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Meredith Rambo

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STUDENT ESSAY

THE JOHNIA BERRY ACT OF 2007: DNA FINGERPRINTING

Meredith Rambo[1]

I. Introduction

On December 6, 2004, at age twenty-one, Johnia Hope Berry was brutally slain in her Knoxville, Tennessee apartment.[2] She had come to the University of Tennessee at Knoxville to pursue her master's degree after receiving a bachelor's degree at East Tennessee State University.[3] The night of her death, Johnia was sorting toys she bought for children in need—a charitable habit she engaged in every year.[4] Johnia was deeply loved by two sets of parents: Joan and Mike Berry (adoptive father), and Donna and John Tiller (biological father).[5]

Joan and Mike Berry were very active in the search for anyone responsible for Johnia's murder and in seeking

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[1] J.D., pending May 2010, University of Tennessee School of Law. Prior to law school, Ms. Rambo worked for twenty years in the legal field as a legal secretary and paralegal.

[2] Hank Hayes, *Johnia Berry Act Awaiting Governor's Signature* (May 9, 2007), *available at* www.http://johniaberry.org; J.J. Stambaugh, *More details on suspect in Berry death; 'It was an accident'* (Sept. 24, 2007), *available at* http://www.knoxnews.com/news/2007/sep/24/kcso-spokeswoman-announces-break-berry-slaying/?printer=1/; Liz Tedone, *Celebrating Johnia Berry's Legacy Three Years After Her Death* (Dec. 6, 2007), *available at* http://www.volunteertv.com/home/headlines/12236141.html.

[3] Hayes, *supra*, note 2.

[4] Tedone, *supra*, note 2.

[5] Hayes, *supra*, note 2; WVLT Channel 8, *Trial Date Set for Johnia Berry Murder Suspect* (Sept. 25, 2007), *available at* http://www.volunteertv.com/home/headlines/9979256.

legislation to require DNA[6] testing of arrestees for violent crimes.[7] Joan Berry, in an effort to handle the brutality and senselessness of Johnia's murder, even kept a journal of questions she wanted to ask Johnia's killer.[8] In the end, the questions went unanswered as, after three long years, the suspect committed suicide in his jail cell. Joan Berry commented bitterly to the press that "'It makes me angry. My daughter didn't get to leave a note. She didn't get to say goodbye.'"[9]

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[6] A human's deoxyribonucleic acid ("DNA") contains a unique alphanumeric identifier, much like a social security number, that is being used to identify missing persons, crime victims, and suspected crime perpetrators. While originally it was believed that the DNA being tested contained only information necessary for identification, scientists are now discovering that the so-called "junk DNA" may contain information about genetic predispositions as well as ethnic and gender identifiers. *See,* United States v. Weikert, 504 F.3d 1, 3-4 (1st Cir. 2007); Nicholas v. Goord, 430 F.3d 652, 670 (2d Cir. 2005); State v. Martin, Nos. 2006-119 & 2006-205, 2008 WL 1914658, at *10, *23 (Vt. May 2, 2008) (Johnson, J. dissenting); State v. Surge, 156 P.3d 208, 216 (Wash. 2007) (Chambers, J., dissenting) (noting "individual DNA can provide much more than [a picture or a fingerprint] including information about our ancestry, our medical future, and even information about our biological family members."); Doles v. State, 994 P.2d 315, 318 (Wyo. 1999) (noting "DNA is the material that determines the genetic characteristics of all living things . . . [and] . . . with the exception of identical twins, no two individuals have identical DNA.").

[7] *See, e.g.,* Telephone Interview with Representative Jason Mumford, Tennessee House of Representatives, in Chattanooga (Jul. 3, 2008); Hayes, *supra*, note 2; Amy Hunter, *A second possible suspect surfaces in Johnia Berry 2004 Slaying* (Nov. 16, 2007), *available at* http://www.tricities.com/tri/news/local/article/TRI_2007_11_17_0006/3983/; TriCities.com, *Johnia Berry's parents to meet with Prosecutors* (Nov. 18, 2007), *available at* http://www.tricities.com/tri/news/local/article/TRI_2007_11_18_0028/4022/.

