1-1-2008

FOURTH AMENDMENT—GUILT BY RELATION: IF YOUR BROTHER IS CONVICTED OF A CRIME, YOU TOO MAY DO TIME

Lina A. Hogan

Follow this and additional works at: http://digitalcommons.law.wne.edu/lawreview

Recommended Citation

This Note is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.
FOURTH AMENDMENT—GUILT BY RELATION: IF YOUR BROTHER IS CONVICTED OF A CRIME, YOU TOO MAY DO TIME

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

INTRODUCTION

Given advancing technology and growing safety concerns in recent years, U.S. citizens have suffered a loss of privacy at the hands of the government.2 For the most part, citizens have silently endured with the understanding that zealous governmental actions are well intentioned and designed to protect Americans.3 But a new privacy concern has now emerged that should cause Americans great alarm. This new governmental surveillance tactic is designed to generate criminal suspects based solely upon genetics. It targets people for criminal investigation based upon their relationship to a person who has, at some point in time, been convicted of a crime. It is called a familial search.

On one hand, society wants criminals to be identified and punished for their crimes. On the other hand, innocent family members should not forfeit their privacy rights simply because they are related to someone who has been convicted of a crime.4 Consider the following hypothetical.

2. School children have been forced to have their fingerprints scanned before eating lunch in their cafeteria, cameras have been installed at public shrines, people are subjected to full-body x-rays and baggage searches at airports, and facial recognition cameras are used at public sporting events. Bob Barr, Op-Ed., What Is Happening to Our Privacy?, DAILY COURIER (Connellsville, Pa.), July 8, 2003, available at 2003 WLNR 13948726 (Westlaw).
3. While a majority of people polled stated that President Bush should obtain a warrant before monitoring private phone conversations and Internet communications, other data indicate that when balancing privacy concerns against fighting the threat of terrorism, people view safety as the higher priority. Tom Raum, How Far Will the Government Go on Spying?, Bucks County Courier Times (Pa.), Jan. 22, 2006, at 1B, available at 2006 WLNR 1390337 (Westlaw).
A. Your Brother’s Sin—A Hypothetical

Brian Taylor and his brothers were brought up by their father in a poor neighborhood in Hartford, Connecticut. Brian’s brothers have engaged in criminal lifestyles from the time they were teenagers. Nicholas, Brian’s brother, is incarcerated in Connecticut for armed robbery. Resisting a life of crime, Brian committed himself to his studies and earned a doctorate in psychology. He is now an esteemed professor at Harvard University. Although Brian loves his brothers, he cut off all ties with them many years ago. In an attempt to maintain an untarnished reputation and avoid the trouble that surrounds his family, Brian has kept his family history a secret from his peers at Harvard.

One dark, icy, December night Brian was on campus walking to his car when his student, Jessica, approached him. They spoke for a few minutes. Because it was dark and not too many students were on campus, Brian offered to walk Jessica to her car. Jessica accepted. As they walked, Jessica slipped on the ice, grabbed Brian’s hand to stop her fall, and accidentally scratched him. Brian did not mention it, and Jessica did not realize that she scratched him. At Jessica’s car, Brian told her to drive safely, said goodbye, and walked away.

As Jessica sat in her car waiting for her windshield to defrost, she realized that she left her purse in the school. Although she dreaded the thought of braving the parking lot again, she needed her purse. As soon as Jessica stepped out of her car she was forced back in and brutally raped. She never saw her attacker’s face. Jessica fought very hard, as she screamed and kicked her attacker.

The attacker wore a condom, facemask, hat, jacket, and gloves. He left no DNA behind. Forensic DNA was recovered, however. It was Brian’s DNA found under Jessica’s nails, which the police wrongly assumed belonged to her attacker. The DNA was submitted to Massachusetts law enforcement to run through the DNA-indexing database. The goal was to match the forensic DNA to DNA stored in the database belonging to someone with a criminal record.

In the meantime, the police interviewed Brian since he was the last person to see Jessica before the rape. The police initially ruled him out. Later, they received information from Connecticut law enforcement about a near-match hit to the forensic DNA found under Jessica’s nails. It belonged to Brian’s brother, Nicholas. The police knew the forensic DNA did not belong to Nicholas because
he was incarcerated when the rape occurred. However, they surmised that the attacker must have been Brian since he was the last person to see Jessica before the rape and based on the similarities between the forensic DNA and the DNA found in the DNA-indexing database. Consequently, the police obtained a warrant for Brian’s DNA to compare to the forensic DNA. Not surprisingly, Brian’s DNA matched the forensic DNA. Arrested and charged with rape, Brian is now awaiting trial. Brian is innocent.

His attorney is attempting to have the DNA evidence suppressed at trial. His argument is that the DNA evidence is poisonous fruit because the police obtained it based on information gleaned from an unconstitutional familial search of the DNA-indexing database.

B. The Problem

The FBI now permits the use of familial searches to investigate crimes.5 As illustrated by the hypothetical, the use of familial searches may lead to devastating results because innocent family members, who would not have been suspected but for a genetic link, may be transformed into criminal suspects. The legal issue is whether familial searches amount to unreasonable searches by the government in violation of the Fourth Amendment. The FBI’s policy concerning familial searches is so new that no court has reported a decision on this issue yet. This Note anticipates the potential arguments that defendants who have been targeted by law enforcement based on familial searches might make and ultimately concludes that familial searches are unconstitutional.

Part I provides a background on DNA. An introduction to the Combined DNA Index System (CODIS), the database that stores DNA, is set out in Part I.A. Parts I.B and I.C respectively discuss DNA as a powerful crime-solving tool and the pros and cons of CODIS. Part I.D presents new developments in the use of DNA profiling.

The Fourth Amendment’s prohibition against unreasonable governmental searches and seizures is described in detail in Part II. Parts II.A and II.B set out the purpose and scope of the Fourth Amendment, including the standing and reasonableness tests. Part III discusses the treatment of a search and seizure absent individualized suspicion of wrongdoing, which includes an introduction to

the special needs test in Part III.A. An additional safeguard to the special needs test adopted by the Supreme Court is set out in Part III.B. Part III.C depicts the application of the special needs test in the context of mandatory DNA extractions for the purpose of analogy to familial searches. This is followed by Part IV, which analyzes the constitutionality of a familial search. Specifically, Part IV.A maintains that a family member has standing to bring a Fourth Amendment claim against the government and Part IV.B argues that familial searches are unreasonable governmental intrusions. Finally, this Note concludes that familial searches are unconstitutional.

I. A Brief Background on DNA

A. The Combined DNA Index System Program: Its Composition and Inner Workings

In 1990, the FBI began a pilot program called CODIS. According to the FBI, CODIS is primarily a crime-solving tool. CODIS has three tiers: national (NDIS), state, and local. The DNA profiles begin at the local level and flow upward to the higher levels. NDIS is the highest tier in the CODIS program, with the state and local levels sharing information with the national tier.

The CODIS program has two indices: forensic and offender. Working together, the indices help to create investigatory leads. Biological evidence collected from a crime scene is stored in the forensic index and individuals' DNA profiles are stored in the off-

7. Combined DNA Index System, supra note 6, at 1. The FBI's use of CODIS has assisted in solving tough crimes. See Fed. Bureau of Investigation, Recent CODIS Success Stories, http://www.fbi.gov/success.htm (last visited Dec. 23, 2007) (reporting that Wayne DuMond, on parole for rape in Arkansas, was arrested and convicted for the murder of Carol Shields in September 2001 based on DNA evidence found under her fingernails and stored in the NDIS database—notwithstanding the fact that the crime scene was meticulously cleaned). The same FBI report states that CODIS solved the oldest believed "cold" case—the 1968 murder of a fourteen-year-old girl, Linda Harmon, of San Francisco. Id.
8. Combined DNA Index System, supra note 6, at 4.
9. Id.
10. Id.
11. Id.
12. Id. at 1.
13. Id.
fender index. These profiles are collected pursuant to state and federal statutes that allow the authorities to extract, store, and analyze DNA of convicts, probationers, parolees, and arrestees. The majority of DNA profiles stored in NDIS are those of convicted felons who have served time for crimes such as assault and battery, rape, murder, and robbery. The evidence stored in the forensic index is run in CODIS against the offender index to find a match between the biological evidence and a particular offender. If there is a match to a convict, the police consider him to be a good suspect.

According to the FBI, 59,600 investigations have been aided by CODIS between 1990 and October 2007. Also as of October 2007, the total number of DNA profiles stored in NDIS was 5,265,258, of which 194,785 were forensic profiles and 5,070,473 were convicted offender profiles.

B. DNA: A Complex and Powerful Crime-Solving Tool

Given its unique ability to identify people, DNA has become a priceless tool for law enforcement in solving crimes. DNA, formally known as deoxyribonucleic acid, is the fundamental building block of an individual’s entire genetic makeup. While DNA is highly complex, it is generally described as follows:

DNA is a double-helix shaped nucleic acid held together by hydrogen bonds and composed of base pairings of Adenine and Thymine and Cytosine and Guanine, which repeat along the double-helix at different regions (referred to as short-tandem-re-

14. Id.
16. See Combined DNA Index System, supra note 6, at 1.
20. See Use the Tools, supra note 17.
peat loci, or STR loci). When analyzed, these STR loci reveal the presence of various alleles, genic variants responsible for producing a particular trait, that represent themselves differently in virtually everyone except identical twins, who share the same DNA.23

DNA can be found, for example, in a person’s blood, hair, and tissue.24 Forensic DNA evidence can be found on a weapon or any item that has touched a person’s body, such as a hairbrush, toothbrush, or under someone else’s fingernails.25

Even DNA that is decades old can be used to solve crimes or rule out suspects, though the quality of DNA can be compromised by several factors.26 Just as officers have been trained to collect fingerprints from a crime scene, they now test for DNA evidence, which may be invisible to the naked eye, but is nonetheless helpful in solving the crime.27 The power of forensic DNA found at a crime scene is immense because it can not only destroy a suspect’s alibi by proving that the suspect was at the scene of a crime, but it can also show the manner in which the crime was committed.28 For example, it may prove that the suspect held the weapon.29

When a familial search is conducted, DNA collected from a crime scene that produces a near-match hit to a convict can determine if the suspect is a relative of that convict.30 While complete strangers might share a few common alleles,31 the chance that two...

---

23. Banks v. United States, 490 F.3d 1178, 1180 (10th Cir. 2007) (citations omitted).
24. What Every Law Enforcement Officer Should Know, supra note 22 ("DNA is . . . in blood, semen, skin cells, tissue, organs, muscle, brain cells, bone, teeth, hair, saliva, mucus, perspiration, fingernails, urine, feces, etc.").
25. President’s DNA Initiative, Identifying DNA Evidence, http://www.dna.gov/audiences/investigators/know/identifying (last visited Dec. 23, 2007) [hereinafter Identifying DNA Evidence] (citing a variety of examples where DNA can be found, including a baseball bat or other weapon, hat, facemask, eyeglasses, cotton swab, toothpick, used cigarette, stamp, envelope, tape, bottle, glass, used condom, blanket, pillow, sheet, through and through bullet, bite mark, fingernail, etc.).
26. What Every Law Enforcement Officer Should Know, supra note 22 (warning that factors such as "heat, sunlight, moisture, bacteria, and mold" can destroy DNA). New software has been created that claims to help interpret DNA which was previously unusable because of poor quality. BBC News, New DNA Test to Solve More Cases, Oct. 4, 2006, http://news.bbc.co.uk/2/hi/uk_news/england/5404402.stm (last visited Dec. 24, 2007).
27. What Every Law Enforcement Officer Should Know, supra note 22.
29. Id.
30. Greely et al., supra note 21, at 251.
31. Id. at 252. An allele is "any of the alternative forms of a gene that may occur at a given locus." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 32 (11th ed. 2003).
unrelated people share thirteen alleles in common is "infinitesimal."32 Parents, siblings, and children generally share at least one-half of the same alleles.33 Relatives of further degree, such as aunts, uncles, grandparents, grandchildren, and half-siblings share one-quarter of the same alleles.34 Relatives of even further degree, such as cousins, great-grandparents, and great-grandchildren share one-eighth of the same alleles.35 The danger is when a near-match hit is produced the law enforcement authorities will arbitrarily generate a suspect pool based on the convict's family members, which implicates privacy concerns.

