

IMPLICATIONS OF *UNITED STATES V. JONES* ON DNA COLLECTION FROM ARRESTEES: A TRESPASS PROHIBITED BY THE FOURTH AMENDMENT?

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I. INTRODUCTION

Alonzo Jay King was arrested in Maryland on assault charges, and pursuant to state statute police collected a DNA sample from King on the day of his arrest and entered the information into a database.¹ Eventually, King was found guilty of one misdemeanor count of second degree assault.² But his trouble with the law did not end there; one month later he was indicted for an unsolved rape case, which had occurred six years earlier and where the police were never able to identify the attacker.³ The only evidence to support the indictment was a hit in a DNA database from the DNA sample that had been collected on the day of his arrest for the unrelated assault charges. Without the DNA sample, there was nothing to link King to the rape crime.⁴ Ultimately, King was sentenced to life in prison without parole.⁵ King appealed his conviction and the Maryland Court of Appeals, contrary to other courts across the country, found that this DNA collection from an arrestee was unconstitutional.⁶ This decision further emphasized the disagreement among courts over the issue.⁷

The United States Court of Appeals for the Ninth Circuit and the United States Court of Appeals for the Third Circuit have ruled on this issue, as well as several district courts and state appellate courts around the

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1. King v. State, 42 A.3d 549, 553 (Md. 2012).
2. *Id.* at 553 n.3.
3. *Id.* at 553–54.
4. *Id.* at 554.
5. *Id.* at 555.
6. *Id.* at 552.
7. See discussion *infra* Part II.B.

country, and their rulings are conflicting.⁸ Yet, the debate over whether the government can collect DNA from a person who has been arrested for a felony but has not yet been convicted, will finally be resolved by the Supreme Court of the United States in the near future.⁹ The Supreme Court has hinted that it intends to find that this practice does not violate any constitutional rights.¹⁰

However, based on the Court's recent opinion in *United States v. Jones*, the reasoning used to determine if a practice is a violation of Fourth Amendments rights has become even more blurred.¹¹ Although previous cases have used the reasonable expectation of privacy test to make this determination, the Court in *Jones* chose to use common law trespass to find that the planting of a global positioning system ("GPS") on a suspect's car was a constitutional violation.¹² Interestingly, the Court did not replace the reasonable expectation of privacy test with the use of trespass theory, but instead, decided that the reasonable expectation of privacy is a subsequent test after the trespass theory.¹³

8. *Maryland v. King*, 133 S. Ct. 1, 2 (2012); *see also In re Welfare of C.T.L.*, 722 N.W.2d 484, 492 (Minn. Ct. App. 2006) (finding that the DNA collection from an arrestee was a violation of the Fourth Amendment because the privacy rights of the arrestee were not outweighed by the government's interest). *Compare Haskell v. Harris*, 669 F.3d 1049, 1060 (9th Cir. 2012) (finding that DNA collection from arrestees is constitutional because it is the same as fingerprinting), *United States v. Mitchell*, 652 F.3d 387, 415–16 (3d Cir. 2011) (holding that DNA collection from arrestees is constitutional because the government has a legitimate interest in identifying the arrestee), *and Mario W. v. Kaipio*, 281 P.3d 476, 482–83 (Ariz. 2012) (finding that the actual collection of the DNA was a constitutional search but the use of the cells to create a DNA profile was an unconstitutional search), *with People v. Buza*, 129 Cal. Rptr. 3d 753, 783 (Ct. App. 2011) (finding that the DNA collection from arrestees is not based on individualized suspicion and therefore, unconstitutional). *See generally infra* discussion Part II.B (discussing the court split on the constitutionality of DNA collection).

9. *King*, 133 S. Ct. 594 at 3 (granting certiorari and explaining that the split of authority involves an important feature of law enforcement practices that has an effect beyond just the state of Maryland and as a result makes it probable that the Court will grant certiorari to review the issue).

10. *Id.* ("[T]here is a fair prospect that this Court will reverse the decision below."). The Court of Appeals of Maryland found that the provision of the Maryland statute which allowed for the DNA collection from arrestees was unconstitutional. *Id.*

11. *See United States v. Jones*, 132 S. Ct. 945, 950–52 (2012) (using a trespass test to decide that a governmental action was a Fourth Amendment search). In this case, police officers planted a GPS on a car that a suspect was in possession of without the suspect's consent. *Id.* at 948. The lower court ruled that Jones had no reasonable expectation of privacy in a car driving through public roads. *Id.* at 949. The Supreme Court, however, found that the information gathered from the GPS while the car was in the suspect's driveway was protected under the Fourth Amendment under a trespass law theory. *Id.* at 950.

12. *Id.* at 950.

13. *Id.* at 952.

This comment discusses the constitutionality of warrantless DNA collection from arrestees, and proposes an analysis that the Supreme Court should use when deciding on this issue to find that this practice violates the Fourth Amendment. Part II of this comment discusses the general development of DNA collection laws, how the laws have expanded to include persons that have been arrested but not convicted of certain crimes, and the procedures used to collect the DNA samples.¹⁴ In addition, Part II includes a survey of the conflicting decisions by courts across the country and demonstrates the disagreement over the constitutionality of this particular practice.¹⁵ Part II also argues that DNA collection and fingerprinting are not analogous in particular circumstances.¹⁶ Part III summarizes the evolution of Fourth Amendment jurisprudence, and how it is shifting back to the trespass interpretation originally used by the courts.¹⁷ Part III also analyzes how the collection of DNA is a search under the Fourth Amendment.¹⁸ In Part IV, this comment discusses how the Supreme Court should handle the issue of warrantless DNA collection from arrestees and proposes that the trespass test used most recently by the Supreme Court in *Jones* should also be applied to this issue to find that the collection of DNA is a violation of the Fourth Amendment.¹⁹

II. BACKGROUND

A. EXPANSION OF DNA COLLECTION PRACTICES

As technology has advanced, law enforcement officials and lawmakers have recognized the potential advantages of having a database of DNA samples in order to solve crimes.²⁰ Consequently, in 1990, the federal government began creating the Combined DNA Index System (“CODIS”), which is a centralized database that is linked to each individual

14. See discussion *infra* Part II.A.

15. See discussion *infra* Part II.B.

16. See discussion *infra* Part II.C.

17. See discussion *infra* Part III.A.

18. See discussion *infra* Part III.B.

19. See discussion *infra* Part IV.

20. *The FBI and DNA, Part I*, FBI (Nov. 23, 2011), http://www.fbi.gov/news/stories/2011/november/dna_112311; see Ashley Eiler, Note, *Arrested Development: Reforming the Federal All-Arrestee DNA Collection Statute to Comply with the Fourth Amendment*, 79 GEO. WASH. L. REV. 1201, 1204 (2011) (stating that DNA allows the police to link a suspect to a crime without any other evidence or eyewitnesses). A national DNA database system was created when the FBI realized the potential for using DNA for solving crimes, which could not be solved any other way, by comparing DNA profiles. *The FBI and DNA, Part I, supra*.

state's DNA database.²¹ The DNA Identification Act of 1994 gave the Federal Bureau of Investigation ("FBI") the authority to create and use a national DNA database.²² In 2000, Congress passed a law which allowed the collection of DNA from individuals who had been convicted of certain crimes.²³ In recent years, the federal government and many states have expanded the types of individuals from whom DNA samples can be collected.²⁴ The categories of persons subject to DNA collection have grown from those convicted of felonies to those persons who have merely been arrested.²⁵ The DNA Fingerprint Act of 2005, which was a part of the popular Violence Against Women and Department of Justice Reauthorization Act of 2005, amended the previous law allowing the federal government to collect a DNA sample not only from a person who has been convicted, but also from a person who has merely been arrested.²⁶

21. John D. Biancamano, Note, *Arresting DNA: The Evolving Nature of DNA Collection Statutes and Their Fourth Amendment Justifications*, 70 OHIO ST. L.J. 619, 625 (2009); *CODIS and NDIS Fact Sheet*, FBI, <http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet> (last visited Oct. 4, 2012). CODIS was designed to compare a DNA profile with all the DNA records in the database. *CODIS and NDIS Fact Sheet, supra*. CODIS now has different indexes, one of which is specifically for DNA collected from arrestees. Biancamano, *supra*. The other indexes are for persons who have been convicted, missing persons, and unidentified remains. *Id.* In 2007, the database contained over 5.2 million DNA profiles; however, the number of profiles from arrestees' DNA was not given. *Id.*

22. DNA Identification Act of 1994, 42 U.S.C. § 14132 (2006).

23. See DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, § 3, 114 Stat. 2728 (codified as amended at 42 U.S.C. § 14135a); SHELDON KRIMSKY & TANIA SIMONCELLI, *GENETIC JUSTICE: DNA DATA BANKS, CRIMINAL INVESTIGATIONS, AND CIVIL LIBERTIES* 33 tbl.2.1 (2011) (listing crimes in which persons would be subject to DNA collection under the DNA Analysis Backlog Elimination Act of 2000). A person convicted of murder, voluntary manslaughter, sexual abuse, child abuse, kidnapping, and offenses involving burglary or robbery would have to provide the police with a DNA sample under the statute. KRIMSKY & SIMONCELLI, *supra*.