[8] Amy Hunter, *Slain Student's Mother 'Very Upset' Over Suspect's Suicide* (Mar. 24, 2008), *available at* http://www.tricities.com/tri/news/local/article/-TRI_2008_03_25_0005/7719/.

[9] Hunter, *supra*, note 8.

John and Donna Tiller were equally devastated. Even though John allowed Mike Berry to adopt Johnia at age 5, "it doesn't lessen his pain or emotion over what has happened."[10] John Tiller is thankful that he has a voice mail message received from Johnia just six hours before her murder, saying, "'Dad, I love you."[11] Out of this deep sense of sadness and loss emerged a family's crusade to ensure that no other family would suffer as they did for as long as they did.[12]

Two and one-half years after the tragic stabbing death of Johnia, twenty-two-year-old Taylor Lee Olson was indicted for first-degree murder. [13] Other than petty crimes, Olson had no significant criminal history through 2004 and was never required by law to provide a DNA sample to police.[14] In 2005, Olson was charged with credit card theft and forgery, but this escalation was still not enough to require a DNA sample under Tennessee law.[15] In early 2007, Olson became a person of interest in the criminal investigation of Johnia's murder, but the police still had no sample to compare against DNA found at the murder scene.[16] It was not until late July, 2007, after Olsen had been arrested for a probation violation, that the police obtained a voluntary DNA sample from Olsen.[17] Afterward, Olsen was released, only to be arrested again in late August 2007 for burglary and theft, not Johnia's murder. [18]

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[10] WVLT Channel 8, *supra*, note 5.
[11] *Id.*
[12] Telephone Interview with Representative Jason Mumford, *supra*, note 7.
[13] Stambaugh, *supra*, note 2.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*

This paper will discuss the ever-widening scope of federal and state DNA collection legislation that has largely gone unnoticed by the general American populace. This DNA legislation has continuously and systematically eroded our Constitutional rights and has, to date, been unanimously upheld by courts from the lowest state courts to the United States Supreme Court. The checks and balances of our democracy are failing in the never-ending struggle against rising crime rates.

II. Legislative History of DNA Collection

It is important to review the legislative history of DNA collection statutes in order to see how federal and state legislatures have continuously, systematically, and quickly been eroding our constitutional rights. While federal legislation took the lead, state collection acts have kept pace in both scope and time, despite concerns over the cost of and personal information contained in DNA sampling. Legislation has kept pace with the advances in technology that continue to make it possible to obtain, analyze, and store DNA more effectively.[19] DNA analysis was first used in missing person investigations and overturning wrongful convictions before finally being recognized as a viable evidentiary tool in criminal prosecutions.[20]

In 1990, fourteen states participated in a pilot program to capture DNA samples for a national indexing system called the Combined DNA Index System

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[19] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); DNA-Sample Collection Proposed Rule, 73 Fed. Reg. 21083, 21085 (Apr. 18, 2008) (to be codified at 28 C.F.R. § 28.12).

[20] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); DNA-Sample Collection Proposed Rule, 73 Fed. Reg. 21083, 21084 (Apr. 18, 2008) (to be codified at 28 C.F.R. § 28.12).

("CODIS").[21] In four short years, CODIS was expanded across the nation.[22] It took only six more years before Congress systematically began expanding compulsory DNA testing.[23] In less than twenty years, Congress

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[21] United States v. Kincade, 379 F.3d 813, 845 (9th Cir. 2004) (Reinhardt, Pregerson, Kozinski, & Wardlaw, J.J., dissenting). CODIS was initially created to store "DNA samples from individuals convicted of crimes, from crime scenes, and from unidentified human remains," and later legislation allowed for "samples voluntarily contributed from relatives of missing persons." Department of Justice Appropriations Act of 2000, Pub. L. 106-113, 113 Stat. 1501A-23 (1999). CODIS makes it possible for "[s]tate and local forensics laboratories to exchange and compare DNA profiles electronically in an attempt to link evidence from crime scenes for which there are no suspects to DNA samples of convicted offenders on file in the system.'" United States v. Sczubelek, 402 F.3d 175, 181 (3d Cir. 2005) (citing H.R. Rep. 106-900(I), at 8 (2000)).