C. The Pros and Cons of CODIS

Because DNA is such a powerful tool, the DNA stored in CODIS has been extremely beneficial to society.36 It has helped to solve crimes and also to clear suspects of charges.37 Our criminal justice system is imperfect and sometimes innocent people are incarcerated while true criminals remain free.38 CODIS has been used to free some of the innocent people who have been wrongly convicted.39 Death-row inmates' lives have been spared based on postconviction DNA testing.40 The Innocence Project reports that 212 people in the United States have been exonerated based on DNA evidence.41 Since 1973, 126 defendants on death row have

32. Greely et al., supra note 21, at 250.
33. Id. at 251-52.
34. Id. at 252.
35. Id.
36. See Use the Tools, supra note 17.
38. Innocence Project, The Causes of Wrongful Conviction, http://www.innocenceproject.org/understand (last visited Dec. 23, 2007). Some of the factors leading to false convictions are: false confessions, bad lawyering, microscopic hair comparison, defective or fraudulent science, prosecutorial misconduct, and mistaken identification. Id. Dennis Maher of Massachusetts was wrongly convicted and sentenced to life imprisonment for rape, assault with intent to rape, assault and battery, and aggravated rape in 1984. Innocence Project, Dennis Maher, http://www.innocenceproject.org/Content/205.php (last visited Dec. 23, 2007). Maher was a sergeant in the U.S. Army at the time. After nineteen years of imprisonment, he was exonerated—the real perpetrator has not been discovered. Id.
41. Id. "DNA testing has been a major factor in changing the criminal justice system. It has provided scientific proof that our system convicts and sentences innocent
been exonerated. Further, DNA profiling has assisted families in locating the remains of their loved ones killed in the terrorist attacks of September 11, 2001, and gaining some measure of closure.

On the other hand, the storage of DNA in CODIS has also been criticized based upon privacy concerns. Commentators argue that the mass storage of DNA is a breach of privacy, especially given the personal information that the DNA may contain. For example, it may reveal information about whether a person has a genetic disorder or a predisposition to disease. It could indicate whether a person has a propensity for addiction to drugs or alcohol or other traits that could be used by the police to profile individuals. In addition, if a list of individuals that have DNA stored in CODIS is released to third parties, the mere fact that their DNA is in CODIS might have adverse effects for those individuals.

D. New Developments in the Use of DNA Profiling

The FBI is in charge of the national tier of CODIS and the sharing of information between the states. When a state is unable


43. See DNA Fingerprinting and Civil Liberties Project, supra note 37. Joan Greener of Salem, Massachusetts, received news in September 2006 that her niece’s remains—as a victim of September 11—were finally identified due to DNA results. Amy Westfeldt, Discovery of More 9/11 Remains Proves Tough for Some Families, INTELLIGENCER (N.Y.), Nov. 12, 2006, at A11, available at 2006 WLNR 19874534 (Westlaw). The news brought sad emotions, but ultimately, Greener was glad the discovery was made. Id.

44. See, e.g., Gregory D. Kesich, DNA Use at Issue in Murder Case: The Lawyer for the Man Accused of Killing Crystal Perry Says Taking Sample Was Unconstitutional, PORTLAND PRESS HERALD, Oct. 20, 2006, at B1, available at 2006 WLNR 18240747 (Westlaw) (noting the potential to invade a person’s privacy).

45. DNA Fingerprinting and Civil Liberties Project, supra note 37.

46. Id.

47. See id. (predicting that the mere knowledge that an individual’s DNA is stored in CODIS might persuade adoption agencies, insurance companies, and employers to avoid dealing with the individual based on a preconceived notion that the individual is a criminal).

48. Hansen, supra note 5, at 49.
to obtain a match in its database, it can search the national database to find a match. In the past, if the state found a hit in the national database, the FBI would only share the identifying information if there was an exact match. In other words, the FBI would not release the identity of an individual if the hit produced only a near match. However, on July 14, 2006, the FBI adopted a new policy of allowing information about the near-match hits to be released. The practice of using familial searches to obtain near-match hits to investigate family members of convicts who have DNA stored in CODIS will expand the use of the database beyond its original purpose.

Some criminologists say that familial searches will intrude on the privacy of family members. It is "genetic surveillance" of innocent relatives that will transform them into criminal suspects. On the other hand, law enforcement officials argue that a near-match hit only produces a "lead" that should be pursued in an investigation. They say that it is the equivalent of an eyewitness reporting to the police that the suspect looked and sounded exactly like Joe Smith, but it is much more reliable than an eyewitness.

49. See id. A "match" or "hit" occurs when the DNA stored in the forensic index is the same as the DNA in stored in the offender index. CODIS, National DNA Index System, http://www.fbi.gov/hq/lab/codis/national.htm (last visited Dec. 23, 2007).

50. Hansen, supra note 5, at 49.

51. Id.

52. Id. In Colorado, the police ran a search through NDIS to identify a rapist who beat his victim so badly that she had to have her eye surgically removed. Id. at 48. The search produced only a near-match hit to a man in Oregon. Id. The police believed that the near-match hit strongly suggested that a relative of the Oregon man was the rapist, and if they could prove that the relative was in Denver at the time of the rape, the crime was as good as solved. Id. However, because FBI policy did not allow information to be released when a match was not exact, the FBI initially refused to reveal the Oregon man's name. Id. at 49. After some persistence, the FBI changed its policy and released the Oregon man's name to the police in Colorado. Id.

53. Use the Tools, supra note 17.


56. See DNA Database Can Flag Suspects, supra note 55.

57. Id.

58. Use the Tools, supra note 17.
The United Kingdom routinely uses a "familial searching technique" in its National DNA Database and has enjoyed success. In the United States, it is estimated that the use of familial searches on a national level could significantly increase the chances of finding criminals through DNA—potentially thousands of additional identifications. In at least one case in the United States, the familial search has already solved a crime and exonerated a wrongly convicted man. After being incarcerated for eighteen years, Darryl Hunt was freed when DNA from the crime scene was tested and a search in CODIS revealed the brother of the real killer.

II. An Overview of the Fourth Amendment: A Prohibition Against Unreasonable Searches and Seizures by the Government

A. The Fourth Amendment's Origin and Goals

The Fourth Amendment guarantees people the right to be secure in their persons, houses, papers, and effects against unreasonable governmental searches and seizures. The Fourth Amendment was adopted to gain independence from the general warrants and warrantless searches that were imposed by Britain upon the colonists. It was adopted to protect citizens' privacy and dignity from

59. See Brenda Hickman, Rapist Faces Justice 20 Years On, NEWCASTLE EVENING CHRON., Sept. 19, 2006, at 21, available at 2006 WLNR 16243486 (Westlaw) (describing the account of a rape victim whose attacker was caught twenty years later by use of the familial searching technique). The technology was touted as "pioneering," and "cutting edge." Id.

60. Randolph E. Schmid, Relatives' DNA Could Help Find Criminals: But Such Searches Involve Ethics Issues, Some Experts Say, ORLANDO SENTINEL, May 14, 2006, at A28, available at 2006 WLNR 8272064 (Westlaw) (addressing Frederick R. Bieber's estimate that "in a case in which there is a 10 percent chance of finding a criminal through a DNA search, expanding the search to suspects' close relatives could raise the chances to 14 percent," which potentially represents thousands of additional identifications).


62. Id.

63. U.S. CONST. amend. IV.

64. British customs officers conducted general exploratory searches using general writs of assistance against the American colonists between 1761 and 1776. PHILLIP A. HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 77 (2005). General warrants have been described as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," because they placed "the liberty of every man in the hands of every petty officer." Stanford v. Texas, 379 U.S. 476, 481 (1965) (quoting James Otis). The warrant requirement of the Fourth Amendment was not adopted to shield criminals. Instead, the Fourth Amendment was
arbitrary governmental intrusion.65

Although the Fourth Amendment protects one of our greatest and most fundamental individual rights, this right has been curtailed, at various times, by the government to protect the broader interests of the public.66 This is especially true of convicts’ rights.67 Although the statutorily mandated extraction and analysis of a convict’s DNA is a search and seizure for Fourth Amendment purposes,68 the practice has been held to be reasonable in light of a governmental “special need” that outweighs the convict’s expectation of privacy.69 If the FBI’s new policy of allowing states to share

adopted in response to colonists’ memories of abuse from unreasonable governmental searches and seizures due to general warrants and warrantless searches. Chimel v. California, 395 U.S. 752, 761 (1969) (citing McDonald v. United States, 335 U.S. 451, 455 (1948)). Abuses such as these were considered to be a major cause of the American Revolution. Id.


66. HUBBART, supra note 64, at 5.

67. When this Note refers to “convicts,” the term shall also generally include probationers, parolees, and supervised releasees, unless specifically stated otherwise. Although there are technical differences among the legal status of these individuals, the term “convicts” will be used for the sake of simplicity.

68. See generally Skinner, 489 U.S. at 616 (stating that a “physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable” and “[t]he ensuing chemical analysis of the sample to obtain physiological data is a further invasion”); Schmerber v. California, 384 U.S. 757, 767 (1966) (commenting that “if compulsory administration of a blood test does not implicate the Fifth Amendment, it plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment’’); United States v. Stewart, 468 F. Supp. 2d 261, 264 (D. Mass. 2007) (holding that “[a]ny forced extraction of blood . . . invades one’s expectation of privacy in bodily integrity, and its reasonableness must be adjudged under a Fourth Amendment analysis”).

69. See United States v. Conley, 453 F.3d 674, 680 (6th Cir. 2006) (finding that the special need was to procure reliable identifying information, reduce recidivism, and protect communities); Nicholas v. Goord, 430 F.3d 652, 668-69 (2d Cir. 2005) (finding that the special need was to create a DNA-indexing database to assist in solving crimes); Green v. Berge, 354 F.3d 675, 677 (7th Cir. 2004) (finding that the special need was to create a reliable identification for storing in the database to solve past and future crimes); United States v. Kimler, 335 F.3d 1132, 1146 (10th Cir. 2003) (finding that the special need was to create a DNA-indexing database); Roe v. Marcotte, 193 F.3d 72, 79 (2d Cir. 1999) (finding that the special need was to reduce and prevent the recidivism rate). But see United States v. Weikert (Weikert I), 421 F. Supp. 2d 259, 265 (D. Mass. 2006) (holding that the purported special need was merely regular law enforcement purposes), rev’d, 504 F.3d 1 (1st Cir. 2007), reh’g denied en banc, 504 F.3d 20 (1st Cir. 2007). For the purposes of this Note, Weikert I will refer to the district court’s opinion and Weikert II will refer to the opinion by the Court of Appeals for the First Circuit.
near-match DNA hits is challenged, opponents may argue that the practice violates the Fourth Amendment rights of the family members, just as convicts have argued that the extraction and analysis of DNA constitutes a violation of their Fourth Amendment rights.70

B. The Scope of the Fourth Amendment and Its Requirements

The Fourth Amendment refers to "searches and seizures."71 But according the Supreme Court, a person can be illegally searched absent a seizure, just as a person can have an item illegally seized, absent an illegal search.72 The right to be free from a search and seizure protects two separate and individual expectations and interests.73 An illegal search intrudes upon a person's individual privacy interest, while an illegal seizure divests a person of control of his property.74 This Note focuses on the legality of the familial search and does not address the seizure issue because a person has no possessory interest in a family member's DNA.