24. ANNA C. HENNING, CONG. RESEARCH SERV., R40077, *COMPULSORY DNA COLLECTION: A FOURTH AMENDMENT ANALYSIS* 7 (2010), available at <http://www.fas.org/spp/crs/misc/R40077.pdf>; see 151 CONG. REC. S13756 (daily ed. Dec. 16, 2005) (statement of Sen. Kyl) (stating that the DNA Fingerprint Act will help police apprehend criminals who otherwise would never get caught by including the DNA profiles of arrestees in the DNA database). The DNA Fingerprint act makes it possible to create an all arrestee DNA database by eliminating federal prohibitions against this. 151 CONG. REC. S13757. According to Senator Kyl, "the creation of a comprehensive, robust database . . . will make it possible to catch serial rapists and murderers before they commit more crimes." *Id.* at S13756.

25. See HENNING, *supra* note 24, at 1 (stating that federal and state statutes now authorize the compulsory collection of DNA from arrestees that have not been convicted); KRIMSKY & SIMONCELLI, *supra* note 23, at 32 (explaining that the DNA Analysis Backlog Elimination Act also required DNA samples to be taken from persons on probation or parole for felonies).

26. See DNA Fingerprint Act of 2005, 42 U.S.C. § 14135a (2006); KRIMSKY & SIMONCELLI, *supra* note 23, at 34. This amendment to the prior law was introduced by Senator Jon Kyl from Arizona. KRIMSKY & SIMONCELLI, *supra* note 23, at 34. The text of the statute reads:

The Attorney General may, as prescribed by the Attorney General in regulation,

The states have also expanded their DNA collection laws.²⁷ Today, every state has authorized the collection of DNA samples from persons who have been convicted of felonies.²⁸ Moreover, in the past three years, the number of states that allow the collection of DNA samples from arrestees has nearly doubled.²⁹ Approximately twenty-four states, along with the federal government, authorize the collection of DNA samples from individuals who have only been arrested for a crime.³⁰ Several rationales are cited in support of this practice.³¹ Legislators contend that DNA collection has helped solve cases, exonerate innocently convicted individuals, and is equivalent to modern fingerprinting.³² However, the benefits of this practice are questionable.³³ For example, in 2011, Maryland collected over 10,000 DNA samples from individuals that had been arrested even before they were ever convicted.³⁴ Less than ten of these samples collected have resulted in a conviction.³⁵

The collection of DNA typically involves a buccal or saliva swab of the arrestee's cheeks.³⁶ In the past, DNA samples could only be collected by taking blood from the person; however, due to technological advances, blood sampling is no longer the most commonly used procedure.³⁷ A saliva swab of a person's cheeks requires the insertion of a device into the

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

42 U.S.C. § 14135a(a)(1)(A).

27. See *infra* text accompanying notes 28–30.

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

29. See Biancamano, *supra* note 21, at 626 (stating that in 2009, fourteen states were requiring DNA collection from arrestees).

30. Editorial, *DNA and the Fourth Amendment*, N.Y. TIMES, Aug. 6, 2012, at A16.

31. See Michael J. Crook, *Sacrificing Liberty For Scrutiny: North Carolina's Unconstitutional Search and Seizures of Arrestee DNA*, 34 CAMPBELL L. REV. 473, 476 (2012).

32. *Id.*

33. See *DNA and the Fourth Amendment*, *supra* note 30, at A16.

34. *Id.*

35. *Id.*

36. DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74,932, 74,935 (Dec. 10, 2008) (to be codified at 28 C.F.R. pt. 28); see, e.g., *People v. Buza*, 129 Cal. Rptr. 3d 753, 756 (Ct. App. 2011) (stating that the DNA sample that was required to be taken from the defendant was through the use of a saliva swab); *King v. State*, 42 A.3d 549, 553 n.5 (Md. 2012) (describing the saliva swab process used in Maryland).

37. 73 Fed. Reg. at 74,935. Previously DNA samples were obtained by drawing blood from the arm. *Id.* Now, if blood samples are still used, it is obtained by a finger prick. *Id.*

person's mouth and the scraping of the inner cheek to collect cells.³⁸ Although, the saliva swab procedure is less invasive than the blood sample, it is still not a completely invasive free procedure, because it requires a foreign object to be inserted into the mouth and the scraping of the inside of the cheeks.³⁹ Once the sample is collected, it is then sent to an FBI laboratory for processing and analysis.⁴⁰

B. COURTS SPLIT OVER CONSTITUTIONALITY

Courts throughout the country have varying opinions about the constitutionality of DNA collection from arrestees who have not yet been convicted of a crime. In 2006, a Minnesota appellate court was one of the first courts to address the issue.⁴¹ In this case, the Minnesota Court of Appeals concluded that probable cause to arrest a person was not equivalent to the necessary probable cause for taking that person's biological specimen.⁴² Moreover, the "privacy interest of a person who has been charged with a criminal offense, but who has not been convicted, is not outweighed by the state's interest in taking a biological specimen from the person for the purpose of DNA analysis. . . ."⁴³ The court of appeals

38. See *King*, 42 A.3d at 553 n.5 ("A buccal swab DNA collection requires the collector to swab up-and-down and rotate a sterile cotton swab on the interior of the cheek in the subject's mouth, with enough pressure to remove cells. This process is repeated on the other cheek with a separate cotton swab."); *FCO Buccal Kit*, FBI, <http://www.fbi.gov/about-us/lab/dna-nuclear/fco-buccal-kit> (last visited Oct. 4, 2012) (explaining the saliva swab process to collect DNA). The collection process as described by the FBI requires the collector to insert the buccal collection device into the arrestee's mouth to soak up saliva in the mouth. *FCO Buccal Kit*, *supra*. The device should be run along the gum line, under the tongue, and around the cheek fold line. *Id.* Then, the device is used to swab the inside of the cheek for at least 15 seconds. *Id.* This process is repeated again for the other cheek. *Id.*

39. Brian Smith, *Rinse, Swab or Spit – What's the Real Source of DNA in Saliva?*, THE GENETIC LINK (Mar. 31, 2010, 10:00 AM), <http://blog.dnagenotek.com/blogdnagenotekcom/bid/35944/Rinse-Swab-or-Spit-What-s-the-Real-Source-of-DNA-in-Saliva>; see *People v. More*, 764 N.E.2d 967, 969 (N.Y. 2002) (comparing body cavity searches to blood tests). Although a body cavity search may be considered less intrusive than a blood test, body cavity searches are still invasive and degrading. *More*, 764 N.E.2d at 669. A warrant is still required for this type of search, even if it is clear that evidence will be obtained. *Id.* An example of a non-invasive DNA collection would be spitting into some sort of collection vessel. Smith, *supra*.

40. *FCO Buccal Kit*, *supra* note 38.

41. *In re Welfare of C.T.L.*, 722 N.W.2d 484, 486–87 (Minn. Ct. App. 2006). A juvenile was charged with assault, in violation of section 609.224, Minnesota Statutes. *Id.* at 486. The state moved for an order which would require the juvenile to appear at the sheriff's office for the purpose of taking a DNA sample. *Id.* The juvenile then moved for an order finding that this practice was a violation of the Fourth Amendment and of the Minnesota Constitution. *Id.*

42. *Id.* at 490. Probable cause for a search requires "a fair probability that contraband or evidence of a crime be found in a particular place." *Id.* (quoting *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995)).

43. *Id.* at 492.

reasoned that arrestees do not have a reduced expectation of privacy, unlike persons who have already been convicted of a crime.⁴⁴ In the end, the court decided that the Minnesota statute was a violation of the Fourth Amendment.⁴⁵

In California, an appellate court also held that the collection of DNA from felony arrestees violated their Fourth Amendment rights.⁴⁶ According to this court, the California statute allows for a search of a person without a warrant and without any suspicion that the person has committed any other crime other than the one for which the person was arrested.⁴⁷ Because an arrestee has privacy rights more like an ordinary citizen than a prisoner or convicted felon, the interest of the government in DNA is problematic.⁴⁸ Although the government has an interest in solving crimes, a search cannot be justified by what turns up as a result of the search.⁴⁹ Therefore, the court found that the provision of the Act, which required arrestees to give DNA samples, was unconstitutional.⁵⁰

A more recent example occurred in 2012 when the Court of Appeals of Maryland held that the provision of the Maryland statute,⁵¹ which authorized the collection of DNA samples from arrestees, violated the Fourth Amendment.⁵² The Maryland court, similar to the court in Minnesota, reasoned that “King’s expectation of privacy is greater than the State’s purported interest”⁵³ in resolving other crimes and agreed that the

44. Biancamano, *supra* note 21, at 649.

45. *C.T.L.*, 722 N.W.2d. at 492.

