets. In so doing, the court employed an analysis that balanced the degree to which the data bank advances this public interest against the severity of the resulting interference with individual liberty.[136] The proponents of the DNA database prevailed. The dissent, led by Judge Nelson, took issue with the *Rise* majority, pointing out that the "special needs beyond normal law enforcement" rationale supports searches on a lesser ground than probable cause only in a very few, "carefully tailored, regulatory contexts that do not involve the apprehension of criminal perpetrators."[137]

{30} Second, the Tenth Circuit, in *Boling v. Romer,*[138] recognized the complexity of applying the "special needs" standard in a criminal context. Instead, the court applied a "minimal intrusion" standard, asserting that the government's interest should prevail, despite its criminal application because collecting saliva and blood

are minimal intrusions.[139] Recall, this standard requires that when the search or seizure incurs a minimal intrusion, "a reviewing court may balance the government's interest in conducting the search, the degree to which the search actually advances that interest, and the gravity of the intrusion upon personal privacy to determine whether the search is reasonable."[140] Perhaps the "minimal intrusion"[141] test is the most persuasive mode of analysis to date. After all, the foundation of all of these arguments is the *Schmerber* ruling, which did not allow the extraction of blood incident to arrest. Rather, *Schmerber* required exigent circumstances. This requirement of exigency is not met when DNA sampling is incident to conviction of a serious crime. The blood sample obtained in *Schmerber* was used as evidence in prosecuting the same crime for which the initial arrest was made under probable cause.[142]

V. RECOMMENDATION

A. *The Problem with the "Special Needs" Standard in the Criminal Context*

{31} While the issue may seem settled in Connecticut for the moment, a review of the contemporary decisions in the Fourth, Ninth, and Tenth Circuits reveals an uncertainty about how to apply the "special needs" analysis. Is the appropriate balance the government's interests versus the "limited" privacy of convicts, railroad workers, or others within highly regulated settings? Alternatively, should the balance, instead be the government's interests versus the "general" privacy of individuals, apart from any defined setting? The latter balance is a more difficult case for the government, particularly if the proffered interest is a criminal one. For example, deterring recidivism is not a valid government interest. On one hand, recidivism is far too broad a purpose, in that it allows the use of the DNA sample to investigate past crimes. On the other hand, it is inapplicable within the two extremes where the individuals being sampled are either citizens without criminal records or death row inmates who will never return to society at large.

{32} One concern is whether the proffered government interest is a balancing factor. It may very well be established that the government's "need to conduct the search" exists; however, setting aside concerns for individual privacy, the factors to consider pertain to how badly the government "needs to conduct the search without a warrant."[143] In other words, how urgent is the governmental interest? The latter must be a narrower interest requiring an even more narrowly construed means. Granted, on its face, the Fourth Amendment requires that a search be merely reasonable. However, DNA sampling is a search of the kind that infringes on a person's constitutionally protected right to privacy of his person. Thus, the courts must examine this particular type of search under a more scrutinizing standard. The concept of "special needs" does not suffice in the context of DNA sampling for two reasons. First, "special needs" is not a strict scrutiny standard. That is, it does not require the government to demonstrate a compelling interest for invading a person's zone of privacy. Second, the "special needs" exception was developed in the area of administrative searches - not criminal searches - thus, indicating its application presumes prisoners' rights to privacy of their person should be equal to those of free persons outside of a merely regulatory governmental interest.[144] To assume that "special needs" implies an automatic diminishing of privacy rights is incorrect; rather, a diminished right to privacy only results if, within a "special needs" analysis, the government's interest prevails. Thus, if "special needs" are not clearly defined, there exists the potential for statutes to evolve that broaden the types of qualifying crimes, and also broaden the types of qualifying individuals.[145] For example, Louisiana's statute provides for the testing of arrestees.[146]

{33} Moreover, DNA fingerprinting technology ultimately may enable criminal investigators not only to identify specific perpetrators of specific crimes, but also to identify likely perpetrators of crime, in general, by virtue of their genetic characteristics.[147] The dissent in *Rise* suggests that developing technology may yield even more intrusive possibilities for verifying an individual's identity, which would provide the government with an even stronger interest in invading one's bodily integrity. This developing technology could legitimize

a weakened Fourth Amendment.[148] DNA sampling in the criminal context under a "special needs" standard opens the door for potential mass government intrusion.[149]

{34} A first step toward prevention would be for the Supreme Court to interpret the parameters of "beyond normal law enforcement."[150] Do interests like deterring recidivism, solving crimes, and exonerating the wrongly accused or convicted fall outside the bounds of normal law enforcement? If the government's interest is to control recidivism, or to prevent the commission of future crimes, it bears an equal obligation to use DNA technology to address unsolved past crimes. It seems that justice demands that the technology be used, as well, to verify the validity of past convictions. Presently, if the government's proffered interest is public safety, the argument for DNA sampling is more constitutionally sound than if its true interest is criminal investigation. However, what government interests fall within the realm of public safety, but outside the bounds of normal law enforcement?