[22] *Kincade*, 379 F.3d at 845 (Reinhardt, Pregerson, Kozinski & Wardlaw, J.J., dissenting) (noting passage of the Violent Crime Control act of 1994); *see also* United States v. Amerson, 483 F.3d 73, 76 (2d Cir. 2007); United States v. Sczubelek, 402 F.3d 175, 181 (3d Cir. 2005) (citing Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §§ 13701-14223)).

[23] DNA Analysis Backlog Elimination Act of 2000, Pub.L. No. 106–546, 114 Stat. 2729, 2729, 2732 (2000) (codified as amended at 42 U.S.C. § 14135a (2000)) (including "individuals convicted of a qualifying Federal offense," District of Columbia criminal offenders for specified offenses, and military personnel convicted of specified military offenses); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub.L. No. 107-56 § 503, 115 Stat. 364 (2001) (including "terrorists and other violent offenders" convicted of violating 18 U.S.C. § 2332b(g)(5)(B), any violent crime defined in 18 U.S.C. § 16, or attempting or conspiring to commit such offenses); Justice for All Act of 2004, Pub. L. No. 108-405, § 203, 118 Stat. 2269 (2004) (amending 42 U.S.C. §§ 14132, 14135, 14135(a)) (including "persons who have been charged in an indictment or information with a crime," which covers all felonies, all 18 U.S.C. § 109A offenses, all crimes of violence defined in 18 U.S.C. § 16, as well as any attempt or conspiracy to commit these felonies and crimes); DNA Fingerprint Act of 2005, Pub. L. No. 109-162, 119 Stat. 3084, 3085 (2006) (buried in the voluminous Violence Against Women and Department of Justice

expanded a narrowly defined authority to obtain DNA samples from specific federally convicted felons to any "individuals who are *arrested, facing charges, or convicted* or [ ] non-United States persons who are *detained* under the authority of the United States."[24] Despite the fact that legislative expansions are coming so quickly and the Attorney General cannot implement final rules fast enough, the United States Senate proposed a further expansion in June 2008.[25] If implemented, this latest expansion of federal law will require compulsory DNA samples from any individual *convicted of any felony under state law*, thereby preempting all or part of most state DNA collection statutes.[26]

Following in Uncle Sam's footsteps, the various states began to enact DNA collection statutes. In fact, "all 50 States authorize the collection and analysis of DNA samples from *convicted* state offenders . . . and several states authorize the collection of DNA samples from individuals they *arrest*."[27] However, the states' authorized use of the profiles varies widely from identification to detection or exclusion of potential suspects to the

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Reauthorization Act of 2005, and including any United States citizen *arrested* or non-citizen *detained* under authority of the federal government); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 155, 120 Stat. 611 (amending 42 U.S.C. § 14135(a)) (including persons facing charges, which presumably does not require arrest or detention). *See also Amerson*, 483 F.3d at 75, 77; United States v. Weikert, 504 F.3d 1, 3 (1st Cir. 2007).

[24] 73 Fed. Reg. 21083, 21087 (Apr. 18, 2008) (to be codified at 28 C.F.R. § 28.12) (emphasis added).

[25] 73 Fed. Reg. 21083, 21083-84 (Apr. 18, 2008) (to be codified at 28 C.F.R. § 28.12).

[26] DNA Felony Collection Act of 2008, S. 3104, 110th Cong. (2008).