46. *People v. Buza*, 129 Cal. Rptr. 3d 753, 783 (Ct. App. 2011). The defendant, Mark Buza, was arrested after being suspected of lighting a police car on fire. *Id.* at 755. After he was arrested and taken to the county jail, but before being seen by any judge, the defendant was required to give a DNA sample, and he refused. *Id.* at 756. Subsequently, he was charged with a misdemeanor for failing to provide the DNA sample. *Id.*

47. *Id.* at 777.

48. *Id.* at 782–83.

49. *Id.* at 783 (quoting *People v. Brown*, 290 P.2d 528 (Cal. 1955)); see *Haskell v. Harris*, 669 F.3d 1049, 1076 (9th Cir. 2012) (Fletcher, J., dissenting) (concluding that collecting DNA from arrestees when there is no suspicion of a crime that the DNA may help solve is unconstitutional).

50. *Buza*, 129 Cal. Rptr. 3d at 753.

51. Maryland DNA Collection Act, MD. CODE ANN., PUB. SAFETY § 2-504(a)(3)(i) (West 2012) (“In accordance with regulations adopted under this subtitle, a DNA sample shall be collected from an individual who is charged with: 1. a crime of violence or an attempt to commit a crime of violence; or 2. burglary or an attempt to commit burglary.”).

52. *King v. State*, 42 A.3d 549, 602 (Md. 2012). In 2009, King was arrested for assault and a DNA sample was taken on the day of his arrest. *Id.* at 556. This DNA sample matched a sample which had been collected in a 2003 rape case that remained unresolved. *Id.* at 557. As a result of the match, King was indicted for first-degree rape, although the DNA match was the only evidence to support the charges. *Id.*

53. *Id.* at 556.

probable cause to arrest a person is not sufficient probable cause to obtain a DNA sample without a warrant.⁵⁴

Other courts, however, have made conflicting findings to the ones in Minnesota and Maryland. For instance, the Ninth Circuit, in *Haskell v. Harris*,⁵⁵ ruled that California's DNA and Forensic Identification Data Base and Data Bank Act of 1998⁵⁶ did not violate the Fourth Amendment.⁵⁷ According to the court of appeals, the DNA samples are "substantially indistinguishable from traditional fingerprinting" and because fingerprinting has been found to be constitutional, DNA sampling does not present any privacy issues for the arrestees.⁵⁸ The court evaluated the issue using a totality of the circumstances test in order to balance the arrestee's privacy rights and the state's need for the DNA samples.⁵⁹

The Third Circuit has also declined to find that DNA collection from arrestees is a violation of the Fourth Amendment in *United States v. Mitchell*.⁶⁰ The court also used a totality of the circumstances test to determine if the privacy rights of the arrestee outweighed the legitimate government interest in DNA collection. It concluded that the government interest outweighed the arrestee's interest.⁶¹ The possible misuse of the personal information contained in a person's DNA, which was a concern of

54. *Id.* at 597–98.

55. *Haskell v. Harris*, 669 F.3d 1049, 1049 (9th Cir. 2012); *see also Haskell v. Brown*, 677 F. Supp. 2d 1187, 1192 (N.D. Cal. 2009). Lily Haskell was arrested during a protest for trying to free a prisoner. *Haskell*, 677 F. Supp. 2d at 1192. In jail she was required to give a DNA sample although she was never charged with any crime. *Id.* The plaintiffs sued the attorney general and requested an injunction on the basis that the DNA collection was a violation of the Fourth Amendment. *Haskell*, 669 F.3d at 1050.

56. CAL. PENAL CODE § 296 (West 2004); 1998 Cal. Legis. Serv. Ch. 696 (West 1998). This act, passed in 1998, required all persons convicted of certain offenses to submit DNA samples. 1998 Cal. Legis. Serv. Ch. 696. In 2004, the law was amended to include any adults who had been arrested or charged with a felony, and required these persons to submit the sample before being released from custody. CAL. PENAL CODE § 296(A)(2)(C). The 2004 amendment, effective January 1, 2010, included any adult arrested or charged with a felony, and required that the adult submit a sample before being released from custody. *Id.*

57. *Haskell*, 669 F.3d at 1065.

58. *Id.* at 1059–60.

59. *Id.* at 1053–54.

60. *United States v. Mitchell*, 652 F.3d 387, 390 (3d Cir. 2011). Ruben Mitchell was arrested and charged with attempted possession of cocaine with the intent to distribute; after he was arrested, the government attempted to collect a DNA sample, and Mitchell refused on the basis that it violated his Fourth Amendment rights. *Id.* According to the district court, DNA had the potential to reveal private information about an arrestee and therefore, a DNA sample was not equivalent to a fingerprint. *Id.* (citing *United States v. Mitchell*, 681 F. Supp. 2d 597, 608–09 (W.D. Pa. 2009)).

61. *Id.* at 413. This test balances the degree to which the search intrudes on the arrestee's privacy and the degree to which the search is needed for a government interest. *Id.* at 402.

the arrestee, was too speculative to outweigh a legitimate government interest.⁶² According to the court, the act of collecting the DNA was only a minimal intrusion.⁶³ Moreover, the probable cause previously obtained to arrest an individual gives the state a legitimate interest in that arrestee's DNA; thus, the law was found to be constitutional.⁶⁴

Interestingly in 2012, the Supreme Court of Arizona held that the actual collection of cells for the DNA sample was not a violation of the Fourth Amendment, but that the extraction of DNA from the cells was a violation.⁶⁵ The court reasoned that the government had a legitimate interest in obtaining the cells before an arrestee is convicted because if the arrestee failed to appear in court, any attempt to obtain the identity would have been lost.⁶⁶ The taking of the cells, according to this court, was constitutional because the cells alone did not reveal any private information about the arrestee.⁶⁷ This procedure was essentially the same as the fingerprinting process.⁶⁸ However, the use of the DNA from those cells is an unconstitutional search because the government's interest is not strong enough to justify taking private information from the cells to create the DNA profile.⁶⁹

C. DNA VERSUS FINGERPRINTS

Courts and law enforcement officials have continuously compared the collection of DNA from individuals who have been arrested to the collection of fingerprints, which can identify the person to whom the DNA belongs but reveal nothing else about that person.⁷⁰ Fingerprints are merely a two dimensional depiction of a person's identity.⁷¹ In addition, the

62. *Id.* at 408.

63. *Id.* at 404.

64. *Id.*

65. *Mario W. v. Kaipio*, 281 P.3d 476, 482–83 (2012). Seven juveniles were required to submit buccal cells or bodily fluids for DNA testing within five days of being charged. *Id.* at 478. The DNA profiles would then be entered into both the Arizona DNA Identification system and CODIS. *Id.*

66. *Id.* at 482.

67. *Id.* at 481.

68. *Id.*

69. *Id.* at 483.

70. See KRIMSKY & SIMONCELLI, *supra* note 23, at 234 (explaining that law enforcement officials have referred to DNA profiles as “DNA fingerprint” and argued that the profiles will not disclose any other facts about an individual). See generally *Haskell v. Harris*, 669 F.3d 1049, 1059–60 (9th Cir. 2012) (Fletcher, W., dissenting) (finding that the DNA samples collected are indistinguishable from traditional fingerprinting); *United States v. Mitchell*, 652 F.3d 387, 410 (3d Cir. 2011) (finding that DNA is analogous to the twenty-first century fingerprints).

71. KRIMSKY & SIMONCELLI, *supra* note 23, at 235 box 14.2.

collection of a fingerprint does not involve any sort of physical intrusion, unlike DNA collection, because fingerprints are collected from an imprint of the ridges on the skin exposed to ink and placed on paper.⁷² Fingerprinting has been established as a law enforcement tool used to identify persons who have been arrested, and courts have upheld the practice of collecting fingerprints from a person for the purpose of identification.⁷³ However, there are limitations to the collection of fingerprints. For example, fingerprints taken for investigative purposes without any probable cause are not allowed.⁷⁴ In general, courts have held that law enforcement officers must first have probable cause to use a fingerprint that will connect a person with a particular crime.⁷⁵

In *United States v. Mitchell*, the court asserted that there were two components of a person's identity: who the person is and what the person has done.⁷⁶ The second component includes the crimes both solved and unsolved that the person has committed.⁷⁷ Using these two components as the definition of identity, the collection of DNA would fulfill the government's interest in identifying an arrestee because a mere fingerprint would not reveal the crimes that a person has committed, while DNA could reveal other crimes committed.⁷⁸ However, this collection of DNA is equivalent to the collection of fingerprints in an investigative manner, which would result in the assumption that the collection of DNA is prohibited.⁷⁹ In *People v. Buza*, the court reasoned that the nature of the

72. See *King v. State*, 42 A.3d 549, 576 (Md. 2012) (deciding that the analogy between fingerprints and DNA is wrong because fingerprints can easily determine a person's identity without any physical intrusion which is the difference between fingerprints and DNA). But see *supra* notes 38–39 and accompanying text (explaining that the collection of a DNA sample is invasive because it requires the insertion of a device into the mouth and the scraping of the cheeks). The court noted that fingerprinting consists of imprints of ridges on the skin made when a person's finger is exposed to ink and pressed on paper. *King*, 42 A.3d at 576. This fingerprinting process is very different from the procedure employed to take a DNA sample. See *supra* note 38 and accompanying text (describing the DNA collection process).