B. *A Plausible "Special Need" Within the Criminal Context: Protecting Individual Liberty*

{35} The conclusiveness of DNA evidence ensures the unquestionability of convictions and enhances the effectiveness of plea bargaining and the certainty of the death penalty. Yet, it can also be used to address appeals to criminal convictions. According to Project Innocence, a nonprofit group espousing the use of DNA fingerprinting to exonerate the wrongfully convicted, DNA analysis has yielded the exoneration of forty-eight prisoners, including twelve death row inmates.[151] These are impressive statistics in comparison to the number of cold hits investigators have made in their diligent, proactive attempts to find criminals.[152] Perhaps, the existence of DNA technology should substantiate a requirement that the government be as diligent in its efforts to exonerate the wrongly convicted. Exoneration, however, usually results from the prisoner taking the initiative to request that DNA analysis be applied in his case.

{36} Recall Calvin Johnson, who served sixteen years in a Georgia prison for rape. Johnson's state appeals were exhausted, but a subsequent DNA analysis of biological evidence from the crime scene exonerated him. DNA analysis has been used to demonstrate that it is acceptable for an individual's right to privacy to be limited in the criminal context, but the same technology can also be used to ensure one's right to a fair trial. In other words, accompanying the statutory requirement that an individual provide a DNA sample, there should be an automatic right to its analysis and a guarantee that the sample will be used to ensure the conclusiveness of the conviction - even if the deadline for an appeal has passed.[153] A few states agree with that proposition. New York and Illinois, for example, provide for automatic testing within their statutes,[154] and Wyoming has ensured the longevity of the testing procedure through a state supreme court decision.[155]

{37} Perhaps, this special need of protecting individual liberty - that is, an assurance that what occurs within the bounds of normal law enforcement does not harm the innocent - is a better articulated special need for DNA sampling. In other words, the invasion of personal privacy to acquire genetic evidence may be more acceptable, constitutionally, if it is couched in the language of protecting the innocent, rather than searching out criminals. For example, developing a massive DNA data bank should coincide with developing a data bank for biological evidence from crime scenes and enhancing requirements for retaining that biological evidence. Additionally, with the constitutional exceptions allowing law enforcement to collect DNA samples, courts must eliminate procedural bars to using a DNA database to exonerate criminal convictions.

{38} DNA sampling is a reasonable search under the "special needs" exception in at least four circuits. As several dissents have shown, however, the judicial building blocks that led to the outcome in *Marcotte* are unstable.[156] Every constitutional infringement, whatever its purpose, comes at the expense of individual liberty. When it comes to the development of DNA sampling, the Supreme Court should strike a more reasoned balance between fighting crime and protecting privacy.

C. *Conclusion*

{39} The intrigue with DNA technology, the success with which it is used to solve crimes and to free the wrongly accused, and the public's disdain for crime have all fostered the expediency with which CODIS and other state data banks have developed. *Marcotte*, however, exemplifies the lack of uniformity among the federal circuits when employing the "special needs" analysis in a criminal context.[157] Apart from whether the acquisition of this data is constitutional, one cannot deny the threat to individual privacy imposed by warehouses of genetic information. This information can be used for purposes outside of law enforcement - purposes that go beyond those discussed in this comment. For example, individuals submitting DNA samples must have guarantees of privacy protection, such as how the information will be used, who will have access to it, how it will be disseminated, and if and when it will be expunged from the database. A guarantee of expungement must exist, at a minimum, when the government's proffered purpose for obtaining the sample no longer exists.

{40} The present lobbying activity in the federal legislature suggests that DNA data banks will continue to develop as a definitive tool for criminal investigation. Recently, the International Association of Police Chiefs urged Congress to require DNA samples from every person arrested in connection with a crime.[158] This political pressure, along with the speed of developing technology, may soon force the Supreme Court to address the constitutionality of DNA sampling in order to bring uniformity and coherence to the various circuits' rationales for upholding statutes of this nature.

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ENDNOTES[**]

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[**]. **NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

Deborah F. Barfield, Comment, *DNA Fingerprinting - Justifying the Special Need for the Fourth Amendment's Intrusion into the Zone of Privacy*, 6 RICH. J.L. & TECH. 27 (Spring 2000), *at* http://www.richmond.edu/jolt/v6i5/note2.html.