1. Standing Requirement for a Successful Fourth Amendment Claim

Before a Fourth Amendment violation occurs, a person must have standing to make such a claim.75 For standing to be satisfied, the person complaining must be subjected to the search,76 the search must be recognized under the Fourth Amendment,77 and the

70. Defendants have overwhelmingly lost the battle against the forced extractions of DNA. See Conley, 453 F.3d at 674; United States v. Kraklio, 451 F.3d 922, 923 (8th Cir. 2006); Johnson v. Quander, 440 F.3d 489, 491 (D.C. Cir. 2006); Nicholas, 430 F.3d at 655; United States v. Szubelek, 402 F.3d 175, 177 (3d Cir. 2005); Padgett v. Donald, 401 F.3d 1273, 1275 (11th Cir. 2005); United States v. Kincade, 379 F.3d 813, 832 (9th Cir. 2004); Green, 354 F.3d at 679; Groceman v. U.S. Dep't of Justice, 354 F.3d 411, 413-14 (5th Cir. 2004); Kimler, 335 F.3d at 1134; Marcotte, 193 F.3d at 74; Jones v. Murray, 962 F.2d 302, 308 (4th Cir. 1992); Weikert II, 504 F.3d at 1. But see Stewart, 468 F. Supp. 2d at 282.

71. U.S. CONST. amend. IV.

72. See United States v. Jacobsen, 466 U.S. 109, 118-21 (1984) (holding that no search occurred when federal agents examined a powdery substance found in a damaged box opened by Federal Express employees because the defendant had no expectation of privacy in the box; however, the federal agents' control over the packages was a seizure).

73. Id. at 113.


77. A Fourth Amendment search is recognized when a person has a subjective expectation of privacy against the search that society is willing to accept as reasonable. Kyllo v. United States, 533 U.S. 27, 32 (2001). The Supreme Court has held that a person has a reasonable expectation of privacy in the areas of his person that are not
search must constitute an invasion by the government. A Fourth Amendment search is recognized when a person has a subjective expectation of privacy against the search that society is willing to accept as reasonable. If any one of these elements is not met, a Fourth Amendment claim will fail.

The Fourth Amendment lists the items that it protects against unreasonable searches seizures. These include a person and his home, papers, and effects. However, the Fourth Amendment does not fully speak to standing. Three Supreme Court cases artic...
ulate the standing requirement: *Katz v. United States*, \(^{82}\) *Minnesota v. Olson*, \(^{83}\) and *Kyllo v. United States*. \(^{84}\)

The scope of the Fourth Amendment's protection was best set forth in *Katz v. United States*, which held that the Fourth Amendment protects people, not places. \(^{85}\) In *Katz*, the defendant was convicted of transmitting bets over the telephone, which was a violation of a federal statute. \(^{86}\) The FBI used an electronic listening device placed on the outside of a public phone booth to listen to the defendant's side of the conversation. \(^{87}\) The use of the electronic listening device and the recording was held to be an unreasonable search and seizure in violation of the defendant's Fourth Amendment rights. \(^{88}\) The defendant was found to have a reasonable expectation of privacy in the phone booth. \(^{89}\) The fact that a phone booth is not specifically listed in the Fourth Amendment was not dispositive. This is because it is the person's expectation of privacy that is protected, not the place. \(^{90}\) The test was set out in Justice

\(^{82}\) *Katz*, 389 U.S. 347.


\(^{84}\) *Kyllo*, 533 U.S. 27.

\(^{85}\) *Katz*, 389 U.S. at 351. The rule before *Katz* was that, to be protected, the thing searched must have been material, such as a person, house, paper, or effect. *Olmstead v. United States*, 277 U.S. 438, 464 (1928), *overruled by Katz*, 389 U.S. 347, and *Berger v. New York*, 388 U.S. 41 (1967). Justice Brandeis, in his dissenting opinion in *Olmstead*, noted that, when analyzing the Constitution, society should not merely focus on the evils that were in the minds of the Framers when the Fourth Amendment was adopted, but that society must also look to the future to address the evils that may become. *Id.* at 472-73 (Brandeis, J., dissenting). Otherwise, the principles will be impotent and valueless. *Id.* Furthermore, Justice Brandeis took issue with the majority's position that only searches of material things could be constitutionally protected. *Id.* at 478-79. Justice Brandeis suggested a much broader reading of the Fourth Amendment when he stated,

> The protection guaranteed by the Amendment[] is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

*Id.* at 478.

\(^{86}\) *Katz*, 389 U.S. at 348.

\(^{87}\) *Id.*

\(^{88}\) *Id.* at 353.

\(^{89}\) *Id.* at 352.

\(^{90}\) *Id.* at 351-52.
Harlan's concurring opinion: In order to implicate the Fourth Amendment, a person must have a subjective expectation of privacy in the thing or area searched, and that expectation must be "one that society is prepared to recognize as 'reasonable.'"

In Minnesota v. Olson, the Supreme Court provided further clarification that the Fourth Amendment protects people not places. In Olson, the police suspected the defendant's involvement in a robbery, which ultimately resulted in the death of a store manager. While the police were searching for Olson, they learned that he was staying at his friend's home. Without a warrant, the police entered the home and found Olson hiding in a closet. The police arrested Olson and brought him to the police station, where he made an inculpatory statement. Although the house was not his home, Olson claimed that he had an expectation of privacy while he was in the house, and therefore the warrantless entry, absent exigent circumstances, violated his Fourth Amendment rights.

The Supreme Court held that Olson had a legitimate expectation of privacy in his friend's home. Again, this reflects the understanding that the Fourth Amendment's protection expands beyond the physical person, home, papers, and effects because it is the person whose interests are truly protected by the Fourth Amendment. This is true as long as the person has manifested an expectation of privacy in the area searched that society is prepared to recognize as reasonable.

In Kyllo v. United States, the Supreme Court addressed an invasion of privacy in light of new technology and the reasonableness of an expectation of privacy under the circumstances. The case examined "whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constituted a 'search' within the meaning of the

91. Id. at 361 (Harlan, J., concurring).
93. Id. at 93.
94. Id. at 94.
95. Id.
96. Id.
97. See id. at 94-95.
98. See id.
99. Id. at 96 n.5.
100. Id. at 95-96.
Fourth Amendment.” Law enforcement officers suspected that the defendant was growing marijuana in his house, which would require the use of strong heat lamps. Without a warrant, in the dark, early morning hours, the officers used a thermal imager to detect a high level of heat emanating from the home, which they could not have seen without the use of the technology. The thermal images quickly revealed that an unusually high amount of heat was coming from over the garage. The officers obtained a warrant based on the thermal image readings, unusually high electric bills, and informant tips. Officers found approximately one hundred marijuana plants in the defendant’s home. The defendant was indicted for manufacturing marijuana after unsuccessfully attempting to suppress the marijuana evidence found in the home.

The government’s main argument was that the search was constitutional because Kyllo could not have a reasonable expectation of privacy when the government did not actually physically intruded into his home and the technology did not reveal any intimate details of the home. The Supreme Court held that a Fourth Amendment violation can occur absent an actual physical intrusion and rejected the “intimate details” argument. However, the rule regarding physical intrusion is limited. An unconstitutional intrusion is found, in the context of new technology, if the information collected could not have been obtained without an actual physical intrusion, without the use of the technology—at least to the extent that the technology is not available for use to the general public. To better explain this, the police in Kyllo would have had to make an actual physical intrusion into the home to find the marijuana evidence if they did not have the new and publicly unavailable thermal imaging technology. Therefore, if the actual physical intrusion into the home would have been an unconstitutional invasion, so would the invasion that lacked the actual “physical” intrusive-

102. Id. at 29.
103. Id.
104. Id. at 29-30.
105. Id. at 30.
106. Id.
107. Id.
108. Id.
109. See id. at 30-31.
110. Id. at 34.
111. Id.
112. See id.
ness—only made capable by the new technology. On the other hand, if the thermal imaging technology was readily available to the general public, then the intrusion would not be unconstitutional because the searched person had no legitimate expectation of privacy given the public's access to the technology. This case exemplifies the Supreme Court's concern with technological advances impinging on individuals' rights to privacy.

The lesson learned from the three cases discussed above is that the standing requirement is satisfied if the government conducts a search that invades an individual's subjective expectation of privacy and that expectation of privacy is one that society would deem reasonable. Although a person, his home, papers, and effects are explicitly protected by the Fourth Amendment, the Fourth Amendment's protections extend further and do not require an actual invasion of these things. It is the subjective expectation of an individual's privacy that is protected, so long as it is also objectively reasonable.

2. A Search Must Be Unreasonable to Constitute a Fourth Amendment Violation

Once a person satisfies the standing requirement, the next issue is whether the search was reasonable. If the search is found to be unreasonable, then a Fourth Amendment violation has occurred. But if the search is reasonable, then no Fourth Amendment violation has occurred.

The Fourth Amendment requires that law enforcement officials obtain a warrant through judicial approval, whenever practicable. An individual's privacy interest is deemed so precious that an objective person should decide whether or not to invade the interest, and not a person whose job it is to solve crimes. For a

113. Id.
114. Id.
115. E.g., id. at 33.
116. U.S. Const. amend. IV.
117. Katz v. United States, 389 U.S. 347, 353 (1967) (“[O]nce it is recognized that the Fourth Amendment protects people—and not simply ‘areas’—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.”).
118. E.g., Kyllo, 533 U.S. at 33.
119. HUBBART, supra note 64, at 12.
120. Id.
warrant to be issued, there must be "probable cause." In some
instances, a search can be conducted without a warrant; however, it
usually must be based on probable cause or a showing of individual-
ized suspicion of wrongdoing. Otherwise, the search is consid-
ered unreasonable. In very limited circumstances, a search can
even be considered constitutionally reasonable without individual-
ized suspicion. This important exception is called the "special
needs exception," which occurs when the government has a special
need that is "beyond the normal need for law enforcement." This
exception dispenses with the need for a warrant, probable
cause, and even individualized suspicion for searches involving, for
example, public schools, government agencies, and prisons.