73. *Haskell*, 669 F.3d at 1071.

74. *Id.*; see also *King*, 42 A.3d at 569–70 (stating that fingerprints taken for investigative purposes are used to link the person to a crime to which the person is not yet connected).

75. KRIMSKY & SIMONCELLI, *supra* note 23, at 50.

76. *United States v. Mitchell*, 652 F.3d 387, 414 (3d Cir. 2011) (quoting *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1199 (N.D. Cal. 2009)).

77. *Id.*

78. See KRIMSKY & SIMONCELLI, *supra* note 23, at 234–35 (explaining that DNA reveals much more information than fingerprints could possibly reveal).

79. See *King*, 42 A.3d at 570 (comparing DNA collection and fingerprinting for investigatory purposes). When DNA is collected it takes time to process and fingerprints are also needed for the analysis in order to correctly identify a person; this leads to the conclusion that the DNA is not intended for identification. *Id.*

information acquired from that second component implies that there is a purpose of investigation.⁸⁰

DNA, unlike a fingerprint, is equivalent to a personal medical record.⁸¹ JUSTICE, a law reform organization, has described genetic information as “the most intimate medical data an individual may possess.”⁸² DNA can reveal whether a person is susceptible to certain diseases, such as Alzheimer’s disease, or whether the person carries a specific gene.⁸³ Moreover, another monumental difference between DNA and fingerprints is that DNA analysis can “implicat[e] biological relatives of the [arrestee], whose profiles, while not identical to the [arrestee’s] profile . . . may be similar.”⁸⁴ DNA and fingerprints are not analogous, and

80. *Id.* at 569–70 (citing *People v. Buza*, 129 Cal. Rptr. 3d 753, 771–772 (Ct. App. 2011)).

81. KRIMSKY & SIMONCELLI, *supra* note 23, at 248; see Brief for Appellee at 43–44, *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011) (No. 09-4718), 2010 WL 1535117, at *33–34 (arguing that the fingerprinting process cannot be equated to DNA collection); *infra* text accompanying note 82; see also *HIPAA Basics: Medical Privacy in the Electronic Age*, PRIVACY RIGHTS CLEARINGHOUSE (April 2012), <https://www.privacyrights.org/fs/fs8a-hipaa.htm> (explaining how laws protect patients’ medical records). According to the district court in *United States v. Mitchell*, DNA and fingerprints are not the same because DNA contains “inherently private information.” Brief for Appellee, *supra*. The Health Insurance Portability and Accountability Act (“HIPAA”) was passed by Congress in 1996. *HIPAA Basics: Privacy in the Electronic Age, supra*. HIPAA grew out of the need to protect the private nature of medical information, and it sets a standard for the way medical information is accessed. *Id.* It covers all information about mental and physical health, including any genetic information, such as genetic history or results of genetic testing. *Id.* If medical records are given the privacy protections that people expect because they contain sensitive information then DNA should also be kept private because it contains information that is just as sensitive as that in medical records. See *infra* text accompanying note 82.

82. HUMAN GENETICS COMM’N., NOTHING TO HIDE, NOTHING TO FEAR? BALANCING INDIVIDUAL RIGHTS AND THE PUBLIC INTEREST IN THE GOVERNANCE AND USE OF THE NATIONAL DNA DATABASE 45 (November 2009), available at <http://www.statewatch.org/news/2009/nov/uk-dna-human-genetics-commission.pdf>.

83. See Kelly Lowenberg, *Applying the Fourth Amendment When DNA Collected for One Purpose Is Tested for Another*, 79 U. CIN. L. REV. 1289, 1295–96 (2011) (discussing how DNA contains a person’s phenotypic information); cf. KRIMSKY & SIMONCELLI, *supra* note 23, at 235 (arguing that the analogy between fingerprints and DNA is flawed because fingerprints do not reveal a person’s likelihood of developing Alzheimer’s disease or breast cancer and if that person carries specific genes). While some of the phenotypical information contained in genes is easy to observe, such as eye color, other kinds of information may not be known by the person. Lowenberg, *supra* at 1296. Genes within DNA can predict how likely that person is to develop Huntington’s disease, Alzheimer’s disease, or Lynch syndrome. *Id.* In addition, DNA can also reveal a person’s genetic risk for psychiatric disorders including alcoholism and schizophrenia. *Id.* at 1297.

84. Jean E. McEwen, *Storing Genes to Solve Crimes: Legal, Ethical and Public Policy Implications*, in STORED TISSUE SAMPLES: ETHICAL, LEGAL, AND PUBLIC POLICY IMPLICATIONS 317 (Robert F. Weir ed., 1998); see Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 297–98 (2010) (describing the mechanics of DNA familial searches in a DNA database); see also Jeffrey Rosen, *Genetic Surveillance for All?*, SLATE

should not be treated alike legally.⁸⁵ DNA collection is subject to Fourth Amendment analysis to determine its validity because there are integral differences from fingerprinting.

III. DNA AND THE FOURTH AMENDMENT

A. OVERVIEW OF FOURTH AMENDMENT JURISPRUDENCE

The Fourth Amendment of the Constitution provides that people have the right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”⁸⁶ It also provides that any warrants for searches or seizures must only be issued if probable cause to do so has been shown.⁸⁷ Under the original interpretation of this amendment, a physical trespass was considered to be a violation of a person’s constitutional rights.⁸⁸ One of the early Fourth Amendment cases,

MAGAZINE (March 17, 2009, 4:52 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2009/03/genetic_surveillance_for_all.html (discussing the FBI’s considerations of familial searches of DNA in CODIS). A familial search is used when a DNA database is searched to find a relative of the person who committed the crime rather than the actual offender. Murphy, *supra* at 297. There are two types of familial searches: inadvertent partial matching, which occurs when police enter DNA into the database in search of the exact match but only find partial matches, and intentional familial searches, which occur when police search the database specifically to find potential partial matches. *Id.* at 299–30. For example, in a case where the offender has not been apprehended, but the offender’s DNA was found at the crime scene, that DNA can be entered into the database. McEwen, *supra*. If the offender’s relative has a DNA profile in the database, law enforcement could target the relative, or find the offender because the DNA was similar to a relative’s profile. *Id.* This situation occurred in what became known as the case of the bloody brick, a case from 2003 in England. Rosen, *supra*. A man threw a brick off a bridge and killed a truck driver that was driving on the road below the bridge. *Id.* The police took the DNA from the brick and searched the country’s DNA database for a similar match. *Id.* The closest partial match was the brother of the man who threw the brick and, because of his brother’s DNA in the database, the man was caught and convicted. *Id.*

85. See *King*, 42 A.3d at 595 (noting the differences between fingerprinting and DNA collection). *Contra* KRIMSKY & SIMONCELLI, *supra* note 23, at 247 (explaining that Virginia has upheld the collection of DNA from arrestees because, according to the Virginia Supreme Court, the collection of DNA and the collection of fingerprints are not different). A fingerprint is collected without any sort of physical intrusion to the person because it is just an imprint of the ridges on the person’s finger. See *King*, 42 A.3d at 595. DNA collection, however, requires a saliva swab of the interior of a person’s cheek or a blood sample. *Id.* Although minimal, this is a physical intrusion that does not occur when simply getting a fingerprint. *Id.*

86. U.S. CONST. amend. IV.

87. *Id.*

88. Jeremy M. Miller, *Essay on the Pragmatism of Original Intent: Returning to the Trespass Standard of the Fourth Amendment*, 52-SEP ORANGE COUNTY LAWYER 10, 10 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1803557; see *Silverman v. United States*, 365 U.S. 505, 510–11 (1961) (noting that the difference between this case and *Olmstead v. United States* was that here there was a physical invasion into Silverman’s property, while in *Olmstead* there was none); *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (finding

Olmstead v. United States, found that the wiretapping of phone conversations was not a violation of the Fourth Amendment because there was no trespass committed by the police.⁸⁹ According to the Supreme Court, a violation would have to entail some sort of physical invasion.⁹⁰ This physical invasion necessary to constitute a Fourth Amendment violation has also been applied to a person's body, notably in *Schmerber v. California*.⁹¹

However, the decision of whether an alleged physical trespass is sufficient to be a physical intrusion was debated by the courts.⁹² The Court in some cases decided that even a minimal physical invasion was a trespass resulting in Fourth Amendment protection.⁹³ In *Clinton v. Virginia*, the Court reversed a decision by the Virginia Supreme Court and found that a small listening device that was stuck in an adjoining wall was a physical trespass and thus, a violation of the Fourth Amendment.⁹⁴ The device did not completely penetrate the wall and was compared to a thumbtack being

that a wiretap on a phone line was not a physical intrusion and as a result it was not a search under the Fourth Amendment).