[1]. U.S. CONST. amend. IV (providing "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

upon probable cause . . .").
[2]. *See id*.
[3]. *See* Terry v. Ohio, 392 U.S. 1, 10-11 (1968).
[4]. *See* Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891) (reading, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law"). *Id*.
[5]. *See* Roe v. Marcotte, 193 F.3d 72, 76-80 (2nd Cir. 1999) (examining issue and concluding that the DNA statute does not violate the Fourth Amendment); Shaffer v.Saffle, 148 F.3d 1180 (10th Cir. 1998)).
[6]. *See* Jones v. Murray, 962 F. 2d 302 (4th Cir. 1992) (holding that convicted felons retain only a limited expectation of privacy).
[7]. *See* United States v. Bullock, 71 F.3d. 171 (5th Cir. 1995); Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995); Jones v. Murray, 962 F.2d 302 (4th Cir. 1992).
[8]. Palko v. Connecticut, 302 U.S. 319, 325 (1937).
[9]. *See* Katz v. United States, 389 U.S. 347, 351 (1967) (explaining that the Fourth Amendment does not provide a general right to privacy; rather, it protects what individuals seek to preserve as private.).
[10]. *See* Roe v. Wade, 410 U.S. 113, 155 (1973) (articulating the strict scrutiny standard in the context of government regulation of a woman's fundamental right to decide to have an abortion) *citing* Kramer v. Union Free School District, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969), Griswold v. Connecticut, 381 U.S.479, 485 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); Sherbert v. Verner, 374 U.S. 398, 406 (1963); Cantwell v. Connecticut, 310 U.S. 296, 307-308 (1940); Eisenstadt v. Baird, 405 U.S.405 U.S. 438, 460, 463-64 (1972) (White, J., concurring in result).
[11]. *See* ALA. CODE § 36-18-24 (Supp. 1999); ALASKA STAT. § 44.41.035 (Michie 1998 & Supp. 1999); ARIZ. REV. STAT. ANN. § 31-281 (West 1996 & Supp. 1999); ARK. CODE ANN. § 12-12-1109 (Michie 1999); CAL. PENAL CODE § 296.1 (West 1999 & Supp. 2000); COLO. REV. STAT. § 17-2-201(5)(g) (1999); CONN. GEN. STAT. § 54-102(g) (1994 & Supp. 1999), *repealed and substituted by* 1999 CONN. ACTS 183, § 11 (Reg. Sess.); DEL. CODE ANN. tit. 29, § 4713(b) (1997 & Supp. 1998); FLA. STAT. ANN. § 943.325 (West 1996 & Supp. 2000); GA. CODE ANN. § 24-4-60 (1995 & Supp. 1999); HAW. REV. STAT. § 706-603 (1993 & Supp. 1998); IDAHO CODE § 19-5507 (1997 & Supp. 1999); 730 ILL. COMP. STAT. 5/5-4-3 (West 1997 & Supp. 1999), *as amended by* 1999 ILL. LAWS 528; IND. CODE § 10-1-9-10) (1999); IOWA CODE § 13.10 (1995 & Supp. 1999); KAN. STAT. ANN. § 21-2511 (West 1995 & Supp. 1999), *as amended by* 1999 KAN. SESS. LAWS 164, §§ 3, 39; KY. REV. STAT. ANN. § 17.170 (Michie 1996 & Supp. 1999); LA. REV. STAT. ANN. § 15:609 (West Supp. 2000); ME. REV. STAT. ANN. tit. 25, § 1574 (West Supp. 1996); MD. ANN. CODE art. 88B, § 12A (1998 & Supp. 1999); MASS. ANN. LAWS ch. 22E, § 3 (Law. Co-op. 1996 & Supp. 2000); MICH. COMP. LAWS ANN. § 750.520m (West 1991 & Supp. 1999); MINN. STAT. § 609.3461 (Supp. 2000); MISS. CODE ANN. § 45-33-15(3) (1999 & Supp. 1999); MO. ANN. STAT. § 650.055 (West Supp. 2000); MONT. CODE ANN. §44-6-102 (1999); NEB. REV. STAT. § 29-4106 (Supp. 1999); NEV. REV. STAT. ANN. § 176.0913 (Michie 1997 & Supp. 1999); N.H. REV. STAT. ANN. § 632-A:21 (1996 & Supp. 1999); N.J. STAT. ANN. § 53:1-20.20 (West Supp. 1999); N.M. STAT. ANN. § 29-16-2 (Michie 1997 & Supp. 1999); N.Y. EXEC. LAW § 995 (Consol. 1995 & Supp. 2000); N.C. GEN. STAT. § 15A-266.4 (1999); N.D. CENT. CODE § 31-13-03 (1997 & Supp. 1999); OHIO REV. CODE ANN. § 2901. 07 (West 1999 & Supp. 1999); OKLA. STAT. ANN. tit. 74, § 150.27a (West 1995 & Supp. 2000); OR. REV. STAT. § 137.076 (Supp.1998), *as amended by* 1999 OR. LAWS 97, § 1; 35 PA. CONS. STAT. ANN. § 7651.306 (West 1998 & Supp. 1999); R.I. GEN. LAWS § 12-1.5-8 (Supp. 1999); S.C. CODE ANN. § 23-3-620 (Law Co-op. Supp. 1999); S.D. CODIFIED LAWS § 23-5-14 (1998 & Supp. 2000), *as amended by* H.B. 1064, 75th Leg. (S.D. 2000); TENN. CODE ANN. § 38-6-113 (1997 & Supp. 1999); TEX. GOV. CODE ANN. § 411.142 (West 1998 & Supp. 2000); UTAH CODE ANN. § 53-10-403 (Supp. 1999); VT. STAT. ANN. tit. 20, § 1933 (Supp. 1999); VA. CODE ANN. § 19.2-310.2 (Michie 1995 & Supp. 1999); WASH. REV. CODE ANN. § 43.43.754 (West 1998 & Supp. 2000); W. VA. CODE § 15-2b-6 (2000), *as amended by* H.B. 4322, 75th Leg. (W. Va. 2000); WIS. STAT. § 165.76 (1997 & Supp. 1999); WYO. STAT. ANN. § 7-19-403 (Michie 1999) (authorizing the creation of state DNA databases, outlining procedures for taking samples, indicating