[27] *See, e.g.*, Polston v. State, 201 S.W.3d 406, 412 n.3 (Ark. 2005) (citations omitted) (emphasis added); State v. Maass, 64 P.3d 382, 386 (Kan. 2003); State v. Raines, 857 A.2d 19, 23 (Md. 2004); Landry v. Attorney General, 709 N.E.2d 1085, 1087, 1090 n.8 (Mass. 1999); State v. O'Hagen, 914 A.2d 267, 271 (N.J. 2007).

prosecution of violent crimes.[28] While the states also vary widely as to the individuals subject to compulsory DNA sampling, most states generally include individuals convicted of violent felonies.[29] Tennessee joined the DNA collection bandwagon in 1991[30] and recently expanded its reach to arrestees of specific violent felonies in 2007.[31] Similarly, in 2008 a substantial increase of arrestee DNA collection legislation was proposed in various states.[32]

It took ten years after the first DNA legislation for the federal government to require states to remove from the database any DNA samples for persons with overturned convictions.[33] It took four more years before Congress prohibited arrestee or voluntary DNA profiles from being included in CODIS and created a right to voluntary DNA testing for convicted individuals who assert their innocence.[34] In essence, in the same time it took to erode

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[28] *Landry*, 709 N.E.2d at 1090 n.8.

[29] CAL. CODE REGS. Title 9, § 296 (2008) (including any felony arrestees effective 2009); LA. REV. STAT. ANN. § 15:609 (2005) (including any felony arrestees); TENN. CODE ANN. § 40-35-321(e)(3) (Suppl. 2007) (including specific violent felony arrestees); TEX. PUBLIC SAFETY CODE ANN. § 411.1471 (Vernon 2005) (an arrestee previously convicted for specific statutory crimes); VA. CODE ANN. § 19.2-310.2 (2004) (including any felony arrestees). *See also Landry*, 709 N.E.2d at 1090 n.8 (including all persons arrested).

[30] TENN. CODE ANN. § 40-35-321 (2006).

[31] TENN. CODE ANN. § 40-35-321(e)(3) (Suppl. 2007).

[32] Gordon Thomas Honeywell, *2008 DNA Database Expansion Litigation* (May 14, 2008), *available at* http://www.dnaresource.com/documents/2008DNAExpansionLegislation.pdf.

[33] DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, 114 Stat. 2733 (2000) (codified as amended at 42 U.S.C. § 14135a (2000)).

[34] Justice for All Act of 2004, Pub. L. No. 108-405, § 203, 118 Stat. 2269 (amending 42 U.S.C. §§ 14132, 14135, 14135(a)) (noting that if arrestee was charged with a separate crime requiring inclusion in the database, then DNA sample from arresting offense could be placed into database); 118 Stat. 2278-84 (2004) (adding Chapter 228A—Post-Conviction DNA Testing, 18 U.S.C. § 3600-3600(a)) (noting that

constitutional rights by requiring compulsory DNA testing, Congress has provided compulsory removal only for overturned convictions. Meanwhile, the United States Congress is compelling local and state authorities to upload DNA profiles to CODIS as a prerequisite to its access.[35]

III. Historical Challenges to DNA Collection

As could be expected, with the increasing reach of compulsory DNA testing, there was a corresponding increase in legal challenges to its constitutionality. Alternative theories for attacking DNA collection legislation include equal protection claims, illegal search and seizure, self-incrimination, and cruel and unusual punishment under the Eighth Amendment, as well as ex post facto violations and even a violation of the right to the free exercise of religion.[36] Federal and state courts have responded by applying a totality-of-the-circumstances approach, a special-needs approach, or both to justify the

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convicted individuals seeking post-conviction DNA testing must assert innocence, must have preserved right to testing, and must meet specific statutory requirements.).

[35] 42 U.S.C. § 14132(b)(3) (2008).