89. *Olmstead*, 277 U.S. at 466. In this case, *Olmstead* was charged with conspiracy to violate the National Prohibition Act by importing and selling alcohol. *Id.* at 455. The information which led to this charge was obtained through wiretaps on the phone lines used by *Olmstead* and the other conspirators in their homes and office. *Id.* at 456–57. There was no physical invasion of *Olmstead's* property because the wiretaps on the phone lines were placed on the lines in the streets near his house. *Id.* at 457.

90. *Id.* at 466.

91. *Schmerber v. California*, 384 U.S. 757, 767 (1966). *Schmerber* was arrested at a hospital where he was taken after getting into a car accident. *Id.* at 758. He had been driving while intoxicated, and this was determined by a blood test taken at the hospital, despite *Schmerber's* refusal. *Id.* at 758–59. According to the Court, the taking of a blood sample fell under the applicability of the Fourth Amendment; although, in this case there was no violation of constitutional rights because there was probable cause to take the blood sample. *See id.* at 767, 771 (finding there was no time for police to obtain a warrant because the accused had to be taken to the hospital).

92. Compare *Clinton v. Commonwealth*, 130 S.E.2d 437, 442 (Va. 1963), *rev'd per curiam*, 377 U.S. 158, 158 (1964) (finding a thumbtack-like listening device stuck in a wall was a trespass in violation of the Fourth Amendment), with *Goldman v. United States*, 316 U.S. 129, 131–33, 135 (1942) (holding there was no Fourth Amendment violation when police placed a listening detector on the wall of the defendant's office), and *Olmstead*, 277 U.S. at 466 (holding there was no trespass when police wiretapped phone lines that were located on the street near the defendant's home).

93. *See Clinton v. Virginia*, 377 U.S. 158, 158 (finding that a small listening device "stuck" in an adjoining wall was a sufficient intrusion to constitute a trespass with Fourth Amendment protection), *rev'g* 130 S.E.2d 437 (Va. 1963).

94. *Id.*

stuck in the wall.⁹⁵ Still, the Court reversed the prior decision that there was no physical intrusion and found that there was a trespass.⁹⁶

The Supreme Court continued to use a trespass test when determining violations of the Fourth Amendment until its decision in *Katz v. United States*.⁹⁷ In *Katz*, the Court extended the scope of the Fourth Amendment to go beyond just physical intrusions.⁹⁸ According to the Court, “the Fourth Amendment protects people, not places.”⁹⁹ This made it clear that the Court was announcing a shift from the need of a physical intrusion in order to find a violation of the Constitution.¹⁰⁰ Instead, after *Katz*, a two-part test was used to classify an unreasonable search under the Fourth Amendment: (1) whether the person has an actual expectation of privacy; and (2) whether society recognizes that expectation as reasonable.¹⁰¹

In 2001, the Supreme Court decided the case of *Kyllo v. United States*, where a thermal imaging device was used to determine that a homeowner was growing marijuana plants within his home without any sort of physical intrusion into the home.¹⁰² According to the Court, obtaining information about the interior of a home without any sort of physical trespass was a search under the Fourth Amendment.¹⁰³ The government argued that the thermal imager could only detect heat that was

95. *Clinton*, 130 S.E.2d at 442.

96. *Clinton*, 377 U.S. at 158, *rev'g* 130 S.E.2d 437 (Va. 1963).

97. *See Katz v. United States*, 389 U.S. 347, 351 (1967) (explaining that what a person seeks to keep private may be protected by the Fourth Amendment); *infra* text accompanying notes 98–101.

98. KRIMSKY & SIMONCELLI, *supra* note 23, at 242; *see* Kevin Emas & Tamara Pallas, *United States v. Jones: Does Katz Still Have Nine Lives?*, 24 ST. THOMAS L. REV. 116, 125–28 (2012) (arguing that *Katz* significantly changed the test to determine a constitutional violation because this case discarded the use of a trespass or physical intrusion test for the first time); *see also* Biancamano, *supra* note 21, at 630 (explaining that Justice Harlan’s concurring opinion provides the modern test to determine whether a search violates the Fourth Amendment).

99. *Katz*, 389 U.S. at 351.

100. *See id.* at 353 (finding that because the Fourth Amendment is meant to protect people and not places, a violation of the amendment does not depend on whether a physical intrusion actually occurred).

101. *Id.* at 361 (Harlan, J., concurring); *see also* Emas & Pallas, *supra* note 98, at 128–29 (explaining that, after *Katz*, courts could find an illegal search even without the occurrence of a trespass).

102. *Kyllo v. United States*, 533 U.S. 27, 29 (2001). Danny Kyllo’s home was part of a triplex in Oregon. *Id.* Federal agents used a thermal imaging scanner to determine the amount of heat emanating from Kyllo’s home. *Id.* Because heat lamps are used to grow marijuana indoors, a high amount of heat would be indicative of this activity. *Id.* The agents were across the street when they conducted the scan that only took a few minutes. *Id.* at 30. The scan revealed that the roof over the garage and a sidewall were warmer than other parts of the house and the other homes in the triplex. *Id.*

103. *Id.* at 34.

coming off the walls and could not see inside the home, but the Court rejected this argument.¹⁰⁴ Because the federal agents were able to obtain information about Kyllo's home that otherwise would not have been available without a physical intrusion into the home, the use of the thermal imager was a search and it was unreasonable, thus violating the Fourth Amendment.¹⁰⁵ An important implication of this case was that the Court demonstrated that, even with technological advances, the government cannot invade a person's home, even if there is no physical intrusion.¹⁰⁶

In January of 2012, the Supreme Court issued its opinion in *United States v. Jones*, which reverted to the common law trespass analysis for Fourth Amendment violations.¹⁰⁷ In the Court's opinion, written by Justice Antonin Scalia, "Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'"¹⁰⁸ Under the reasoning used in this case, a GPS on a car was a search because it consisted of a trespass to the owner's property, which was a protection intended by the Framers of the Constitution.¹⁰⁹ The Court held that a physical trespass test was added to the *Katz* test: first, a court would ask if there was a physical trespass, and if there was no trespass, then the *Katz* test would be used to determine if there was an unreasonable search under the Fourth Amendment.¹¹⁰

B. DNA COLLECTION UPON ARREST AS A SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT

The first step in analyzing the constitutionality of the collection of DNA from arrestees is to determine whether the practice is in fact a search or seizure protected by the Fourth Amendment.¹¹¹ The practice of

104. *Id.* at 35.

105. *Id.* at 40.

106. See Michele M. Jochner, *Privacy Versus Cyber-Age Police Investigation – The Fourth Amendment in Flux*, 90 ILL. B.J. 70, 75 (2002) (explaining that the Court created a broad rule regarding technologically advanced investigative tools and did not establish whether this only applied to searches of the home).

107. See *United States v. Jones*, 132 S. Ct. 945, 952 (2012) (discussing that the test set forth in *Katz* added to the common law trespass test); *supra* text accompanying notes 12–13.

108. *Jones*, 132 S. Ct. at 950 (alteration in original) (quoting *Kyllo*, 533 U.S. at 34).

109. *Id.*

110. *Id.* at 952.

111. See KRIMSKY & SIMONCELLI, *supra* note 23, at 242 (explaining that courts must first ask whether the DNA collection is a search or whether it is a seizure and then the court must determine its reasonableness in order for Fourth Amendment protection to apply); D.H. Kaye, *Who Needs Special Needs? On the Constitutionality of Collecting DNA and Other Biometric Data from Arrestees*, 34 J.L. MED. & ETHICS 188, 189 (2006) (enumerating the three factors used

collecting a DNA sample from a person yields two searches.¹¹² The first search occurs when the cells containing DNA are physically collected from a person, and the second search happens when that DNA profile is created and analyzed through the DNA database for possible matches.¹¹³

The taking of DNA is considered a search because DNA is something that an arrestee, or any person, considers to be private.¹¹⁴ Most medical professionals agree that a person's DNA is a private matter.¹¹⁵ The American Society of Human Genetics has argued that "genetic information, like all medical information, should be protected by the legal and ethical principle of confidentiality."¹¹⁶ In the past, the Supreme Court has held that for police to take a biological specimen from a person, the police must have a warrant or probable cause.¹¹⁷ "[E]ven for the most minor intrusion, the

to determine whether DNA collection should be considered a search: public exposure, bodily intrusion, and information extracted).

112. See *infra* text accompanying note 113.

113. *United States v. Mitchell*, 652 F.3d 387, 406–07 (3d Cir. 2011); *Mario W. v. Kaipio*, 281 P.3d 476, 480–81 (Ariz. 2012); see KRIMSKY & SIMONCELLI, *supra* note 23, at 244 (discussing that courts have generally considered the physical taking of DNA to be a search but fewer courts have been concerned with the searches of DNA profiles once they are in the database); Eiler, *supra* note 20, at 1209 (explaining that DNA collection procedures constitute multiple searches under the Fourth Amendment). Including a DNA profile in CODIS is a search because it "results in multiple, recurrent searches each time a law enforcement official accesses the database to conduct a search of the DNA profiles it contains." Eiler, *supra* note 20, at 1209.