from whom samples should be taken, and discussing other regulatory issues).
[12]. *See* ARK. CODE ANN. § 12-12-1109 (Michie 1999); COLO. REV. STAT. § 17-2-201(5)(g) (1999); DEL. CODE ANN. tit. 29, § 4713 (1997 & Supp. 1998); GA. CODE ANN. § 24-4-60 (1995 & Supp. 1999); HAW. REV. STAT. § 706-603 (1993 & Supp. 1999); 730 ILL. COMP. STAT. 5/5-4-3 (West 1997 & Supp. 1999), *as amended by* 1999 ILL. LAWS 528; IND. CODE § 10-1-9-10 (1999); KY. REV. STAT. ANN. § 17.170 (Michie 1996 & Supp. 1999); LA. REV. STAT. ANN. § 15:609 (West Supp. 2000); MASS. ANN. LAWS ch. 22E, § 3 (Law. Co-op. 1996 & Supp. 2000); MISS. CODE ANN. § 45-33-15(3) (1999 & Supp. 1999); N.H. REV. STAT. ANN. § 632-A:21 (1996 & Supp. 1999); N.J. STAT. ANN. § 53:1-20.20 (West Supp. 1999); N.D. CENT. CODE § 31-13-03 (1997 & Supp. 1999); S.C. CODE ANN. § 23-3-620 (Law Co-op. Supp. 1999); TENN. CODE ANN. § 38-6-113 (1997 & Supp. 1999) (limiting DNA sampling to sexual offenses only).
[13]. *See* DEL. CODE ANN. tit. 29, § 4713 (1999) (including bestiality, female genital mutilation, and engagement in child pornography); GA. CODE ANN. § 24-4-60 (1999) (including statutory rape, sexual assault against people in custody, and necrophilia).
[14]. MINN. STAT. § 299C.09 (1999).
[15]. Alabama, Nebraska, New Mexico, Virginia, Wyoming, and Minnesota. *See* ALA. CODE § 36-18-20 (Supp. 1999); NEB. REV. STAT. § 29-41-1 (Supp. 1999); N.M. STAT. ANN. § 29-16-2 (Michie 1999); VA. CODE ANN. § 19.2-310.2 (Michie 1999); WYO. STAT. ANN. § 7-19-403 (Michie 1999); MINN. STAT. § 299C.09 (Supp. 2000) (extending the requirement of DNA sampling to gross misdemeanors as well).
[16]. *See* ARK. CODE ANN. § 12-12-1105 (Michie 1999).
[17]. *See* WIS. STAT. § 165.76 (1997 & Supp.1999).
[18]. *See* CAL. PENAL CODE § 295 (West 1999); ME. REV. STAT. ANN. tit. 25 § 1574 (West Supp. 1996); MD. ANN. CODE art. 88B, § 12A (1998 & Supp. 1999); MICH. COMP. LAWS § 750.520m (1991 & Supp. 1999); N.Y. EXEC. LAW § 995 (McKinney 1999); OHIO REV. CODE ANN. § 2901.07 (West 1999); UTAH CODE ANN. § 53-10-403 (Supp. 1999); W. VA. CODE § 15-2b-6 (1999) (adding murder to the list of violent crimes that qualify for DNA sampling).
[19]. *See* ARK. CODE ANN. § 12-12-1109 (Michie 1999) (failing to define "violent offense); HAW. REV. STAT. § 706-603 (1993 & Supp. 1998) (defining violent offense as murder or attempted murder); MO. ANN. STAT. § 650.055 (West Supp. 2000) (sending reader to § 565 in search of definition); MONT. CODE ANN. § 44-6-102 (1999) (sending reader to 41-5-1502 in search of definition); WASH. REV. CODE § 43.43.754 (West 1998 & Supp. 2000) (applying the descriptor "violent" to no particular crime); *see also* ALA. CODE § 36-18-20 (Supp. 1999) (including any "crime against the person").
[20]. *See, e.g.*, ALA. CODE § 36-18-20 (Supp. 1999) (including stalking); CAL. PENAL CODE § 295 (West 1999 & Supp. 2000) (designating a list of qualifying violent crimes); FLA. STAT. ANN. § 943.325 (West 1996 & Supp. 2000) (including car jacking); IDAHO CODE § 19-5507 (1999) (including arson, racketeering, and kidnaping); MD. ANN. CODE art. 88B, § 12A (1998 & Supp. 1999) (listing seven qualifying crimes); MICH. COMP. LAWS § 750.520m (1991 & Supp. 1999) (listing code provisions where one may find the qualifying crimes); W. VA. CODE § 15-2b-6 (2000) (listing the numerous code sections that define the offense that triggers the DNA requirement); *see also* ME. REV. STAT. ANN. tit. 25, § 1574(4)(N) (West Supp. 1996) (for any lesser offense if the original charge was for a greater offense that qualified for DNA sampling). For the most extensive and explicit list of qualifying crimes, see N.C. GEN. STAT. § 15A-266.4 (1999).
[21]. *See* N.C. GEN. STAT. § 15A-266.4 (1999) (listing twenty-two crimes covered by the Article of the statute).
[22]. *See* NEB. REV. STAT. § 29-4106 (Supp. 1999); 35 PA. CONS. STAT. ANN. § 7651.306 (West 1998 & Supp. 1999) (allowing DNA sampling for any offense that has a substantial impact on the detection and identification of sexual offenders and violent offenders); *see also* ALA. CODE § 36-18-20-24 (Supp. 1999) (giving agency director discretion to collect DNA from perpetrators of other offenses not specifically outlined in the statute).
[23]. *See also* MINN. STAT. § 299C.09 (1999) (targeting individuals who, upon arrest, were convicted of a felony or gross misdemeanor within the state).
[24]. *See* IDAHO CODE § 19-5507 (1999).