III. TREATMENT OF A SEARCH OR SEIZURE ABSENT AN
INDIVIDUALIZED SUSPICION OF WRONGDOING:
THE SPECIAL NEEDS TEST

A. Introduction to the Special Needs Test—Eliminating the
Typical Requirements: Warrant, Probable Cause, and
Individualized Suspicion

Ordinarily, law enforcement officials are required to have a
warrant, probable cause, or in some instances, individualized suspi-
cion of criminal wrongdoing in order to conduct a constitutional
search. However, the Supreme Court developed the special

123. U.S. CONST. amend. IV.
suspicion as "a sufficiently high probability that criminal conduct is occurring to make
the intrusion on the individual's privacy interest reasonable"). Usually the Fourth
Amendment requires probable cause; however, "a lesser degree satisfies the Constitu-
tion when the balance of governmental and private interests makes such a standard
reasonable. The same circumstances that lead to the conclusion that reasonable
suspicion is constitutionally sufficient also render a warrant requirement unnecessary."
Id. The Fourth Amendment focuses on the warrant requirement and reasonableness of
the search to guard against arbitrary governmental intrusions. Skinner v. Ry. Labor
Executives' Ass'n, 489 U.S. 602, 621-22 (1989); O'Connor v. Ortega, 480 U.S. 709, 719
347, 357 (1967).
127. Edmond, 531 U.S. at 37 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S.
646, 653 (1995)).
128. Id.; see Vernonia Sch. Dist. 47J, 515 U.S. 646 (public schools); Nat'l Treasury
325 (public schools).
129. See Vernonia Sch. Dist. 47J, 515 U.S. at 653.
needs test to determine whether a search is reasonable without a warrant, probable cause, or suspicion of individual wrongdoing.\textsuperscript{130} The "special needs test," which carves out an exception to the normal requirements of a warrant, probable cause, and individualized suspicion, was first articulated in \textit{New Jersey v. T.L.O.}\textsuperscript{131} In \textit{T.L.O.}, a fourteen-year-old girl was caught smoking in her school bathroom.\textsuperscript{132} The assistant vice-principal searched through the girl's purse and found cigarettes and rolling papers.\textsuperscript{133} Based on his experience that rolling papers were used to smoke marijuana, he was suspicious and continued his search of her purse more thoroughly.\textsuperscript{134} He found marijuana, among other incriminating evidence.\textsuperscript{135} T.L.O. claimed that the search of her purse was a violation of her Fourth Amendment rights.\textsuperscript{136} The Court applied a balancing test: "the individual's legitimate expectations of privacy and personal security" versus "the government's need for effective methods to deal with breaches of public order."\textsuperscript{137} Although the Court found that school children do have a reasonable expectation of privacy, the Court rejected the warrant and probable cause requirements in light of the government's strong need to maintain order in schools.\textsuperscript{138}

The concurring opinions added additional light to formulation of the special needs test. Justice Blackmun said that the balancing test should only reduce the warrant and probable cause requirements of the Fourth Amendment when there is "a special law enforcement need for greater flexibility," which makes the requirements "impracticable."\textsuperscript{139} Further, as Justice Powell stated, children at school have a lower expectation of privacy than the general public because school personnel have authority over the schoolchildren, much like parents.\textsuperscript{140} Justice Blackmun believed that the need for an immediate response by school officials, the schools' significant duty to protect the students, and the students'
lowered expectation of privacy justified dispensing with the warrant and probable cause requirements of the Fourth Amendment.\(^{141}\)

In *Skinner v. Railway Labor Executives' Ass'n*, the Court officially adopted the special needs test and eliminated the warrant, probable cause, and individualized suspicion requirements in certain circumstances.\(^ {142}\) It determined that a federal regulation mandating urine and blood testing of railroad employees was not a violation of the employees' Fourth Amendment rights under the special needs test.\(^ {143}\) According to the Court, the testing was justified by the number of accidents due to employees' alcohol and drug use.\(^ {144}\) The special need was to put an end to railroad accidents and loss of human life due to employees' use of alcohol or drugs, not to gather evidence for the prosecution of the employees.\(^ {145}\) It also noted the deterrent value of the regulation to keep employees clean and sober.\(^ {146}\)

**B. The Primary Purpose and Immediate Objective of the Special Need Must Go Beyond Typical Law Enforcement Purposes**

The Supreme Court again applied the special needs test in *City of Indianapolis v. Edmond* when it held that a checkpoint program designed to discover illegal drugs was unconstitutional under the Fourth Amendment.\(^ {147}\) The Court acknowledged that certain types of "suspicionless" searches and seizures are constitutional if the "program [is] designed to serve 'special needs, beyond the normal need for law enforcement.'"\(^ {148}\) However, the drug interdiction program in *Edmond* had a "primary purpose . . . to uncover evidence of ordinary criminal wrongdoing" and was, therefore, unconstitutional.\(^ {149}\) In making its decision, the Court noted that it had never upheld a program that was designed specifically to detect criminal wrongdoing.\(^ {150}\) For instance, the Court recalled invalidating a suspicionless search that was conducted merely to check a driver's li-

\(^{141}\) *Id.* at 353 (Blackmun, J., concurring).


\(^{143}\) *Id.* at 634.

\(^{144}\) *Id.* at 606-07.

\(^{145}\) *Id.* at 620-22.

\(^{146}\) *Id.* at 629.


\(^{148}\) *Id.* at 37 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995)).

\(^{149}\) *Id.* at 41-42.

\(^{150}\) *Id.* at 38.
cense and registration on the grounds that the officer's discretion to stop was "'standardless and unconstrained.'" 151 In contrast, the Court recounted upholding a checkpoint program "aimed [to re­duce] the immediate hazard posed by the presence of drunk drivers on the highways, [since] there was an obvious connection between the imperative of highway safety and the law enforcement practice at issue." 152 Accordingly, a search can be deemed reasonable even absent an individualized suspicion of wrongdoing, but only if it is clear that the primary purpose of the activity serves a special need beyond that of general law enforcement, and that its purpose is not solely to obtain general evidence of criminal wrongdoing. 153

Another case which helped to clarify the special needs test was Ferguson v. City of Charleston. 154 In this case, a hospital program forced pregnant women suspected of drug use to submit to urine tests to determine if they were in fact taking illegal drugs while pregnant. 155 The Supreme Court considered the searches to be suspicionless and, as a result, it applied the special needs test. 156 The Court cautioned that when applying the special needs test, the "immediate objective" of the search should be a consideration and not the "ultimate purpose" of the search. 157 Even if the end goal of the testing was to assist pregnant drug users to get treatment, the immediate objective was to obtain evidence of the drug use and to give it to law enforcement in order to effectuate that end goal. 158 The Court reasoned that if the special needs test is viewed in light of the broad "ultimate purpose" rather than the narrow "immediate objective" of the search, every suspicionless search could be "immunized under the special needs doctrine." 159 Therefore, to determine whether there is some special need beyond that of ordinary law enforcement that creates a valid exception to the warrant requirement, the focus must be on the immediate objective of the governmental intrusion rather than the ultimate purpose. 160

A more recent case dealing with the special needs of law enforcement is Illinois v. Lidster, which describes another example of

151. Id. at 39 (quoting Delaware v. Prouse, 440 U.S. 648, 661 (1979)).
152. Id. (citing Mich. Dep't. of State Police v. Sitz, 496 U.S. 444, 451 (1990)).
153. See id. at 37-48.
155. Id. at 70-73.
156. Id. at 79.
157. Id. at 84.
158. Id. at 82-83.
159. Id. at 84.
160. Id.
a suspicionless search program. The police set up a checkpoint in response to a hit-and-run accident that left one person dead, which was designed to acquire information about the accident from motorists who may have seen the hit-and-run. Approaching the checkpoint, Lidster, who was intoxicated, nearly hit an officer. Lidster challenged the stop as an unlawful seizure. The Court did not reference the special needs test, but determined that the checkpoint had an information-seeking purpose, as opposed to the type of search conducted in Edmond, which was intended to control crime. The Court upheld the program as reasonable because the stop was in response to a "grave public concern" and minimally interfered with the motorists' liberty interests. The purpose of the stop was to seek information from motorists about a crime that was probably committed by someone other than those who were questioned. The Court reasoned that a vital part of police work is to ask for information from people. When there is a serious public need, a minimal intrusion of a person's liberty interest is outweighed if the governmental activity is designed to obtain information from people who may have witnessed but not committed the crime.

C. Application of the Special Needs Test to Mandatory DNA Extractions—United States v. Weikert

The statutes mandating extraction of DNA from convicts for storage and analysis in CODIS have been challenged as requiring unconstitutional searches and seizures under the Fourth Amendment. However, courts that have applied the special needs test

162. Id. at 422.
163. Id.
164. Id.
165. Id. at 423.
166. Id. at 422, 427.
167. Id. at 423.
168. Id. at 425.
169. See id. at 426.
170. See, e.g., United States v. Weikert (Weikert II), 504 F.3d 1, 1 (1st Cir. 2007), reh'g denied en banc, 504 F.3d 20 (1st Cir. 2007); United States v. Conley, 453 F.3d 674, 676 (6th Cir. 2006); United States v. Kraklio, 451 F.3d 922, 923 (8th Cir. 2006); Johnson v. Quander, 440 F.3d 489, 491 (D.C. Cir. 2006); Nicholas v. Goord, 430 F.3d 652, 655 (2d Cir. 2005); United States v. Szubelek, 402 F.3d 175, 176 (3d Cir. 2005); Padgett v. Donald, 401 F.3d 1273, 1275 (11th Cir. 2005); Green v. Berge, 354 F.3d 675, 679 (7th Cir. 2004); United States v. Kincade, 379 F.3d 813, 816 (9th Cir. 2004); Groceman v. U.S. Dep't of Justice, 354 F.3d 411, 412-13 (5th Cir. 2004); United States v. Kimler, 335 F.3d 1132, 1138 (10th Cir. 2003); Roe v. Marcotte, 193 F.3d 72, 74 (2d Cir. 1999); Jones v.
to these cases have ruled that the government's special needs outweigh the privacy interests of the convicts, and thus the statutes have been upheld as constitutional.\textsuperscript{171}

Extraction and analysis of DNA is considered a search and seizure protected by the Fourth Amendment because "it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable."\textsuperscript{172} Not only is the extraction an intrusion into the body but it is also an intrusion into the individual's personal privacy and identity—especially since the information taken from the sample can be used in the future.\textsuperscript{173}

However, as stated above, courts that have examined the issue under the special needs test have overwhelmingly held that forced DNA extractions on convicts are not unconstitutional because, notwithstanding the constitutionally protected expectation of privacy in one's DNA, the search is reasonable under the special needs test.\textsuperscript{174} An obstacle under the special needs test that the courts have had to overcome is the "primary purpose/immediate objective" prong.\textsuperscript{175} The courts have found their way around this prong by citing special needs such as obtaining reliable identification, pro-

---

\textsuperscript{171} Conley, 453 F.3d at 679 (finding that the special need was to procure reliable identifying information, reduce recidivism, and protect communities); Nicholas, 430 F.3d at 668-69 (finding that the special need was to create a DNA-indexing database to assist in solving crimes); Green, 354 F.3d at 679 (finding that the special need was to create a reliable identification for storing in the database to solve past and future crimes); Kimler, 335 F.3d at 1146 (finding the special need was to create a DNA-indexing database); Marcotte, 193 F.3d at 79 (finding that the special need was to reduce and prevent the recidivism rate). \textit{But see} United States v. Weikert (\textit{Weikert I}), 421 F. Supp. 2d at 265 (D. Mass. 2006) (holding that the purported special need was merely regular law enforcement purposes), rev'd, 504 F.3d 1 (1st Cir. 2007), \textit{reh'g denied en banc}, 504 F.3d 20 (1st Cir. 2007). There is also a line of cases that has analyzed the constitutionality of the mandatory extraction of convicts' DNA under the totality of the circumstances test, as opposed to the special needs test. \textit{Weikert II}, 504 F.3d at 3; Conley, 453 F.3d at 680-81 (analyzing the issue under both the special needs and totality of the circumstances tests); Kraklio, 451 F.3d at 924-25; Johnson, 440 F.3d at 496; Szczubelek, 402 F.3d at 177; Groceanu, 354 F.3d at 413; Jones, 962 F.2d at 308; Stewart, 468 F. Supp. 2d at 269. The Supreme Court has not yet ruled specifically on the issue of whether familial DNA searches are constitutional.