114. See *Crook*, *supra* note 31, at 488 (arguing the collection of DNA from arrestees is a search because people have an expectation of privacy in their DNA).

115. See KRIMSKY & SIMONCELLI, *supra* note 23, at 113 (claiming there is a "growing consensus," which is nearly unanimous amongst medical professionals, that DNA is considered a private matter).

116. *Id.* at 248; see *Genetic Testing*, WORLD HEALTH ORG., <http://www.who.int/genomics/elsi/gentesting/en/index.html> (last visited Oct. 17, 2012) (stating that genetic testing may need to be more safeguarded than other confidential medical information); *supra* note 81 and accompanying text (describing how HIPAA protects the confidential information contained within a person's medical record including genetic information).

117. See *Schmerber v. California*, 384 U.S. 757, 770 (1966) (discussing that, when there is a physical intrusion of an arrestee's person, the police officer needs a warrant just as if the officer was physically intruding in a person's home, but in this case there was probable cause for the intrusion, which justified the search); *Crook*, *supra* note 31, at 488 (explaining that in *Schmerber v. California*, the Court found that the Fourth Amendment protects arrestees from searches that are merely for the purpose of possibly finding desired evidence). In *Schmerber*, the Court found that the probable cause to arrest the defendant for driving while intoxicated was sufficient to establish probable cause to take a blood sample to determine his blood alcohol level. *Schmerber*, 384 U.S. at 770. However, the judgment in this case was based on the specific facts and the fact that "the Constitution does not forbid the States [from performing] minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." *Id.* at 772.

law is clear that searches and seizures for general law-enforcement purposes must be supported by some level of individualized suspicion.”¹¹⁸

The act of collecting DNA from an arrestee typically involves a saliva swab of the person’s cheeks.¹¹⁹ While some courts have described this act as a minimal intrusion, which should not be any cause for concern, there are some authorities that tend to suggest a saliva swab is actually physically intrusive.¹²⁰ One of the areas specifically protected by the Fourth Amendment is the person.¹²¹ People have a constitutional right to be free from unreasonable searches of their persons, and any sort of physical invasion of a person must be authorized by a warrant upon a showing of probable cause.¹²² This procedure, without consent or probable cause, would be a trespass on the person.¹²³ According to its definition, a trespass involves an intentional contact to a person.¹²⁴ In the case of collecting DNA from arrestees, the government intends to have the contact and does have physical contact with the arrestees in order to extract the cells for the DNA samples.¹²⁵ Although the intrusion may be considered minimal, it

118. KRIMSKY & SIMONCELLI, *supra* note 23, at 244; *see also* King v. State, 42 A.3d 549, 580 (Md. 2012) (arguing that taking King’s DNA for identification was not the probable cause needed to charge him with another unrelated crime); STANDARDS FOR CRIMINAL JUSTICE: DNA EVIDENCE Standard 16-2.2 (2006) (setting standards for DNA collection from a person’s body). *But cf. Mitchell*, 652 F.3d at 413 (explaining that an arrestee’s privacy interest is not outweighed by government interest). According to the ABA Standards, DNA should not be collected from a person’s body without that person’s consent. STANDARDS FOR CRIMINAL JUSTICE: DNA EVIDENCE Standard 16-2.2(a). Otherwise, a search warrant is needed to allow for the collection. *Id.* If the person is suspected of committing a crime, then the following factors must be shown in order to get a warrant: probable cause that a serious crime was committed, probable cause that the person committed the crime, and that the DNA will assist in showing that the person committed the crime. *Id.* at Standard 16-2.2(b)(i). These standards demonstrate that collecting an arrestee’s DNA is allowed only for the purpose of showing that the arrestee committed that specific crime, and only if it is necessary to do so will the court allow the procedure. *Id.*

119. *See King*, 425 A.3d at 553 (explaining that King’s DNA sample was collected through the use of a buccal swab); *FCO Buccal Kit*, *supra* note 38 (describing the process used to collect a DNA sample); *supra* note 38 and accompanying text (describing the procedure used to collect the buccal cells and saliva with the saliva swab).

120. *See Smith*, *supra* note 39 (describing a saliva swab as a less invasive method of DNA collection than a blood test, but not completely non-invasive). *But see Mitchell*, 652 F.3d at 407 (finding that the act of collecting DNA is only a minimal intrusion that does not strengthen the defendant’s argument against the collection of his DNA).

121. U.S. CONST. amend. IV.

122. *See id.*

123. *See Trespass Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/trespass+?s=t> (last visited Oct. 4, 2012) (defining trespass as “an encroachment or intrusion”); *infra* text accompanying note 124 (defining a trespass on a person).

124. *See BLACK’S LAW DICTIONARY* 1643 (9th ed. 2009) (describing “trespass vi et armis” as a common law cause of action for trespass to a person, including assault and battery).

125. *See supra* notes 38–39 and accompanying text (describing the procedure used to collect a DNA sample, which requires physical contact).

still involves physical contact with the arrestee and the removal of the arrestee's cells.¹²⁶

The inclusion of an arrestee's DNA profile in a DNA database and the analysis of that DNA is also a search under the Fourth Amendment.¹²⁷ The DNA collected from an arrestee, pursuant to DNA collection statutes, is not taken because there is a reasonable suspicion that the arrestee's DNA is essential to solving the crime for which the arrestee was arrested.¹²⁸ Instead, the DNA is collected arbitrarily under the statutes for the purpose of possibly solving another unrelated crime for which there is not probable cause that the arrestee was involved.¹²⁹ The collection of DNA from arrestees and the use of that DNA to find out whether that person committed some other unknown and unrelated crime is analogous to the entrance into people's homes randomly in order to find the person who committed a particular crime.¹³⁰ If the entrance into the home is unconstitutional under the original interpretation of the Fourth Amendment, which applied a trespass test to determine an unreasonable search, the DNA collection would also be an unconstitutional search because it involves a trespass to an area protected by the Fourth Amendment: the person.¹³¹

C. EXCEPTIONS TO FOURTH AMENDMENT PROTECTION DO NOT APPLY TO ARRESTEES

If the collection of DNA is considered a search then why can law enforcement require arrestees to submit to DNA samples without a warrant or probable cause and use them for the benefit of law enforcement purposes? Other industries, such as health insurance, which would also

126. See *supra* notes 38–39 and accompanying text.

127. *United States v. Kincade*, 379 F.3d 813, 873 (9th Cir. 2004) (Kozinski, J., dissenting); Eiler, *supra* note 20, at 1211 (“[E]ach time the analyzed DNA profile is subject to a query within CODIS, that query results in a Fourth Amendment search because of the nature of information available to the law enforcement official accessing the database.”).

128. *Haskell v. Harris*, 669 F.3d 1049, 1075 (9th Cir. 2012) (Fletcher, J., dissenting) (arguing that DNA collected under the California DNA Act is done simply because the person was arrested for a felony and without any suspicion that the arrestee's DNA will be helpful in solving any other crime).

129. See *id.* (“It is uncontested that the law enforcement officials who take the samples have no probable cause (or even reasonable suspicion) that the arrestee has committed another crime.”).

130. See *People v. More*, 764 N.E.2d 967, 969 (N.Y. 2002) (quoting *Schmerber v. California*, 384 U.S. 757, 770 (1966)) (explaining that, except in cases of emergencies, search warrants are required to search a dwelling, so the same must be required to search a person when it involves a physical intrusion).

131. See *supra* text accompanying notes 86–88 (explaining that, under the original interpretation of the Fourth Amendment, searches that involved a trespass were unconstitutional).

benefit from obtaining an individual's DNA, are strictly prohibited from accessing a person's DNA, but law enforcement does not have the same prohibition.¹³² Generally, DNA collection from arrestees has mostly been upheld based on two exceptions to the Fourth Amendment: the "totality of the circumstances" and "the special needs" exceptions.¹³³

The totality of the circumstances test has been used by a majority of the circuit courts.¹³⁴ This test balances the government's interest in obtaining and preserving DNA from an arrestee with the arrestee's privacy interest in his or her DNA.¹³⁵ Only when the government's interest in the DNA outweighs the arrestee's interest can the collection be constitutional.¹³⁶ The special needs exception applies when there is a special need for the search other than a typical law enforcement need.¹³⁷

In *United States v. Kincade*, the Ninth Circuit, relying on the totality of the circumstances test, held that the collection and analysis of a DNA sample from a convicted felon on parole was reasonable and not a violation of the Fourth Amendment even without a suspicion that he had committed any other crimes.¹³⁸ The court concluded that the government's interest in the DNA was to ensure that a parolee was complying with the conditions of his release and to deter him from committing more crimes.¹³⁹ These

132. See KRIMSKY & SIMONCELLI, *supra* note 23, at 227 (discussing how health insurance providers are expressly prohibited by law from accessing a person's DNA or even requesting a sample). According to the authors, "[p]rotection of DNA information in the criminal justice context appears to be operating under a different set of principles than that of health or employment." *Id.*

133. See Eiler, *supra* note 20, at 1212 (discussing that courts have examined DNA collection statutes under the two exceptions to Fourth Amendment protections).