[36] Quarterman v. State, 651 S.E.2d 32, 34, 35 (Ga. 2007); Schreiber v. State, 666 N.W.2d 127, 128 (Iowa 2003); *Raines*, 857 A.2d at 21. In addressing the self-incrimination and the cruel-and-unusual claims, Georgia upheld the DNA collection statute and specifically noted that it was not "penal and that means used to enforce the statute [were] not . . . malicious or grossly disproportionate to the refusal to comply with the statutory mandate." *Quarterman*, 651 S.E.2d at 35-36. With respect to the ex post facto claim, Iowa rejected the idea that the intent of DNA collection legislation "is to punish for past activity and not merely to impose a restriction on someone 'as a relevant incident to a regulation of a present situation.'" *Schreiber*, 666 N.W.2d at 129, 130 (quoting State v. Pickens, 558 N.W.2d 396, 398 (Iowa 1997)); *see also* People v. Espana, 40 Cal.Rptr.3d 258, 260 (Cal. Ct. App. 2006) (citing Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995) (overruled on other grounds)); *Raines*, 857 A.2d at 43.

so-called constitutionality of DNA collection statutes.[37] The prevailing standard for judicial scrutiny appears to be the rational basis standard.[38]

When applying a totality-of-the-circumstances approach, a court is supposed to weigh the privacy interest

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[37] *Cf. Weikert*, 504 F.3d at 3, 8, 9 (citing Samson v. California, 547 U.S. 843 (2006)) (supporting use of special needs analysis but noting that the Third, Fourth, Fifth, Eighth, Ninth, Eleventh and D.C. Circuits use the totality-of-the-circumstances analysis); United States v. Conley, 453 F.3d 674, 679-81 (6th Cir. 2006) (supporting analysis under both standards); *Maass*, 64 P.3d at 387 (two approaches: (1) balancing test and (2) "special needs" doctrine); *Landry*, 709 N.E.2d at 1092; *O'Hagen*, 914 A.2d at 273 (United States Supreme Court applies the totality of circumstances test, not the "special needs" test); State v. Martin, Nos. 2006-119 & 2006-205, 2008 WL 1914658, at *4 (Vt. May 2, 2008) (providing citations to many cases for both the balancing test and the "special needs" test); State v. Surge, 156 P.3d 208 (Wash. 2007) (noting concern that "special needs analysis is no longer valid under federal law" is without merit).

[38] State v. Leppert, 656 N.W.2d 718, 723 (N.D. 2003) (citing Roe v. Marcotte, 193 F.3d 72, 82 (2d Cir. 1999)); Boling v. Romer, 101 F.3d 1336, 1341 (10th Cir. 1996); L.S. v. State, 805 So. 2d 1004, 1007-08 (Fla. Ct. App. 2002); *Quarterman*, 651 S.E.2d at 34 n. 4, 35 (applying rational relationship test as "neither a suspect class nor a fundamental right [ ] affected by the challenged statute," and presuming legislation valid with burden on individual to prove others similarly situated were treated differently without a rational basis); Murphy v. Dept. of Correction, 711 N.E.2d 149, 152-54 (Mass. 1999) (holding "some amount of underinclusiveness or overinclusiveness is permissible" in classifications and "[i]n the absence of evidence that the Legislature harbored an illegitimate motive or had no rational reason to draw the distinction as it did, the court must defer to the Legislature's classification"); Gaines v. Nevada, 998 P.2d 166, 173-74 (2000); State v. Olivas, 856 P.2d 1076, 1087 (Wash. 1993); *Schreiber*, 666 N.W.2d at 128 (citing Roe v. Marcotte, 193 F.3d 72, 82 (2d Cir. 1999)). There are "three levels of judicial scrutiny for reviewing equal protection claims": strict scrutiny for "inherently suspect classification or infringement of a fundamental right," intermediate standard when an "'important substantial right' is involved," and rational basis for all other equal protection claims. *Leppert*, 656 N.W.2d at 722; Olivas, 856 P.2d at 1087.

of the individual against the government's purpose for conducting the search.[39] The Supreme Court analogized the individual's privacy interest with that of a physical intrusion to justify giving the individual's privacy interest less weight on the constitutional scale than the government interest.[40] This in no way addresses the fact that legally recognized privacy rights of individuals include more than the physical. To add further weight to the government's side on the constitutional scale, some federal circuits apply the "special needs" analysis to justify warrantless searches.[41] The special need is allegedly subject to the