[25]. *See, e.g.*, CAL. PENAL CODE § 295 (West 1999 & Supp. 2000) (extending DNA sampling to anyone convicted of an enumerated list of crimes who might, as punishment, be committed to any state institution); HAW. REV. STAT. § 706-603 (1993 & Supp. 1998) (requiring DNA sampling whether the convicted person is incarcerated or not); IDAHO CODE § 19-5507 (1997 & Supp. 1999) (requiring DNA sampling of juveniles tried as adults); 730 ILL. COMP. STAT. 5/5-4-3 (West 1997 & 1999) (extending sampling requirement to juvenile sex offenders); MD. ANN. CODE art. 88B, § 12A (1998 & Supp. 1999) (including a conviction for attempt of one of several crimes); MASS. GEN. LAWS ch. 22E, § 3 (Law. Co-op. 1996 & Supp. 2000) (requiring parolees to supply sample); MICH. COMP. LAWS § 750.520m (1999) (extending to the crime of attempt and including parolees); S.C. CODE ANN. § 23-3-620 (Law Co-op. Supp. 1999) (including probationers); VT. STAT. ANN. tit. 20, § 1933 (1999) (including probationers and parolees). *But see* COLO. REV. STAT. § 17-2-201(5)(g) (1999) (making DNA sampling a condition of parole); N.H. REV. STAT. ANN. 632-A:21 (1996 & Supp. 1999) (making sampling a condition of release rather than requiring it immediately upon incarceration); R.I. GEN. LAWS 1956, § 12-1.5-17 (Supp. 1999) (making sampling a condition of release and making refusal to give a sample a violation of release).

[26]. *See, e.g.*, COLO. REV. STAT. § 17-2-201(5)(g) (1999) (making DNA sampling a condition of parole); N.H. REV. STAT. ANN. 632-A:21 (1996 & Supp. 1999) (making sampling a condition of release rather than requiring it immediately upon incarceration); R.I. GEN. LAWS 1956, § 12-1.5-17 (Supp. 1999) (making sampling a condition of release and making refusal to give a sample a violation of release).

[27]. DNA Identification Act of 1994, Pub.L. 103-322, 108 STAT. 2068 (codified at 42 U.S.C. §§ 14131-34 (1994)).

[28]. *See* 42 U.S.C. § 14151 (a) (1994).