134. *United States v. Mitchell*, 652 F.3d 387, 403 (3d Cir. 2011) ("We and the majority of circuits—the First, Fourth, Fifth, Sixth, Eighth, Ninth, Eleventh, and District of Columbia—have endorsed a totality of the circumstances approach.").

135. Eiler, *supra* note 20, at 1213–15; see also *United States v. Kincade*, 379 F.3d 813, 836 (9th Cir. 2004) (explaining that the totality of the circumstances test balances the degree to which the collection of DNA samples interferes with the privacy of qualified federal offenders with the interest of the public in obtaining and analyzing those samples).

136. Crook, *supra* note 31, at 505; see *Mitchell*, 652 F.3d at 413 (finding that the government's most compelling interest in DNA collection is the identification of arrestees, which is better served by DNA profiles than fingerprints). In *Mitchell*, the Third Circuit found that the collection of DNA from Mitchell after his arrest was constitutional because, using the totality of the circumstances test, the government's interest in identifying arrestees was greater than Mitchell's expectation of privacy in his DNA. *Mitchell*, 652 F.3d at 415–16.

137. See discussion *infra* notes 152–55 and accompanying text.

138. *Kincade*, 379 F.3d at 838–39. Thomas Kincade was convicted of robbing a bank with a firearm and was sentenced to prison and three years of supervised release. *Id.* at 820. After being released from prison on probation, Kincade's probation officer asked him to submit a blood sample pursuant to the DNA Analysis Backlog Elimination Act; Kincade refused and he eventually challenged the constitutionality of the act. *Id.* at 820–21.

139. *Id.* at 838–39.

interests, according to the Ninth Circuit, outweighed the minimal intrusion needed to collect the DNA.¹⁴⁰ Other courts have also held that searches of individuals who have been convicted of crimes and are on some type of supervised release are reasonable under the totality of the circumstances.¹⁴¹

While the arguments used by those courts are valid, they are not analogous to searches of individuals who have merely been arrested and not convicted.¹⁴² Arrestees are not the same as convicted felons, probationers, and parolees because they have different expectations of privacy.¹⁴³ In *Friedman v. Boucher*, a case from Montana, the court found that the collection of DNA from Boucher, who had not yet been convicted, was unconstitutional.¹⁴⁴ According to the court, the “government interests that would offset the expectation of privacy in certain circumstances . . . are not present with pre-trial detainees”¹⁴⁵ A person who has merely been arrested is more like an innocent person rather than a convicted felon.¹⁴⁶ Although courts have noted that the privacy interests of arrestees are greater than the interests of parolees, probationers, and those who have already been convicted, some courts have found that the government’s interest in identifying an arrestee outweighs the privacy interests.¹⁴⁷

140. *Id.* at 839.

141. *See* *Samson v. California*, 547 U.S. 843, 846, 852–53 (2006) (finding a warrantless search of a parolee walking down a street was reasonable under the totality of the circumstances because the governmental interest outweighed the parolee’s expectation of privacy); *United States v. Knights*, 534 U.S. 112, 118–19 (2001) (upholding the warrantless search of a probationer’s apartment because the probation order clearly allowed for those searches, and because the government had a legitimate interest in the rehabilitation of the probationer in order to protect society from future crimes).

142. *See, e.g., Haskell v. Harris*, 669 F.3d 1049, 1078 (9th Cir. 2012) (Fletcher, J., dissenting) (“[W]e have repeatedly recognized that an arrestee has greater privacy interests than someone who has been convicted.”).

143. *See id.* (stating that prior case law has recognized that an arrestee has greater privacy rights than persons who have been convicted of crimes); Bonnie L. Taylor, *Storing DNA Samples of Non-Convicted Persons & the Debate over DNA Database Expansion*, 20 T.M. COOLEY L. REV. 509, 519–20 (2003) (discussing the differences between the government’s need for DNA from convicted felons and arrestees). A free person and an arrestee do not have the same expectation of privacy in their DNA as a convicted felon. Taylor, *supra* at 520. This is because once a person is convicted of a felony, the state has an interest in that person’s DNA for identification such that the person loses his or her expectation of privacy. *Id.* (quoting *Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995)).

144. *Friedman v. Boucher*, 580 F.3d 847, 851 (9th Cir. 2009).

145. *King v. State*, 42 A.3d 549, 564 (Md. 2012) (citing *Friedman*, 580 F.3d at 858).

146. Brief for Appellee, *supra* note 81, at 55–56. An arrestee’s DNA cannot be collected because an arrestee is innocent until proven guilty under the law, and, therefore, an arrestee is different from a convicted felon. *Id.* Although they are not considered ordinary citizens, their privacy rights are more similar to ordinary citizens than to convicted felons. *Id.*

147. *See Haskell*, 669 F.3d at 1065 (holding that DNA collection is constitutional because the government’s interest in identification weighs more than the interests of the arrestees); *United*

However, this need for identification of an arrestee does not validate the taking of the arrestee's DNA because identification can be obtained through fingerprinting.¹⁴⁸ Some courts' definition of identity includes all the crimes that a person has committed.¹⁴⁹ But using an arrestee's DNA to explore what crimes he or she has committed is equivalent to using a fingerprint in an investigative manner, which is prohibited by law without probable cause.¹⁵⁰

A number of courts have used the special needs exception to find that a search did not violate the Fourth Amendment.¹⁵¹ Under the special needs exception, a search is upheld if there is a special need beyond normal law enforcement that will render the search permissible without probable cause or a warrant.¹⁵² In general, the purpose of the statutes allowing for warrantless DNA collection from arrestees is for normal law enforcement purposes.¹⁵³ Further, Congress expanded the DNA collection statutes to

States v. Mitchell, 652 F.3d 387, 413 (3d Cir. 2011) (explaining that the government's interests in DNA of persons on supervised release do not apply to an arrestee except for the need to identify arrestees).

148. See discussion *supra* Part II.C. But see *Mitchell*, 652 F.3d at 414 (discussing how arrestees may alter their fingerprints, making DNA a better source for identification).

149. *Mitchell*, 652 F.3d at 414 (quoting *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1199 (N.D. Cal. 2009)).

150. See KRIMSKY & SIMONCELLI, *supra* note 23, at 49–50 (explaining that a fingerprint does not involve the “same level of privacy invasion” as DNA collection); *supra* text accompanying notes 79–80. There is a distinction between gathering a fingerprint to establish the guilt or innocence of an arrestee and gathering the fingerprint for identification. KRIMSKY & SIMONCELLI, *supra* note 23, at 50.

151. See *Eiler*, *supra* note 20, at 1215.

152. *Ferguson v. City of Charleston*, 532 U.S. 67, 79–80 (2001) (finding that the drug testing of pregnant women suspected of using cocaine was used by law enforcement in order to coerce the women into substance abuse treatment); *Eiler*, *supra* note 20, at 1215; see also *Crook*, *supra* note 31, at 499–500 (arguing that no special needs exists for the warrantless collection of DNA samples from arrestees). According to the Supreme Court, in cases where the special needs exception was used, the special need was one that, “was . . . divorced from the State's general interest in law enforcement.” *Ferguson*, 532 U.S. at 79.

153. See *Haskell v. Harris*, 669 F.3d 1049, 1051 (9th Cir. 2012) (stating that the California statute was amended to include arrestees because of a need for technology in order to identify, apprehend, arrest and convict criminals, and to exonerate innocent persons); *King v. State*, 42 A.3d 549, 558 (Md. 2012) (stating that the purpose of the Maryland DNA Collection Act is to investigate a crime, identify missing persons and human remains, and develop a DNA database); *Crook*, *supra* note 31, at 501 (explaining that the purpose of the South Carolina statute allowing for the DNA collection is for law enforcement and to help solve unsolved crimes); *Eiler*, *supra* note 20, at 1221 (explaining that Congress expanded DNA collection statutes to include arrestees in order to expand CODIS and attempt to find matches for unsolved crimes). But see *Green v. Berge*, 354 F.3d 675, 677 (7th Cir. 2004) (explaining that courts that uphold DNA collection statutes find that the government has a special need in obtaining DNA samples). According to other courts that have found that there is a special need for the government to collect these DNA samples, the desire to build a DNA database is not a normal law enforcement need. *Green*, 354

include arrestees in order to apprehend criminals before they commit additional crimes.¹⁵⁴ Therefore, because the purpose of DNA collection statutes allowing for the collection of DNA from arrestees without a warrant is simply a law enforcement purpose, the special needs exception does not apply to them, and they are searches under the Fourth Amendment.¹⁵⁵

The collection of DNA could also possibly be considered a search incident to arrest. A search incident to arrest is an exception to the warrant requirement and is not a violation of the Fourth Amendment.¹⁵⁶ This exception was created to protect the safety of police officers and to preserve evidence that might be destroyed by an arrestee.¹⁵⁷ The DNA collection from an arrestee would not fit into the purpose of a search incident to arrest because it has no effect on the safety of the police office; and even if the DNA is relevant to that arrest, there is no way that an arrestee can destroy that evidence before a warrant is obtained. Although the search incident to arrest allows for a search of the arrestee's person, a DNA collection is beyond the scope of the search's purpose.¹⁵⁸

F.3d at 677.