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[39] *Weikert*, 504 F.3d at 11. Following the federal majority, Arkansas, Kansas, Massachusetts and Maryland, also applied a totality-of-the-circumstances approach when faced with a challenge to their DNA collection legislation concerning qualified convicted felons. *Polston*, 201 S.W.3d at 408, 410; s*ee also Maass*, 64 P.3d at 387; *Raines*, 857 A.2d at 31, 43; *Landry*, 709 N.E.2d at 1092. Governmental interests included reducing recidivism; promoting reintegration; identifying, monitoring, and maintaining records of likelihood of recidivism; enhancing efficient and accurate crime solving; exonerating innocent individuals wrongfully convicted; and protecting innocent individuals from becoming suspects in the first place. *Weikert,* 504 F.3d at 13-14. Arkansas and Kansas hold that a convicted individual's "privacy rights [were] diminished by virtue of [his] conviction and the intrusion of the blood test [was] not significant . . ." and thus, "the collection and maintenance of DNA samples pursuant to the DNA Act is reasonable in light of the substantial interests of the State . . ." which includes "deterring and detecting all recidivist acts, not just those considered to be violent . . . [and] . . . may indeed be useful in helping to solve future drug crimes." *Polston*, 201 S.W.3d at 411, 412; *Maass*, 64 P.3d at 389.

[40] *Weikert*, 504 F.3d at 12.

[41] *Amerson*, 483 F.3d at 81-83 (noting "special needs" are beyond the need for normal law enforcement and make the warrant and probable-cause requirement impracticable or are needed to achieve important purposes not achievable by standard law enforcement methods"). *See also* A.A. ex rel. B.A. v. Attorney General, 914 A.2d 260, 264 (N.J. 2007); *O'Hagen*, 914 A.2d at 273-75; State v. Martin, Nos. 2006-119 & 2006-205, 2008 WL 1914658, at *4 (Vt. May 2, 2008) (providing citations to many cases for both the balancing test and the "special needs" test).

same balancing test of the relevant interests of the individual and the government.[42]

In reality, courts have been failing to exercise the checks-and-balances power afforded each branch of government and justifying the erosion of constitutional rights. Finding that DNA legislation, containing no discretionary component, removes any risk of "dignitary harms" or possibility of abuse, courts are justifying their failure to "provide a check on the arbitrary use of government power."[43] As courts analogize privacy rights with only physical privacy, they also seem to infer that abuse of situational discretion is the only reason to apply the governmental system of checks and balances instituted by the founders of our country.[44] However, it has been recognized that advances in DNA sampling technology, which provide genetic information beyond identification, may require a reconsideration of the reasonableness of DNA legislation.[45]

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[42] The court must balance the special need against an individual's privacy interest by examining three factors: "'(1) the nature of the privacy interest involved; (2) the character and degree of the governmental intrusion; and (3) the nature and immediacy of the government's needs, and the efficacy of its policy in addressing those needs.'" *Amerson*, 483 F.3d at 83-84 (quoting Cassidy v. Chertoff, 471 F.3d 67, 75 (2d Cir. 2006)). Several states agree that, "[a]lthough the enumerated purposes may involve law enforcement to some degree, the central purposes of the DNA testing are not intended to subject the donor to criminal charges"; a need beyond "ordinary law enforcement" must exist to justify DNA sampling without individualized suspicion; the "long-range special need [ ] does not have the *immediate* objective of gathering evidence against the offender. . . . [and] was not to assist in the immediate detection of a crime charged . . . ." *A. ex rel. B.A.*, 914 A.2d at 264; *O'Hagen*, 914 A.2d at 277, 278, 279; *accord Martin*, 2008 WL 1914658, at *6-7.

[43] *Weikert*, 504 F.3d at 14-15 (citations omitted); *Amerson*, 483 F.3d at 82.

[44] *Amerson*, 483 F.3d at 82.

[45] *Weikert*, 504 F.3d at 13.