[29]. *See* Pub. L. 104-132, § 811 (b)(2), 110 STAT. 1313 (1996) (amending the DNA Identification Act).

[30]. *See id*.

[31]. *See id*. For more information about the Department of Justice and FBI current and future use of DNA methods, see National Institute of Justice, *National Commission on the Future of DNA Evidence* (last modified Jan. 16, 2000) <http://www.ojp.usdoj.gov/nij/dna/welcome.html> .

[32]. *See* Violent Offender DNA Identification Act, H.R. 2810, 106th Cong. § 3 (a) (1999).

[33]. *See id*. § 3 (d)(2)(A); *see also* S. 903, 106th Cong. § 3 (d)(2)(A) (1999) (representing the Senate version of H.R. 2810).

[34]. *See* Convicted Offender DNA Index System Support Act of 1999, H.R. 3375, 106th Cong. § 6 (b) (1999).

[35]. *See* Human Genome Program, U.S. Department of Energy, *Primer on Molecular Genetics*, Washington, D.C. (1992) *available at* (visited Mar. 23, 2000) <http://www.ornl.gov/TechResources/Human_Genome/publicat/primer/prim1.html>.

[36]. *See id*.

[37]. *See id*.

[38]. *See* Andrea De Gorgey, Note, *The Advent of DNA Databanks: Implications for Information Privacy*, 16 AM. J.L. & MED., 381, 381 n.4 (1990).

[39]. *See id*. at 381.

[40]. *See* Black's Law Dictionary 495 (7th ed. 1999) (defining DNA identification). For a discussion of how DNA evidence exculpated individuals wrongly convicted, see generally Edward Connors et al., U.S. Department of Justice, Convicted by Juries; Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial (1996). This study can also be found at National Institute of Justice, *Investigative Sciences* (last modified Jan. 16, 2000) <http://www.ojp.usdoj.gov/nij/dna> .

[41]. *See* De Gorgey, *supra* note 35, at 381.

[42]. *See id*.

[43]. *See* De Gorgey, *supra* note 35, at 382 n.5.

[44]. *See* De Gorgey, *supra* note 35, at 381 n.2.

[45]. *See* Mark Holmberg, *Leap of Faith and Science: State's DNA Database is Paying Off in Solving Crimes*, RICH. TIMES-DISPATCH, Dec. 19, 1999, at A1.

[46]. *See id*.
[47]. *See* Mark Hanson, *Banking on DNA*, 85 ABA J. 26, 27 (1999).
[48]. *See id*. at 26-27.
[49]. *See id*.
[50]. *See* Mark Hansen, *DNA Bill of Rights: Activists Call for Standards on Inmate Testing, Evidence Preservation*, 86 ABA J. 30, (2000).
[51]. *See id*.
[52]. *See generally What Jennifer Saw* (PBS *Frontline* television broadcast, Feb. 25, 1997) (examining the reliability of eyewitness identification and the implications of DNA evidence and considering the case of Ronald Cotton); *see also* PBS, *FRONTLINE: Cotton's Wrongful Conviction* (visited Mar. 15, 2000) <http://www.pbs.org/wgbh/pages/frontline/shows/dna/cotton/summary.html> (transcribing broadcast).
[53]. *See id*.
[54]. *See id*.
[55]. *See id*.
[56]. *See id*.
[57]. *See* Paul Derienzo & Joan Mossy, *Gene Cops: The Police Want Your DNA*, In These Times (Inst. for Pub. Affairs, Las Vegas), Dec. 26, 1999, at 14.
[58]. Other issues implicated by DNA sampling are due process, equal protection, and ex post facto; however, these are beyond the scope of this case note.
[59]. Landry v. Attorney General, 709 N.E.2d 1085, 1091 (Mass. 1999) (holding "the high government interest in a particularly reliable form of identification outweighs the minimal intrusion of a pinprick").
[60]. *See* Erin Hallissy, *Prying into DNA Raises Constitutional Questions*, San Francisco Chronicle, Oct. 20, 1999, at A12.
[61]. *But see* Ferguson v. City of Charleston, 186 F. 3d 469 (4th Cir. 1999), *cert. granted*.
[62]. 384 U.S. 757 (1966).
[63]. *See id*. at 767.
[64]. *Id*. at 771.
[65]. *See id*.
[66]. 392 U.S. 1 (1968).
[67]. *See id*. at 22 (finding that "'[i]if subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate. . .'") (quoting Beck v. Ohio, 379 U.S. 89, 97 (1964)).
[68]. *Id*. at 21-22 (framing the objective test of the reasonableness of the officer's conduct as whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate").
[69]. *Id*. at 19-20 (noting that the warrantless search in the instant case related to the officer's on-the-spot observations).
[70]. 441 U.S. 520 (1979).
[71]. *See id*. at 560.
[72]. *See id*. at 559, 560 (upholding the constitutionality of body cavity inspections of inmates following contact visits absent probable cause due to the unique security dangers in a detention facility).
[73]. *Id*. at 559.
[74]. *See id*. at 545.
[75]. 468 U.S. 517 (1984).
[76]. *See id*. at 530.
[77]. WIS. ADMIN. CODE § 328.21(3)(a) (1997 & Supp. 1999).
[78]. *See* Griffin v. Wisconsin, 483 U.S. 868, 872 (1987).
[79]. *Id*. at 873-74.
[80]. 489 U.S. 602 (1989).
[81]. *Id*. at 634 (referring to a federal regulation requiring railroads to conduct breath, blood, and urine analysis to pursue the government interest of public safety in the railroad industry).