154. HENNING, *supra* note 24, at 4. One of the reasons the Department of Justice sided for implementing rules for the collection of DNA from arrestees was that it would aid in preventing crime by allowing the government to create a DNA profile before a crime has been committed. *Id.*

155. See *Ferguson*, 532 U.S. at 79 (explaining that the special needs exception is used when the government's need is separate from normal law enforcement). Compare *Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602, 620–21, 633 (1989) (holding that the toxicological tests prescribed by the Federal Railroad Administration, which were given to prevent accidents and injuries resulting from intoxicated employees, would not require probable cause under the Fourth Amendment because there was a special need to administer those types of tests), with *Haskell*, 669 F.3d at 1051 (stating that the California statute was amended to include arrestees because of a need for technology in order to identify, apprehend, arrest and convict criminals, and to exonerate innocent persons). In *Skinner*, the Federal Railroad Administration did not conduct the searches in order to prosecute employees who were under the influence of drugs and alcohol. *Skinner*, 489 U.S. at 620. Instead, the purpose of those searches was to assure safety from any accidents that could have occurred from the negligence of an intoxicated employee. *Id.* at 620–21. Requiring the railroads to show individualized suspicion would hinder the employers from providing for the safety of the public. *Id.* at 631. On the other hand, in cases where a search is conducted simply for normal law enforcement purposes, the special needs exception does not apply. *Ferguson*, 532 U.S. at 79.

156. *Arizona v. Gant*, 556 U.S. 332, 338 (2009).

157. *Id.* The search is limited to the scope of achieving those specific purposes. *Id.* at 339.

158. See *People v. More*, 764 N.E.2d 967, 969 (N.Y. 2002) (finding that a search incident to arrest that resulted in a search of a body cavity was unreasonable). A search warrant is necessary to conduct a search that requires an intrusion into the body even when it is obvious that evidence will be obtained from that search. *Id.*

IV. ANALYSIS OF DNA COLLECTION FROM ARRESTEES AFTER *UNITED STATES V. JONES*

Traditionally, cases questioning the constitutionality of DNA collection have used the reasonable expectation of privacy test to determine whether there was a Fourth Amendment violation.¹⁵⁹ However, there has been great discord among courts as to whether arrestees have a reasonable expectation of privacy and whether this practice violates constitutional rights.¹⁶⁰ The recent decision of *United States v. Jones* modifies the test used to determine the validity of DNA collection from arrestees.¹⁶¹ *Jones*, in a sense, regresses to the old common law trespass analysis of the Fourth Amendment while recognizing that some actions, which are not trespasses, are still unreasonable searches.¹⁶² Therefore, using the reasoning set out in *Jones* by the Supreme Court, the analysis of warrantless DNA collection from arrestees should begin with a trespass analysis.¹⁶³ If it is found that there is no trespass, the Fourth Amendment analysis does not end; instead, the *Katz* test is used.¹⁶⁴ Using a trespass test to determine whether there is a search violating the Fourth Amendment allows the Court to more easily find that there is in fact a violation because courts have made valid arguments for and against warrantless DNA collection using the *Katz* test of reasonable expectation of privacy.¹⁶⁵

By granting certiorari in the case of *Maryland v. King*, the Supreme Court has finally decided to resolve the conflicting opinions from courts across the country and rule on the constitutionality of this issue.¹⁶⁶ In accordance with *Jones*, the first part of the Court's analysis would be to determine if there is any sort of trespass involved.¹⁶⁷ It is interesting to note

159. Biancamano, *supra* note 21, at 630; *see supra* text accompanying notes 97–101 (discussing the analysis of the Court in *Katz*).

160. *See* discussion *supra* Part II.B (discussing the varying opinions by several different courts).

161. *Compare* *United States v. Jones*, 132 S. Ct. 945, 950 (2012) (explaining the Court must first assure that a government action does not trespass upon the areas that the Fourth Amendment protects, which are persons, houses, papers, and effects), *with* *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (establishing a two-part test for determining Fourth Amendment protection: the person has a reasonable expectation of privacy, and society recognizes that expectation as reasonable).

162. *See Jones*, 132 S. Ct. at 953 (finding there must be at minimum a protection against the unreasonable searches that the Fourth Amendment was originally intended to protect); *supra* text accompanying notes 107–08, 110.

163. *See supra* notes 11, 107, and accompanying text.

164. *See supra* note 107 and accompanying text.

165. *See* discussion *supra* Part II.B.

166. *See Maryland v. King*, 133 S. Ct. 594 (2012); discussion *supra* Part II.B.

167. *See supra* notes 11, 107, and accompanying text.

that in its brief, the state of Maryland only slightly mentions the issue of a physical intrusion, and it relies on the contention that the Court in *Schmerber* found that the invasiveness of a blood test was insignificant.¹⁶⁸ Thus, Maryland argues that the intrusion is of no significance.¹⁶⁹ However, this reasoning may be flawed because the Court held in *Schmerber* that a minor intrusion is allowed by the Constitution “under stringently limited conditions [that] in no way indicates that it permits . . . intrusions under other conditions.”¹⁷⁰ In that case, the condition was the immediate need for the defendant’s blood alcohol level because it changes quickly over time, which is unlike the need for DNA from an arrestee.¹⁷¹ In *King*, the Court should find that the procedure used in obtaining warrantless DNA samples from arrestees is a trespass on the person, which is a violation of the arrestee’s Fourth Amendment right to be free from unreasonable searches and unconstitutional based on the recent decision in *Jones*.¹⁷² For this type of search, a trespass test provides a clearer guideline, benefitting courts that are in conflict over how to interpret the procedure’s constitutionality.¹⁷³

The problem with the trespass analysis occurs when analyzing the exceptions to searches prohibited by the Fourth Amendment.¹⁷⁴ In certain situations, such as where fingerprints have been altered or unavailable, the DNA collection for the purpose of identification would be justified because the government’s interest in identifying an arrestee would outweigh the arrestee’s privacy interest in his or her identity.¹⁷⁵ Nonetheless, collection of DNA from an arrestee, for the purpose of possibly implicating the arrestee for other crimes, is clearly a violation of the Fourth Amendment and is not justified by any of the exceptions.¹⁷⁶ Therefore, the federal and state statutes should be altered to include a requirement that police obtain a warrant prior to collecting the DNA in those specifically justified situations and to include a prohibition from creating a DNA profile that will be entered into CODIS potentially implicating the arrestee in a completely different crime. Because the purpose of the DNA collection would be to identify the arrestee, it is not the same as an individualized suspicion that

168. See Brief of Petitioner at 12–13, *King*, 133 S. Ct. 594 (No. 12-207).

169. See *id.*

170. *Schmerber v. California*, 384 U.S. 757, 772 (1966).

171. See *id.* at 770–71.

172. See *supra* text accompanying notes 119–26.

173. See *supra* text accompanying notes 165, 172.

174. See *infra* text accompanying notes 175–76.

175. See *supra* text accompanying note 135 (describing the totality of the circumstances test).

176. See *supra* text accompanying notes 142–50.

the arrestee committed another crime; as such, including the DNA profile in CODIS would be unconstitutional.¹⁷⁷

V. CONCLUSION

It is only natural that technology advance. In the case of Fourth Amendment searches, technology has allowed searches to occur without a physical trespass on a constitutionally protected area.¹⁷⁸ But as the technological advancements occur, the traditional standards used to determine the validity of practices are challenged. However, this does not imply that these old standards must be completely discarded. In the case of warrantless DNA collection from arrestees, using the original standard for determining an unreasonable search under the Fourth Amendment helps solve the current conflicts over the issue.¹⁷⁹ While courts are continuously debating whether arrestees have greater privacy rights than convicts or whether the government has a legitimate interest that outweighs its privacy rights, the trespass standard used in Fourth Amendment analysis provides a clearer cut guideline for determining the constitutionality of this practice.¹⁸⁰ By finding that there is a trespass to a person when DNA is collected without a warrant and without consent, a court can easily determine that there is a violation of the Fourth Amendment.¹⁸¹

177. *See supra* text accompanying notes 118, 127–31 (arguing that an individualized suspicion is required to collect DNA from an arrestee and use it to implicate the arrestee in a separate, unrelated crime).

178. *See supra* text accompanying notes 102–06 (discussing how the Court held that the use of a thermal imager was a search).

179. *See* discussion *supra* Part IV.

180. *See supra* text accompanying note 173.

181. *See supra* text accompanying notes 163–65.