\textsuperscript{173} \textit{Weikert I}, 421 F. Supp. 2d at 269.

\textsuperscript{174} Nicholas, 430 F.3d at 668-69; Green, 354 F.3d at 679; Kimler, 335 F.3d at 1146; Marcotte, 193 F.3d at 79. \textit{But see Weikert I}, 421 F. Supp. 2d at 265 (holding that the purported special need was merely regular law enforcement purposes).

\textsuperscript{175} Nicholas, 430 F.3d at 668-69; Green, 354 F.3d at 679; Marcotte, 193 F.3d at 79. \textit{But see Weikert I}, 421 F. Supp. 2d at 265.
tecting communities, assisting in solving past and future crimes, creating a DNA-indexing database, and reducing and preventing recidivism.

In *United States v. Weikert (Weikert I)*, the U.S. District Court for the District of Massachusetts considered the constitutionality of a statute mandating the extraction of a supervised releasee's DNA. Although the decision was recently reversed by the Court of Appeals in the First Circuit (*Weikert II*), both decisions are valuable resources to analogize to a familial search scenario.

1. *Weikert I*: Mandatory Extraction of DNA from a Supervised Releasee Is Examined Under the Special Needs Test

After serving time for conspiracy to possess drugs with the intent to distribute and for escape from prison, Weikert was granted supervised release. Upon release, Weikert was notified by the probation office that he was required to submit to a procedure for extracting his DNA, which would then be entered into CODIS. In response, Weikert argued that such an extraction, absent a warrant or individualized suspicion, would violate his Fourth Amendment rights.

Based on the three Supreme Court decisions discussed above, *Edmond*, *Ferguson*, and *Lidster*, *Weikert I* held that the special needs test was the appropriate analysis because the reason for mandating extraction of Weikert's DNA was not based upon an individualized suspicion of wrongdoing. The court applied the

---

176. See Conley, 453 F.3d at 679; Green, 354 F.3d at 679.
178. Kimler, 335 F.3d at 1146.
179. Marcotte, 193 F.3d at 82; Murray, 962 F.2d at 308.
181. United States v. Weikert (*Weikert II*), 504 F.3d 1 (1st Cir. 2007), reh'g denied en banc, 504 F.3d 20 (1st Cir. 2007).
183. *Id.* at 261.
184. *Id.*
189. *Id.* The court distinguished its case from *Griffin v. Wisconsin*, in which the Supreme Court held that a reasonable suspicion justified the search of a probationer's home without a warrant. *Id.* at 264-65 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987)). Because the *Weikert I* search was suspicionless, *Griffin* did not apply.
test, as set out by Justice Blackmun in *T.L.O.*,\textsuperscript{190} and asked whether, in this case, there was a special need beyond typical law enforcement purposes.\textsuperscript{191} *Weikert I* concluded that there was no special need that justified the compulsory extraction, storage, and analysis of DNA.\textsuperscript{192} Rather, the immediate purpose was to solve a crime that Weikert may or may not have committed.\textsuperscript{193}

*Weikert I* also analyzed whether the government's purported special need outweighed Weikert's privacy interest. In examining the intrusion, the court stated that the initial blood extraction is an invasion of a person's privacy interest, and the storage of the information derived from the extraction and later analysis thereof constitutes an even greater invasion of the privacy interest at stake.\textsuperscript{194} The court examined the scope of Weikert's privacy interest, as a supervised releasee.\textsuperscript{195} It explained that a supervised releasee does not have the same level of privacy interest as a law-abiding individual. The exact extent of the interest is a question that has been left unanswered.\textsuperscript{196} For instance, a person on supervised release may have his home searched while he is on probation even if the police have no search warrant and no probable cause, so long as there is adequate reasonable suspicion.\textsuperscript{197} The court found this analogy unhelpful because an intrusion of a person's home is much different than that of his body,\textsuperscript{198} which deserves a higher expectation of privacy. Furthermore, to justify a governmental home invasion there must be a reasonable suspicion of criminal wrongdoing, as opposed to Weikert's circumstances where the DNA was being extracted merely because he was on supervised release and not because he was suspected of criminal wrongdoing.\textsuperscript{199}

\textsuperscript{190} See supra notes 129-139 and accompanying text.
\textsuperscript{191} Id. at 264 (citing Nicholas v. Goord, 430 F.3d 652, 664 n.22 (2d Cir. 2005)).
\textsuperscript{192} Id. at 265.
\textsuperscript{193} Id.
\textsuperscript{194} Id. at 266.
\textsuperscript{195} Id. at 266-68.
\textsuperscript{196} Id. at 266 (citing Griffin v. Wisconsin, 483 U.S. 868, 874 (1987), which stated that a person on supervised release may have a liberty interest conditioned on probationary rules, as opposed to an absolute liberty interest).
\textsuperscript{197} Id. (citing *Griffin*, 483 U.S. at 874). A probationary period is part of the sentence, and the person on supervised release can be sent back to prison for violating the conditions of the supervised release. Id. at 267.
\textsuperscript{198} Id. at 266-67.
\textsuperscript{199} Id. (defining the issue as "whether such individuals have a limited privacy interest in a suspicionless invasion into their body and their identity").
The court then examined the privacy interests of a person in prison,\textsuperscript{200} and determined that a supervised releasee has a privacy interest falling somewhere between that of a law-abiding citizen and that of a prisoner—but closer to that of a law-abiding citizen.\textsuperscript{201} For instance, after one year and upon a showing of good conduct, a supervised releasee can have the supervised release terminated if the termination is in the interest of justice; however, a prisoner's restricted expectation of privacy is limited to the prison cell.\textsuperscript{202} Thus, the court found that a supervised releasee's expectation of privacy is significant.\textsuperscript{203}

In weighing the interests of the individual's privacy right and the government's alleged special need, the court acknowledged the government's success rate of catching criminals due to the DNA-indexing database.\textsuperscript{204} Where there is a great public interest at stake, suspicionless searches may be upheld.\textsuperscript{205} However, the court did not believe that the government's interests outweighed the extreme bodily intrusion and resulting invasion of privacy that occurred when DNA was stored in a centralized database.\textsuperscript{206} The court recognized that, in the future, the stored DNA may be found to contain trait coding.\textsuperscript{207} Further, if the DNA falls into the wrong hands it may be used for improper purposes, which would be a major privacy concern.\textsuperscript{208} The intrusion occurred at various levels: the extraction, analysis, storage, and potential misuse of the DNA.\textsuperscript{209}

The court acknowledged that certain citizens have lowered expectations of privacy, such as a person who has been convicted, or a

\begin{itemize}
\item \textsuperscript{200}Id. at 267 (citing Hudson v. Palmer, 468 U.S. 517, 525-26 (1984), which held that a prisoner does not have a "reasonable expectation of privacy" from his prison cell being searched).
\item \textsuperscript{201}Id. at 267-68.
\item \textsuperscript{202}Id. at 267 (citing 18 U.S.C. § 3583(e)(1) (2000)).
\item \textsuperscript{203}Id. at 268.
\item \textsuperscript{204}Id.
\item \textsuperscript{205}Id.; see, e.g., Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). The special needs test is invoked to "prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person." Id. at 668; see also Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 634 (1989) (holding that the government’s interest in protecting against serious accidents justified the mandatory blood and urine testing); United States v. Martinez-Fuerte, 428 U.S. 543, 566-67 (1976) (holding that searching vehicles at the country’s borders without individualized suspicion was acceptable given the nation’s interest in maintaining secure borders).
\item \textsuperscript{206}Weikert I, 421 F. Supp. 2d at 270.
\item \textsuperscript{207}Id. at 269.
\item \textsuperscript{208}Id.
\item \textsuperscript{209}Id.
\end{itemize}
person on supervised release. And yet, the court still believed that a person on supervised release has a privacy interest in his DNA that outweights the government's interest in solving crimes, especially in light of the severity of the intrusion.

2. Weikert II Reversed Weikert I But Limited Its Holding

In Weikert II the Court of Appeals for the First Circuit reversed Weikert I and held that it is constitutional to extract and store the DNA of an individual on supervised release in CODIS under the DNA Act using the totality of the circumstances test. The First Circuit joined the majority of federal courts that use the totality of the circumstances test when examining challenges to laws that call for mandatory extraction of DNA. The totality of the circumstances test analyzes the reasonableness of a search by weighing the extent to which the search intrudes upon an individual's privacy and the extent to which the search is needed for the promotion of legitimate governmental interests. The court rejected the notion that the special needs test is the only test that may be applied when there is no individualized suspicion against an individual. To support this proposition, it cited Sampson v. California, which utilized the totality of the circumstances test to determine that an individual on conditioned release may be searched absent any individualized suspicion. Because the Court of Appeals for the First Circuit in Weikert II viewed Weikert's status as a supervised releasee, the same as Sampson's status as a con-

---

210. Id. at 266-68.
211. Id. at 270.
212. Id. at 269.
213. United States v. Weikert (Weikert II), 504 F.3d 1, 1 (1st Cir. 2007), reh'g denied en banc, 504 F.3d 20 (1st Cir. 2007).
214. Id. at 8. The majority of courts use the totality of the circumstances test. See United States v. Kraklio, 451 F.3d 922, 924 (8th Cir. 2006); Johnson v. Quander, 440 F.3d 489, 496 (D.C. Cir. 2006); United States v. Sczubelek, 402 F.3d 175, 184 (3d Cir. 2005); Padgett v. Donald, 401 F.3d 1273, 1280 (11th Cir. 2005); United States v. Kincaide, 379 F.3d 813, 832 (9th Cir. 2004); Groceman v. U.S. Dep't of Justice, 354 F.3d 411, 413-14 (5th Cir. 2004); Jones v. Murray, 962 F.2d 302, 306-07 (4th Cir. 1992). A minority of courts use the special needs test. See United States v. Amerson, 483 F.3d 73, 79 n.6 (2d Cir. 2007); United States v. Hook, 471 F.3d 766, 773 (7th Cir. 2006); United States v. Kimler, 335 F.3d 1132, 1146 (10th Cir. 2003).
216. Weikert II, 504 F.3d at 8.
217. Id.
ditioned releasee, it held that the totality of the circumstances test must apply.219

Applying the totality of the circumstances test, the court weighed Weikert’s interest in privacy against the government’s interest in conducting the search (i.e., extraction and storage of DNA in CODIS).220 Again, the court found that an individual on supervised release is like an individual on conditioned release, as in Sampson, and held that such an individual has a lower expectation of privacy by virtue of his status.221 It further found that the intrusion is minimal because the extraction of DNA does not include much risk.222 According to the court, the storage of DNA does not pose a risk unless the DNA information is released and improperly utilized by third parties and the DNA is found to be more than junk.223 The Court of Appeals for the First Circuit noted that the government has a strong interest in identifying, monitoring, and rehabilitating criminals and in solving crimes.224 When balancing the parties’ interests, the court concluded that the government’s interest outweighed Weikert’s.225

Limitations restrict Weikert II’s holding, however.226 It applies only to individuals subject to the DNA Act and not free and law-abiding citizens.227 Given that this Note does not focus on challenges to the DNA Act, but rather free and law-abiding family members, the appropriate analysis that this Note will utilize is the special needs test, as in Weikert I, as opposed to the totality of the circumstances test in Weikert II. It is also worth noting that the Weikert II court stated that it would reexamine the issue if the stored DNA is scientifically concluded to be more than just junk and is potentially, or consequently, misused.228 The court’s conclusion leaves the door open for further evaluation of the privacy implications of CODIS.