IV. Reconsideration of Constitutionality of DNA Collection Legislation

Reconsideration begins by determining the characteristics of individuals subject to DNA collection laws: (1) prisoners, (2) conditional releasees, (3) felons with expired terms, and (4) individuals never convicted of a felony.[46] Acknowledging that convicted persons who have paid their debt to society may have a "substantial privacy issue at stake," some federal courts allow that a separate balancing of retention against individual privacy rights may be needed.[47] Enlarging that theme, "it may be time to reexamine the proposition that an individual no longer has any expectation of privacy in information seized by the government so long as the government has obtained that information lawfully," especially "[w]here a right as central to our liberty as the freedom from unreasonable searches and seizures is at stake."[48] While courts have unanimously held DNA collection acts constitutional with respect to convicted felons, the courts continue to vehemently debate the constitutionality of legislation targeting individuals who are merely arrested.[49]

The outcry against DNA collection may stem from the inherent belief that individuals are "presumed innocent until proved guilty,"[50] as alluded to in various cases holding

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[46] Green v. Berge, 354 F.3d 675, 679-80 (7th Cir. 2004).

[47] *Weikert*, 504 F.3d at 12 (citing *Kincade*, 379 F.3d at 841-42 (holding that "once a conditional releasee has completed his term," the privacy interests differ from those he had while under supervision)).

[48] *Weikert*, 504 F.3d at 16, 18 (Stahl, J., dissenting).

[49] South Carolina's Governor Mark Sanford vetoed arrestee legislation proposed by its legislature not only in 2007, but again on July 2, 2008. Letter from Mark Sanford, Governor of South Carolina, to Robert W. Harrell, Jr., Speaker of the House of Representatives of South Carolina (Jun. 18, 2007); *available at* http://governor.sc.gov/NR/rdonlyres/8DECDAD3-C95E-4871-8C02-52FBA8F8F69D/0/H3304.pdf.

[50] In re C.T.L., 722 N.W.2d 484, 492 (Minn. Ct. App. 2006).

that there is a significant difference in expectation of privacy rights between convicted felons, probationers, parolees, pretrial detainees, prisoners, and "ordinary citizens" or arrestees.[51] To allow arrestee DNA testing "would snuff out probable cause—the oxygen for the Fourth Amendment," resulting in arrestees being searched "without requiring law enforcement to show any nexus between the arrestee and the crime for which his or her DNA is sought."[52] Despite judicial warnings that obtaining DNA from "free persons," which includes arrestees, should be constrained by the Fourth Amendment, [53] the federal legislature passed the Justice for All Act of 2004, allowing for DNA testing of arrestees.[54]

Unfortunately, the majority of rightfully outraged protest is found in dissenting opinions, which express concern that "[t]he privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps."[55] This whittling is occurring in spite of "our nation's history provid[ing] stringent warnings against unabashedly entrusting [the] government with sensitive information

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[51] *Raines*, 857 A.2d at 31; *see also Polston* , 201 S.W.3d at 410; *Quarterman*, 651 S.E.2d at 34; State v. McKinney, 730 N.W.2d 74, 84 (Neb. 2007) (noting critical distinction from Nebraska's other jurisdictions' DNA collection statutes in that statute at issue "does not limit the offenders to whom it applies"); *Martin*, 2008 WL 1914658, at *8; *Surge*, 156 P.3d at 212-13. Minnesota's Court of Appeals found "no basis for concluding that before being convicted, a charged person's privacy expectation is different from the privacy expectation of a person who was charged but the charge was dismissed or the person was found not guilty"; therefore, an arrestee's expectation of privacy was "not outweighed by the state's interest in collecting and analyzing a DNA sample." *In re C.T.L.*, 722 N.W.2d at 489 n.2, 492.

[52] *McKinney*, 730 N.W.2d at 84.

[53] Doles v. State, 994 P.2d 315, 318 (Wyo. 1999).

[54] Justice for All Act of 2004, Pub. L. No. 108-405, § 203, 118 Stat. 2269 (2004).