[82]. 515 U.S. 646 (1995).
[83]. *Id*. at 663.
[84]. *Id*.
[85]. 193 F.3d 72 (2nd Cir. 1999) *aff'g sub nom*. Roe v. Office of Adult Probation, 125 F.3d 47 (2nd Cir. 1997).
[86]. *See id*. at 75-76 (noting that plaintiff's refused to submit the blood sample arguing, inter alia, that the statute violated the Fourth Amendment's prohibition against unreasonable searches and seizures).
[87]. CONN. GEN. STAT. ANN. § 54-102g (a) & (b) (1994 & Supp. 1999).
[88]. *See Marcotte*, 193 F.3d at 76.
[89]. *See id*.
[90]. *See id*. at 77.
[91]. *See id*.
[92]. *See id*. at 76.
[93]. 962 F.2d 302 (4th Cir. 1992).
[94]. *Marcotte*, 193 F.3d at 80 (quoting *Jones*, 962 F.2d at 306)).
[95]. *See id*. at 82.
[96]. *See Jones*, 962 F. 2d at 307 n.2 (finding no need to apply the "special needs" exception to the probable cause requirement because cases involving "the Fourth Amendment rights of prison inmates to comprise a separate category of cases to which the usual per se requirement of probable cause does not apply. . ."). *Id*.
[97]. *See supra* notes 77-79 and accompanying text.
[98]. *See Marcotte*, 193 F.3d at 82.
[99]. "Recidivism" is "a tendency to relapse into a former pattern of behavior; especially a tendency to return to criminal habits." The American Heritage Dictionary of the English Language 1088 (4th ed. 1973).
[100]. *See Marcotte*, 193 F.3d at 82.
[101]. Indicative of the magnitude of the invasion is the threat to the individual's health, safety, and dignitary interests. *See generally* Winston v. Lee, 470 U.S. 753, 763-64 (1985) (finding that threats to defendant's safety posed by compelled surgery were appropriately factored into the lower court's analysis of the reasonableness of the search). The Court ultimately held that the compelled surgery would constitute an unreasonable search in violation of the Fourth Amendment. *See id*. at 766-67.
[102]. *See supra* note 7 and accompanying text.
[103]. *See* CONN. GEN. STAT. § 54-102g(a) (1999).
[104]. *See generally* Rise v. State, 59 F.3d. 1556, 1558 n.1 (9th Cir. 1995) (limiting DNA extraction to offenders incarcerated for murder or sex related crimes such as "rape, sodomy, unlawful sexual penetration, sexual abuse, public indecency, [and] incest. . ."). *Id*.
[105]. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616 (1989).
[106]. *See Marcotte*, 193 F.3d at 80 (noting the statute regulates the manner in which the blood test is conducted and the results are analyzed, restricts access and secures confidentiality, and provides for the information's expungement from the database upon a reversal or dismissal of the conviction).
[107]. 59 F.3d. 1556 (9th Cir. 1995).
[108]. *See Rise*, 59 F.3d at 1559 (comparing the information derived from a blood sample to information derived from fingerprinting and noting that both provide "an identifying marker unique to the individual from whom the information is derived"). *Id*.
[109]. *See id*. at 1560.
[110]. *See Olivas*, at 856 P.2d at 10 78.
[111]. *Rise* at 59 F.3d at 1570 (Nelson, J., dissenting) (comparing DNA sampling to fingerprinting or taking mugshots).
[112]. *See id*. at 1559.
[113]. *See* Boling v. Romer, 101 F.3d 1336, 1340 (10th Cir. 1996).
[114]. *See* Roe v. Marcotte, 193 F.3d 72, 79 (1999).
[115]. 101 F.3d 1336 (10th Cir. 1996).