220. Id. at 11-14.
221. Id. at 11-12.
222. Id. at 12-15.
223. Id.
224. Id. at 14.
225. Id.
226. Id. at 15-18.
227. Id. at 15.
228. Id. at 13.
IV. Analysis

A. A Family Member Has Standing Because He Has a Reasonable Expectation of Privacy Against the Familial Search

1. The Fourth Amendment Should Be Broadly Interpreted to Include Common DNA

The term "person" in the Fourth Amendment should not be narrowly construed to mean the actual person. Common or shared DNA is, in essence, a partial genetic makeup of the family member's person. Rather, the term "person" should be construed more broadly to protect the family member so as to avoid the denial of the family member's reasonable expectation of privacy simply because the intrusion does not occur to his actual person.

The Fourth Amendment expressly protects "persons, houses, papers, and effects against unreasonable searches and seizures." However, Katz v. United States, one of the most significant Fourth Amendment decisions, held that people—not places—are protected by the Fourth Amendment. Katz overturned Olmstead v. United States, which read the Constitution more narrowly, hold-

229. U.S. CONST. amend. IV.
230. See generally Katz v. United States, 389 U.S. 347, 351 (1967). It has long been recognized that the Fourth Amendment does protect a person's reasonable expectation of privacy.
231. U.S. CONST. amend. IV.
232. David A. Sklansky, Katz v. United States: The Limits of Aphorism, in FOUNDATION PRESS, CRIMINAL PROCEDURE STORIES 223 (Carol S. Steiker ed., 2006). Charlie Katz, the defendant in Katz, made his living by wagering on sporting events for him and for others, in large part, across state lines by the telephone. Id. at 224. Charlie did well for himself; he was living in a hotel room on Sunset Boulevard in Los Angeles. Id. On an informant's tip, five FBI agents began an investigation. Id. Everyday the FBI watched Charlie leave his hotel and walk to a group of three phone booths down the street and make several calls. Id. The FBI placed a recording device on top of one of the phone booths, microphones on the back of two of the booths, and an out-of-order sign on the third booth. Id. at 224-25. The FBI recorded numerous one-sided conversations (Charlie's side), which strongly indicated that Charlie was placing bets illegally. Id. at 225. The phone company confirmed that the calls were traveling across state lines and the FBI arrested and charged Charlie with interstate wagering. Id.
233. Olmstead v. United States, 277 U.S. 438 (1928), overruled by Katz, 389 U.S. 347, and Berger v. New York, 388 U.S. 41 (1967). Olmstead was a lieutenant with the Seattle Police Department who was fired because he was caught smuggling alcohol from Canada during Prohibition. Sklansky, supra note 232, at 226. Afterward he became a full-time rum runner, making up to $200,000 per month in sales. Id. Olmstead conducted a lot of his business over the telephone. Id. at 227. Despite a general disapproval of wiretapping at the time—it was illegal in Washington and against federal policy—prohibition agents monitored Olmstead's calls. Id. They obtained enough information to convict Olmstead and twenty of his associates. Id.
ing that the Fourth Amendment protects only material things such a
person and his house, papers, and effects.\textsuperscript{234} With the demise of
\textit{Olmstead}, the notion that the Fourth Amendment analysis was
based in property law was extinguished.\textsuperscript{235} Although the parties in
\textit{Katz} put great emphasis on the issue of whether the phone booth
was a "constitutionally protected area,"\textsuperscript{236} the Supreme Court re­
jected the notion that the "area" was of constitutional significance,
because the court has "never suggested that this concept can serve
as a talismanic solution to every Fourth Amendment problem."\textsuperscript{237}

Fortunately, the Supreme Court had the forethought to avoid
making bright-line rules about what constitutes a constitutionally
protected area.\textsuperscript{238} The Constitution expressly guarantees the right
of the people to be free unreasonable searches of their person.\textsuperscript{239}
However, it is clear in Brian's hypothetical that the DNA, which
was searched in the database, was not extracted from Brian's per­
son.\textsuperscript{240} If the hypothetical was analyzed under a rigid reading of the
Constitution, Brian would have no protection from the familial
search because Brian's person was not actually physically searched.
Such an analysis would deprive Brian of his expectation of privacy
in the personal and common DNA information that Brian shares
with his brother. In light of \textit{Katz},\textsuperscript{241} it should not be dispositive that
the family member's actual person has not been searched, as long a
family member such as Brian has a reasonable expectation of pri­
vacy in the common DNA. This is true especially in light of the fact
that the content of the search reveals extremely private
information.\textsuperscript{242}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{234} \textit{Olmstead}, 277 U.S. at 464.
\item \textsuperscript{235} \textit{Katz}, 389 U.S. at 353 (citing Warden v. Hayden, 387 U.S. 294, 304 (1967)).
\item \textsuperscript{236} \textit{Id.} at 351. During oral argument before the Supreme Court, Katz's counsel
framed the issue to eliminate the typical property-based Fourth Amendment analysis.
Sklansky, \textit{supra} note 232, at 243. Counsel argued that the Court must not focus on
whether an area is constitutionally protected, but rather "whether a reasonable person,
objectively looking at the communications setting, the situation and the location of the
communicator and communicatee, would ... reasonably believe that the communication
was intended to be confidential." \textit{Id.} (quoting Transcript of Oral Argument at 1,
\textit{Katz}, 389 U.S. 347 (No. 35)). The point being that the protected interest follows the
person. \textit{Id.}
\item \textsuperscript{237} \textit{Katz}, 389 U.S. at 351 n.9.
\item \textsuperscript{238} \textit{See id.} at 359.
\item \textsuperscript{239} U.S. \textit{Const.} amend. IV.
\item \textsuperscript{240} \textit{See supra} \textit{INTRODUCTION, Part A.}
\item \textsuperscript{241} \textit{Katz}, 389 U.S. at 351 (rejecting a rigid reading of the Constitution and stating
that the Fourth Amendment protects the privacy interests of people and not places).
\item \textsuperscript{242} \textit{See United States v. Stewart}, 468 F. Supp. 2d 261, 265 (D. Mass. 2007) (re­
marking that DNA information "is of the most sensitive and personal nature, and it is
\end{enumerate}
\end{footnotesize}
In *Minnesota v. Olson*, the Court ruled that a person may have a reasonable expectation of privacy against governmental intrusion in a home that is not his own. The government argued that Olson, an overnight guest, did not have a reasonable expectation of privacy in his host’s home because he did not have exclusive control of the premises and was not free to exclude or admit others as he wished. The Court rejected this contention and ruled that exclusive control over the place searched is not a necessary factor in order to find that a person has a reasonable expectation of privacy in the place searched. The Court reasoned that society recognizes the individual’s expectation of privacy in the host’s home because being a host or an overnight guest is a long-standing tradition in our country that serves many beneficial functions in our society—most people will either be a host or an overnight guest in their lifetime. Overnight guests seek shelter from the elements when at the host’s home. People are most vulnerable when they sleep, so they expect privacy and safety when in the host’s home.

Just as society acknowledges that a person reasonably expects privacy from governmental intrusion in his host’s home, a family member has the same type of reasonable expectation that the DNA he shares in common with his family will be kept private from unreasonable governmental intrusion. In the hypothetical, Brian took great pains to disassociate from his family. Therefore, he has a subjective expectation of privacy that the genetic link will not be traced by the government or anyone else. Furthermore, Brian’s expectation of privacy should be recognized by society as reasonable because family relationships are considered private and sacred.

\[\text{inconceivable that one would expect this information to be readily available to the government or to the public}].\]

244. *Id.*
245. *Id.* at 99.
246. *Id.* at 98-99.
247. *Id.* at 99.
248. *Id.*
249. See *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (calling a family relationship a private realm in the context of a Fourteenth Amendment issue); *Washington v. Glucksberg*, 521 U.S. 702, 771 (1997) (Souter, J., concurring) (acknowledging that there is a broad liberty interest to be free from unreasonable governmental intrusions into the privacy of family life); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (recounting that the Constitution affords protection to individuals with respect to decisions involving their family relationships in the context of a Fourteenth Amendment question); *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) (stating that family relationships, in the context of a First Amendment issue, “presuppose ‘deep attachments and commitments to the necessarily few other individuals with
It is immaterial that Brian does not have exclusive control over his sibling's DNA, and that he does not have an exact match to his sibling's DNA under the Olson Court's reasoning. Brian's convict brother is, in effect, the "host" and Brian is the "overnight guest." Clearly, society must value the privacy interests associated with family relationships to a greater extent than the privacy expectations associated with being an overnight guest. Therefore, it is logical to conclude that society would recognize Brian's expectation of privacy against unreasonable governmental intrusion simply based on the fact that Brian is genetically linked to a person with a criminal record.

2. The Lack of a Physical Intrusion in a Familial Search Is Immaterial

The government would likely challenge a family member's expectation of privacy in common DNA because the DNA is not physically extracted from the family member, and yields no highly personal or intimate information. Therefore, the government would argue that the family member has no standing to assert a Fourth Amendment claim because he has not been subject to an actual governmental intrusion. However, neither the level of personal information revealed nor the lack of a physical intrusion determines the validity of a Fourth Amendment claim. In Kyllo v. United States, the Supreme Court noted that, in the past, an intrusion was easier to discern because it was based on the archaic property concept that no search exists unless there was an actual physical intrusion into the place searched. The law has changed, however, and property law concepts have been separated from Fourth Amendment analysis. After abandoning the property concept and in light of ever-advancing technology, Kyllo examined what a reasonable expectation of privacy might be. Aware of technology's potential harm to individuals' right to privacy, the Court stated that "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been

whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life" (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 619-20 (1984)).

250. See Olson, 495 U.S. at 99.

251. Kyllo v. United States, 533 U.S. 27, 31 (2001). In Kyllo, the government used heat-sensing thermal technology from a parked car across the street from the defendant's home to determine if he was growing marijuana. Id. at 29-30.

252. Id. at 32.

253. Id. at 33.
entirely unaffected by the advance of technology.”254 Therefore, the Court did not impose a narrow understanding of the meaning of “intrusion.” The Court recognized that people’s expectation of privacy in their homes has “roots deep” in our society and “to withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment.”255

*Kyllo*’s dissent argued that the thermal imaging technology did not constitute a search because there is no actual intrusion since it only gleans images that radiate from outside of the house and by an “off-the-wall” observation, as opposed to a “through-the-wall” observation.256 However, the Court strongly disagreed because it had previously rejected such a narrow reading of the Fourth Amendment in *Katz*.257 *Katz* held that the use of eavesdropping technology that only detected sound waves emanating from a phone booth constituted an invasive search even though the sound waves were only picked up from the exterior of the phone booth.258 Refusing to overturn the holding in *Katz*, and in order to preserve the privacy which was envisioned by the Framers of the Fourth Amendment, the Court held that there can be an intrusion into a constitutionally protected area despite a lack of physical intrusion.259 Of great import to the *Kyllo* Court was the danger that more advanced technology was already being used, or being developed that would render “the homeowner at the mercy of advancing technology, including imaging technology that could discern all human activity in the home.”260

In the case of familial searches, the government may make an “off-the-walls” type of argument, contending that the search is conducted against DNA already existing in the database and extracted from a convict, not the family member, and therefore the information gleaned is not a physical intrusion against the family member. However, this notion was rejected in *Kyllo* because a lack of physical intrusion does not mean that a legitimate interest of privacy has not been invaded. The notion should be rejected in the case of familial searches too. *Kyllo* was more concerned with the unfair ad-

---

254. *Id.* at 33-34.
255. *Id.*
256. *Id.* at 35.
257. *Id.* at 36.
258. *Id.*
259. *Id.* at 34.
260. *Id.* at 35-36.
vantages that the government might gain through the use of new
technology, which would erode the Fourth Amendment’s protec-
tion to the detriment of society. The familial searching technology
has the same unfair effect, and will unfortunately harm society.
Members of society will no longer be able to rely on their own good
and honest behavior to keep them free from the government’s
watchful and intrusive eye.

There is a limitation set forth by *Kyllo*. When new technol-
ogy is used to conduct a search, a person cannot reasonably expect
to be free from that particular type of intrusion if the technology is
readily available for “general public use.” This is because a per-
son cannot reasonably claim to have an expectation of privacy in
something that is open for the public to view. If the technology is
available to the public, this would grant it the ability to gain an
open view, and thus one cannot expect such privacy. Today
CODIS is not available for public use; it is limited to governmental
use. Without the use of the familial search technology, the re-
sulting partial match is not readily discernable by the public.
Therefore, a family member’s expectation of privacy in his common
DNA can be considered constitutionally reasonable because tech-
nology is not available to the public that can produce accurate
DNA matches revealing the number of alleles that two relatives
have in common and the degree of their genetic relationship.

261. *Id.*
262. *Id.* at 34.
263. *Id.* at 42 (Stevens, J., dissenting).
264. See *id.*
265. See Combined DNA Index System, *supra* note 6, at 4 (stating that CODIS is
an FBI program that enables national, state, and local crime labs to work together).
Individuals can have familial DNA testing performed by private companies or self-spec-
genetica.com/index.php (last visited Dec. 29, 2007). In a private setting, the individual
must suspect a particular person of having a familial relationship and collect a sample of
his DNA to conduct the analysis between the two individuals’ DNA. See Genetica,
Dec. 29, 2007). Clearly, a familial search in CODIS is distinguished from the private
DNA testing technology that is available to the public. The technology involved in
CODIS allows one sample of DNA to be compared against millions of random offender
DNA samples, having no particular suspect, to find a familial match. A member of the
public would be unable to do a private test to ascertain a familial relationship without
having the suspect’s DNA for comparison and does not have access to the CODIS
database. Therefore, the CODIS technology is not available to the public in the man-
ner required to invoke *Kyllo’s* physical intrusion exception.
3. It Is Immaterial that Junk DNA Is Currently Believed to Lack Intimate Information

The government would likely argue that a familial search is not a search protected by the Fourth Amendment because it reveals no intimate information and, therefore, a person cannot have a reasonable expectation of privacy against a familial search. The basis of this argument would be that common DNA is not protected by the Fourth Amendment because it is not extracted from the family member who is a defendant and the type and extent of intimate information stored in common DNA has no legal significance. The point is that the common DNA that is searched contains information that is personal to the composition of the individual family member’s genetic make-up—his “person.” 266 In *Kyllo*, the Supreme Court examined whether a person can have a reasonable expectation of privacy against a search that reveals no specific intimate information. 267 The Court said that it had never adopted the notion that “the Fourth Amendment’s protection of the home [is] tied to measurement of the quality or quantity of information obtained.” 268

For instance, an officer who simply peaks through an open door and observes a rug has seen something intimate because “*all details are intimate details*” in the home, since the home is protected by the Fourth Amendment. 269 Although the Court refused to say that the invasion must reveal intimate details to be considered intrusive and protected by the Fourth Amendment, it stated that the heat in the defendant’s home was an intimate detail because it came from within the protected home. 270

Likewise, family members share common DNA. The portion of DNA that is unique to the defendant family member is something that reveals highly personal genetic information that is found within his person, although it is also found in the convict family member’s person. This is a protected area and, therefore, is an intimate detail that society should readily accept as deserving constitutional protection. It could indicate whether a person has a propensity for addiction to drugs or alcohol or other traits, or it may reveal information about whether a person has a genetic disor-

266. See generally U.S. Const. amend. IV.
268. *Id.*
269. *Id.*
270. *Id.* at 38.
Applying this to Brian's hypothetical, the familial search revealed information which is stored in Brian's own person, and therefore it is highly intimate. Since it is highly intimate, Brian has a reasonable expectation of privacy in the common DNA he shares with his family.

Furthermore, the depth of intimate knowledge contained in DNA is not yet totally understood. Technology is ever advancing. Society should not be surprised if someday technological advances bring a new understanding that intimate details are stored in junk DNA. Then, family members like Brian who do not have a lowered expectation of privacy may have their DNA information analyzed and used in ways not even dreamt of in this modern world, simply based on a genetic relationship to a convict.

History has demonstrated how the expanded use of data collected by the government can be detrimental to American citizens. It is entirely plausible that, although the government initially has a limited use for the stored DNA, the use will be expanded and the data collected will eventually be used in ways that will further impede on society's freedom from governmental intrusion. The government will have a plethora of information about individuals' biological and psychological make-ups and a new and powerful means of surveillance, which could subject people to arbitrary governmental intrusions.

Today, the DNA stored in CODIS is considered by the government to be junk DNA with no real use other than for identification. However, some scientists now question whether the DNA is actually junk, and believe it may have the potential to reveal "informa-

271. DNA Fingerprinting and Civil Liberties Project, supra note 37.
272. United States v. Stewart, 468 F. Supp. 2d 261, 280 (D. Mass. 2007) (predicting that the government will exploit the DNA data it has collected). For instance, social security numbers were initially assigned to citizens for retirement programs, but now the numbers are used as a "universal identification number." Id. Furthermore, census records initially collected by the government for statistical use were later used to assist in the Japanese internment program of World War II. Id.
274. See id.
tion beyond mere identity, relating to health, race, and gender,"\textsuperscript{275} and may someday reveal the "very basis of human complexity."\textsuperscript{276}

As an example of how the stored DNA could be misused, the government could conduct genetic profiling based on individuals' familial relationships to convicts to try to predict whether crime runs in families.\textsuperscript{277} Once a family member is genetically profiled based on "perceived biological truths," a family member may become susceptible to fulfilling the "genetic prophecy," and become a criminal himself.\textsuperscript{278} Furthermore, the DNA information could be distributed to third parties, either unintentionally or without authorization.\textsuperscript{279} Family members could also potentially be stereotyped based on other perceived genetic predispositions, such as to disease or sexual orientation.\textsuperscript{280} Then, as if genetic profiling is not intrusive enough, the family member's genetic profile can be searched time and again.\textsuperscript{281}

The intimate information contained in common DNA—whether now known, or soon to be learned through advances in science—is information in which a family member has a reasonable expectation of privacy against governmental intrusion. Before society willingly accepts familial searches, it should understand that the practice could open doors that will not easily close. Genetic information is the most intimate and private information. Sacrificing this privacy will erode the Fourth Amendment's protections into meaningless words.


\textsuperscript{277} See DNA Database Can Flag Suspects, \textit{supra} note 55.


\textsuperscript{279} See generally Yael Bregman-Eschet, \textit{Genetic Databases and Biobanks: Who Controls Our Genetic Privacy?}, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 14-15 (2006) (discussing the possibility that third parties might use genetic bio-samples to profile people for genetic dispositions; for example, the military could analyze DNA to determine sexual orientation).

\textsuperscript{280} See Rao, \textit{supra} note 278, at 828.

\textsuperscript{281} See generally Villaflor, \textit{supra} note 276.
B. A Familial Search Is Unreasonable and Violates the Fourth Amendment

The Weikert II court joined the majority of courts that adopt the totality of the circumstances test to analyze Fourth Amendment challenges to mandatory DNA extractions under the DNA Act.\textsuperscript{282} However, Weikert II and other cases that utilize the totality of the circumstances test are not on point with a familial search scenario because the constitutionality of the DNA Act is not at issue. The reasonableness of a search conducted without any individualized suspicion, against a free and law-abiding citizen, must therefore be analyzed under the special needs test. Although reversed, Weikert I viewed a supervised releasee's expectation of privacy closer to that of a law-abiding citizen,\textsuperscript{283} like a family member. Therefore, Weikert I is useful for its discussion about the special needs test and the balancing of interests, and will be used for its analysis in this Part.

1. The Primary Purpose of Conducting a Familial Search Is to Solve a Crime—Thus No Special Need Exists

Familial searches are unreasonable under the Fourth Amendment because a familial search does not serve any purpose beyond assisting the government to solve more crimes. When running a familial search, the government has no suspect. The familial search is in fact conducted in order to contrive individualized suspicion against a convict’s family member in order to solve a particular crime.\textsuperscript{284} For example, before the law enforcement authorities ran the familial search in Brian’s hypothetical, they had ruled out Brian as the culprit. They used the search to implicate Brian.

In the case of familial searches, the government should be required to assert a compelling and special need in order to justify the search when there is no individualized suspicion against the family member. The government’s primary purpose for running a familial search, however, is to solve a particular crime or to “uncover evidence of ordinary criminal wrongdoing.”\textsuperscript{285} It does not serve a

\begin{itemize}
  \item \textsuperscript{282} United States v. Weikert (Weikert II), 504 F.3d 1, 6 (1st Cir. 2007), \textit{reh’g denied en banc}, 504 F.3d 20 (1st Cir. 2007).
  \item \textsuperscript{283} United States v. Weikert (Weikert I), 421 F. Supp. 2d 259, 267 (D. Mass. 2006), \textit{rev’d}, 504 F.3d 1 (1st Cir. 2007), \textit{reh’g denied en banc}, 504 F.3d 20 (1st Cir. 2007).
  \item \textsuperscript{284} Katz v. United States, 389 U.S. 347, 351 (1967).
  \item \textsuperscript{285} \textit{Cf.} City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000) (stating that because the primary purpose of the narcotics checkpoint is to uncover evidence of ordinary criminal wrongdoing, it is not a special need).
\end{itemize}
great societal purpose, such as removing intoxicated drivers from the road,\textsuperscript{286} or protecting people on the railways from the consequences of intoxicated railroad employees\textsuperscript{287}—purposes that were considered legitimate special needs according to the Supreme Court.

One of the main reasons for allowing a search based on a special need is that it would be impractical to obtain a warrant. This is exemplified in \textit{T.L.O.}'s school setting where the need to act swiftly to protect the children outweighed the minimal intrusion of the search and rendered the warrant requirement impractical.\textsuperscript{288} The need to run a familial search is not one that requires an immediate response to safeguard members of society. Such a response would render the warrant and probable cause requirements so impractical as to justify dispensing with them.\textsuperscript{289} Rather, the familial search is more like the unconstitutional roadblock in \textit{Edmond}\textsuperscript{290} and the unconstitutional drug tests in \textit{Ferguson},\textsuperscript{291} which were designed primarily for an ordinary law enforcement purpose: generating evidence to solve a crime.