[116]. *See id*. at 1340.
[117]. Bell v. Wolfish, 441 U.S. 520, 559 (1979).
[118]. *See Marcotte*, 193 F.3d at 79.
[119]. *See id*. at 77.
[120]. 856 P. 2d 1076 (1993).
[121]. *See Marcotte*, 193 F.3d at 81, *citing* Jones v. Murray, 962 F.2d 302, 312 (4th Cir. 1992) (Murnaghan, J., dissenting) (stating that "[b]ecause the state's DNA testing requirement was not justified by internal prison security needs . . . prisoners ha[ve] a 'reasonable expectation of privacy within [their] bodies.'"). *Id*.
[122]. *See id*. at 78.
[123]. *See id*. at 79.
[124]. *See id*. at 78.
[125]. *See id*. at 79.
[126]. *See id*.
[127]. *See id*.
[128]. *See* CONN. GEN. STAT. § 54-102g (1994 & Supp. 1999).
[129]. *See* State v. Olivas, 856 P. 2d 1076, 1084 (1993), *citing* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 620-21 (1989).
[130]. *See id*. at 89 (explaining *Skinner*, 489 U.S. at 602 (1989)).
[131]. *See* Jones v. Murray, 962 F.2d 302, 306 (4th Cir. 1992).
[132]. *See id*. at 307.
[133]. *See id*. at 306 (considering that an individual's presence within the prison system establishes per se probable cause).
[134]. *See Olivas*, 856 P.2d at 1086 (explaining the lower and higher courts' rationales in *Jones*). The *Olivas* found the lower court's reasoning in *Jones* to be more sound, but defers to the persuasive authority of the higher court in holding the statute constitutional.
[135]. 59 F.3d 1556 (9th Cir. 1995).
[136]. *See id*. at 1560.
[137]. *Id*. at 1567.
[138]. 101 F.3d 1336 (10th Cir. 1996).
[139]. *See id*. at 1340 (explaining that when the purpose of collection is to create a data bank to assist in the investigation and prosecution of criminal offenses, "special needs" cannot be used as the balancing test).
[140]. *Olivas*, 856 P. 2d 1076, 1092 (1993) (Utter, J., concurring), *citing* Brown v. Texas, 443 U.S. 47 (1979).
[141]. *See supra* notes 68-71 and accompanying text.
[142]. *Olivas,* 856 P.2d at 1083-84, *citing* Schmerber v. California, 384 U.S. 757, 772 (1966).
[143]. *Id*. at 1090 (Utter, J., concurring); *see also Rise*, 59 F.3d at 1564 (Nelson, J., dissenting) (accusing the majority of extending the *Schmerber* rationale to uphold "mere fishing expeditions to acquire useful evidence."). *Id*.
[144]. *See* Jones v. Murray, 962 F.2d 302, 311 (4th Cir. 1992) (Murnaghan, J., dissenting).
[145]. *See, e.g*., LA. REV. STAT. ANN. § 15:609 (West Supp. 2000) (requiring any person who is merely arrested for a felony sexual offense to submit to DNA sampling).
[146]. *Id*.
[147]. *See generally* Adrienne Appel, *Felons Surrender Blood to DNA Data Bank*, The Boston Globe, Oct. 12, 1999, at B2 (quoting Ruth Hubbard, Professor Emeritus of Biology at Harvard University and board member of the Council for Responsible Genetics who is concerned about using DNA samples for purposes other than prosecuting criminals).
[148]. Rise v. State, 59 F. 3d 1556 1569 n. 3 (9th Cir. 1995) (Nelson, J., disenting).
[149]. *See Olivas*, 856 P.2d at 1093 (Utter, J., concurring).
[150]. *See supra* text accompanying notes 75-79.
[151]. Derienzo & Mossy, *supra* note 142.
[152]. *See* Mark Holmberg, *Leap of Faith Science: State's DNA Database is Paying Off in Solving Crimes*,

RICH. TIMES-DISPATCH, Dec. 19, 1999, at A1 (reporting that Virginia has made 100 cold hits since establishing its data bank in 1989).
[153]. *See* Derienzo & Mossy, *supra* note 142.
[154]. *See* 730 ILL. COMP. STAT. 5/5-4-3(a) (West 1999) and N.Y. EXEC. LAW § 995-c(3) (McKinney 1999).
[155]. *See* Doles v. Wyoming, No. 98-273, 1999 Wyo. LEXIS 197, at *1 (Wyo. Dec. 22, 1999).
[156]. *See Rise*, 59 F.3d at 1564 (Nelson, J., dissenting) (disagreeing with majority's application of *Skinner*).
[157]. *See infra* Part III.E.1. (discussing how the court in Marcotte defers to the ruling in *Jones* as persuasive authority but discounts the Fourth Circuit's rationale in lieu of a state supreme court reasoning from *Olivas)*.
[158]. *See Police Chiefs Want DNA Samples from Suspects*, ORLANDO SENTINEL, Nov. 5, 1999, at A16.

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