Courts that have upheld the mandatory extraction of DNA have justified the searches by claiming that the government has a special need and immediate non-law-enforcement purpose to build a DNA-indexing database.\textsuperscript{292} The district court in \textit{Weikert I} saw through the purported special need to build a DNA-indexing database, stating, "The government’s purpose . . . is not to get ‘information about a crime in all likelihood committed by others’ . . . but instead to determine whether the searched individual has committed a crime."\textsuperscript{293}

\begin{itemize}
\item \textsuperscript{288} New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).
\item \textsuperscript{289} This result was envisioned by Justice Blackmun at the inception of the special needs test. \textit{id.} at 353.
\item \textsuperscript{290} \textit{Edmond}, 531 U.S. at 42-43 (holding that a drug interdiction conducted to find evidence of a crime violates the Fourth Amendment).
\item \textsuperscript{291} \textit{Ferguson} v. City of Charleston, 532 U.S. 67, 82-84 (2001) (holding that a drug testing program designed to find evidence of illegal drug use by pregnant women, which would ultimately protect unborn babies, was unconstitutional).
\item \textsuperscript{292} Nicholas v. Goord, 430 F.3d 652, 655, 668 (2d Cir. 2005); United States v. Kimler, 335 F.3d 1132, 1146 (10th Cir. 2003).
\end{itemize}
It is absurd to say that the primary purpose of CODIS is to build a DNA-indexing database rather than to solve crimes. But it is even more absurd to argue that a familial search is anything other than an effort to solve a particular crime. Weikert I aptly recognized that the FBI's own website states that the purpose of CODIS is to solve crimes. Therefore, it is ludicrous to assert that the purpose of a smaller search, such as a familial one, could be anything other than to solve crime. It is important to distinguish the primary purpose from the ultimate, broader social goal, otherwise the special needs test will "immunize" all searches conducted absent individualized suspicion, thereby creating a police state.

The government is likely to assert that the special need for familial DNA tests is something akin to the "information seeking" activity held lawful in Lidster. It will claim that the familial search is merely a tool to gain information about who may have been present or may have witnessed a crime, rather than implicate that family member as the prime suspect. But the familial search is unlike the type of information-seeking search in Lidster because it is not designed to gather information from someone who probably did not commit the crime. In actuality, the sole and immediate purpose of a familial search is to obtain a lead to solve a crime committed by a convict's family member.

2. A Family Member's Privacy Interest Outweighs the Interests of the Government

If the government can surmount the special need hurdle, the government must still show that its intrusion is justified because its interest in the special need outweighs the privacy interest of the affected family member. In conducting this balancing test, it is important to understand that not every citizen is afforded the same level or degree of interest in his privacy. In other words, a person's interest in privacy is graded on a scale of reasonableness based on that person's status in the legal system.

For instance, the Supreme Court has held that a prisoner cannot reasonably expect privacy in his prison cell, nor can society
deem such an expectation of privacy reasonable.\textsuperscript{299} Prisoners are confined involuntarily because they have engaged in behavior that society rejects.\textsuperscript{300} Such behavior demonstrates that the prisoners were unable to conform to society's notions of acceptable conduct and unable to exercise self-restraint. Riots, murder of inmates and personnel, suicide, rape, assault, and drug trafficking are some of the dangers that lurk in prisons.\textsuperscript{301} Prison authorities have a duty to keep the prisoners and third parties safe.\textsuperscript{302} Thus, the Supreme Court has ruled that a prisoner has no Fourth Amendment right against governmental searches and seizures within a prison cell because the prisoner's interest in privacy is diminished by his legal status and because the important governmental need outweighs the intrusion.\textsuperscript{303}

Imprisonment in solitary confinement at a maximum security prison is at the most extreme end of the punishment continuum and a few hours of community service is on the lower end.\textsuperscript{304} There are many points on the continuum that fall between the two extremes.\textsuperscript{305} For instance, other points on the continuum are medium- and low-level security imprisonment, parole, probation, and halfway houses.\textsuperscript{306} With each point on the continuum, the scope of a convict's privacy interest must be examined.

With respect to a probationer,\textsuperscript{307} the Supreme Court held that a warrantless search of a probationer's home, authorized by a state regulation, is not a Fourth Amendment violation.\textsuperscript{308} While a probationer does have a reasonable expectation of privacy in his home,\textsuperscript{309} probation is a criminal sanction for the probationer's antisocial behavior that resulted in the probationer's conviction.\textsuperscript{310} As such, probationers do not have the same degree of privacy interest as a

\begin{itemize}
\item \textsuperscript{300} Id. at 526.
\item \textsuperscript{301} Id.
\item \textsuperscript{302} Id.
\item \textsuperscript{303} Id.
\item \textsuperscript{304} Griffin v. Wisconsin, 483 U.S. 868, 874 (1987).
\item \textsuperscript{305} Id.
\item \textsuperscript{306} Id.
\item \textsuperscript{307} United States v. Stewart, 468 F. Supp. 2d 261, 274 (D. Mass. 2007) (defining probation as "'[a] court-imposed criminal sentence that, subject to state conditions, releases a convicted person into the community instead of sending the criminal to jail or prison.'" (quoting BLACK'S LAW DICTIONARY 1220 (7th ed. 1999))).
\item \textsuperscript{308} Griffin, 483 U.S. at 872.
\item \textsuperscript{309} Id. at 873.
\item \textsuperscript{310} Id. at 874.
\end{itemize}
law-abiding citizen.\textsuperscript{311} Rather, the probationer’s release into society is conditioned upon restrictions.\textsuperscript{312} Some of the supervisory restrictions imposed on probationers are often mandatory employment, avoidance of certain places and people, weekends in prison, avoidance of alcohol, and allowance of searches by probation officers.\textsuperscript{313} These restrictions help to assist in rehabilitation, protect citizens, reduce the likelihood of recidivism, and ensure that the probationer is safely integrating back into society.\textsuperscript{314} The intrusion of a probationer’s privacy interest is justified because the government’s special need outweighs the probationer’s privacy interest, and a warrant requirement would be impractical.\textsuperscript{315}

Although the court of appeals in \textit{Weikert II} reversed \textit{Weikert I}, the holding was limited to individuals challenging the DNA Act, such as supervised releasees.\textsuperscript{316} The court of appeals believed that, based on Weikert’s status as a supervised releasee, he had a reduced expectation of privacy that was outweighed by the government’s interest in identifying, monitoring, and rehabilitating criminals, and solving crimes more accurately and efficiently.\textsuperscript{317} The holding does not apply to a family member who is a free and law-abiding citizen with an undiminished expectation of privacy.

The district court’s decision in \textit{Weikert I} is valuable for analysis regarding the balancing of interests, particularly the intrusiveness of storing and analyzing DNA in CODIS. The court believed that an analysis of DNA’s identifying information constituted a more severe intrusion than the actual extraction of DNA, which requires penetration of the skin.\textsuperscript{318} In fact, the “startling advance of technology” will enable DNA samples to be turned into profiles and searched time and again throughout a person’s lifetime.\textsuperscript{319} This would constitute an extreme governmental intrusion of a family

\textsuperscript{311} Id.
\textsuperscript{312} Id.
\textsuperscript{313} Id.
\textsuperscript{314} Id. at 875.
\textsuperscript{315} Id. at 876-80.
\textsuperscript{316} United States v. Weikert (\textit{Weikert II}), 504 F.3d 1, 3 (1st Cir. 2007), \textit{reh’g denied en banc}, 504 F.3d 20 (1st Cir. 2007).
\textsuperscript{317} Id. at 11.
\textsuperscript{318} United States v. Weikert (\textit{Weikert I}), 421 F. Supp. 2d 259, 266 (D. Mass. 2006), \textit{rev’d}, 504 F.3d 1 (1st Cir. 2007), \textit{reh’g denied en banc}, 504 F.3d 20 (1st Cir. 2007).
\textsuperscript{319} See United States v. Szubelek, 402 F.3d 175, 198 (3d Cir. 2005) (McKee, J., dissenting opinion) (quoting United States v. Kincade, 379 F.3d 813, 867 (9th Cir. 2004) (Reinhardt, J., dissenting)).
member's identity given that it is becoming more apparent that vast medical information can be revealed from DNA. 320

Sometimes an individual's privacy expectation can be outweighed by serious public concerns, as in T.L.O. when the Supreme Court found that students' have a legitimate privacy expectation that is outweighed by the need to keep students safe. 321 A prisoner's expectation of privacy against searches in his prison cell is obviously lower than a free, law-abiding citizen's right against searches because the prisoner is under the control of the state. 322 However, it is unquestionable that an innocent relative of a convict, such as Brian, has an undiminished expectation of privacy, which is not lowered merely because of his relation to the convict. If the family member is a free, law-abiding citizen, then he has a reasonable expectation that identifying DNA information will not be released without his consent.

The government's interest in running familial searches is outweighed by the family member's significant interest in keeping his genetic information free from governmental intrusion. Assuming that the government will argue that the familial search is no more than a tool to seek information about a given crime and such purpose is a valid special need, the purpose must outweigh the family member's liberty interest in order to be considered a reasonable and constitutional search.

Familial searches may help investigators solve more crimes. In a case where there is a ten percent chance of solving a crime through DNA, the estimated chance of solving it through a familial search only increases to fourteen percent. 323 However, this alone cannot be a justification for violating family members' liberty interests. The familial search does not provide any additional safety measure to the public greater than general law enforcement would provide. The government has no special interest that should be afforded greater weight than a family member who has an undiminished expectation of privacy and therefore the search must be deemed unreasonable.

320. See Weikert I, 421 F. Supp. 2d at 269 (stating that "recent scientific studies have begun to question the notion that junk DNA does not contain useful genetic programming material" (quoting Kincade, 379 F.3d at 818 n.6)).


323. Schmid, supra note 60.
Conclusion

The expanded use of CODIS to include familial searches is a serious intrusion into family members’ expectations of privacy. It is an unnecessary intrusion by the government, since it serves no special need beyond normal law enforcement activities. Law enforcement authorities are simply making use of the tool as a convenient way to sidestep the warrant and probable cause requirements of the Fourth Amendment. Law enforcement authorities must be required to obtain a warrant based on probable cause prior to conducting a familial search. Their problem is, of course, that they do not have probable cause to suspect any single individual in CODIS, and therefore would be unable to obtain the warrant. The unfortunate result of familial searches will be to create suspect pools based solely on genetics and not on any individualized suspicion of wrongdoing. Citizens value their privacy. With the familial search, innocent citizens have lost a measure of privacy that they cannot protect against. We can disassociate from our family members, but we will always share their DNA.

Revisiting the hypothetical at the beginning of this Note, the injustice that may result from this investigatory tool is plain and grim. A reputable person such as Brian, someone who has led an innocent life even if his family members have not, can find himself a criminal suspect because his genetics have characteristics in common with his convicted family member. It is doubtful that the portion of society related to convicts will be prepared to become criminal suspects themselves based on their genetics. Hopefully, this expanded use of CODIS will be rejected by society, the courts, and Congress.

Law enforcement has gone too far. As citizens, we must defend our right to be secure from arbitrary intrusions by law enforcement authorities because this right is paramount to our living as a free society. If allowed, this will put us in a position similar to that of the colonist who protested against Writs of Assistance, a position that the Framers of the Constitution recognized when they adopted the Fourth Amendment. As technology advances, so

324. See supra Introduction, Part A.
should our awareness that such advances could lead to arbitrary governmental intrusions, despite the good intentions of law enforcement authorities.

Lina Alexandra Hogan*

* I give great thanks to my amazing husband James and my wonderful children Alex and Alyssa for providing me with the loving support and patience I required to complete this project. I also thank the hard-working and talented Western New England Law Review staff for their insight and assistance.