[55] *Martin*, 2008 WL 1914658, at *13 (Johnson, J. dissenting) (quoting Osborn v. United States, 385 U.S. 323, 343 (1966)).

about our citizenry."[56] This whittling continues despite the fact that historically inadequate protection of sensitive information is less than reassuring,[57] and there is doubt that the government is immune to the temptation to use DNA sampling for purposes beyond identification.[58]

V. The Johnia Berry Act of 2007

A. Tennessee's Speedy Legislative Process

Like the few states before it, Tennessee amended its DNA collection legislation to include DNA samples from arrestees for violent felonies.[59] Johnia's family told the Tennessee legislators of the suffering they endured upon her death and the frustration resulting from almost three years with no justice.[60] Both the Senate and the House of Representatives supported the passage of the Johnia Berry Act of 2007 after hearing the tragic tale of young Johnia Berry's slashed hopes and dreams.[61] Shockingly, from proposal to approval, the Tennessee legislative process took less than six months to enact the Johnia Berry Act of 2007. Furthermore, Tennessee took only one year more than the federal government to go from authorizing DNA collection

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[56] *Martin*, 2008 WL 1914658, at *24 (Johnson, J. dissenting).

[57] *Id.*

[58] *Surge*, 156 P.3d at 216 (Chambers, J., dissenting).

[59] TENN. CODE ANN. §40-35-321 (Supp. 2007).

[60] Mumford, *supra*, note 7.

[61] *Id.* Minority Leader Jason Mumford proposed House Bill 0867 while Senate Speaker Ron Ramsey proposed Senate Bill 1196. S. 1196, 105th Leg. 1st Sess. (Tenn. 2007); H.R. 0867, 105th Leg. 1st Sess. (Tenn. 2007). The Johnia Berry Act of 2007 was unanimously adopted by the Tennessee Senate on April 23, 2007, unanimously adopted by the Tennessee House of Representatives on May 9, 2007, signed into law by Governor Phil Bredesen on May 24, 2007, and amended title 40, chapter 35, section 321 of the Tennessee Code first enacted in 1991. 2007 Tenn. Pub. Acts Ch. 225; Senate Journal, 105th Gen. Assembly, 1st Sess., at 988-91, 1369 (Tenn. 2007).

for specific convicted felons to authorizing it for all convicted felons and specific violent crime arrestees. [62]

B. Tennessee's DNA Collection Process

The Johnia Berry Act of 2007 specifically requires that all persons arrested for certain violent crimes have a DNA sample taken via buccal (cheek) swab.[63] All DNA samples are forwarded to the Tennessee Bureau of Investigation ("TBI") until a resolution of a criminal trial.[64] If the individual charged with the felony is convicted of the indicted crime, or is convicted of a different felony before the sample is expunged, the DNA sample will remain with the TBI to be used for comparison to DNA received from new crime scenes.[65] Should the individual be found not guilty or exonerated, or if the charges are dropped, the court of record is supposed to notify the TBI, who is supposed to destroy and expunge the DNA sample from the system.[66]

Over 400 DNA samples were processed, and over 1000 people were interviewed during the criminal investigation of Johnia's murder. [67] TBI Director Mark Gwyn stated, "It was the most expensive case in the TBI's history, having cost several hundred thousand dollars."[68] Now, with the passage of the Johnia Berry Act of 2007, an additional one million dollars (at a minimum) will be needed to process the estimated 21,000 additional, legislatively required DNA samples.[69] While funding was

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[62] TENN. CODE ANN. § 40-35-321(e)(3) (Supp. 2007), as amended by 2007 Tenn. Pub. Acts Ch. 225.
[63] TENN. CODE ANN. § 40-35-321(e)(1) & (3) (Supp. 2007).
[64] TENN. CODE ANN. § 40-35-321(e)(1) (Supp. 2007).
[65] *Id.*
[66] TENN. CODE ANN. § 40-35-321(e)(2) (Supp. 2007).
[67] Stambaugh, *supra*, note 2.
[68] *Id.*
[69] The Associated Press, *TBI Chief: No Funds to Implement New*

received in June 2008, allowing the hiring of five more forensic scientists, July saw a backlog of over 5,000 DNA test kits.[70] In fact, between January and July 2008, only 1,000 samples were processed, and only three cases were solved out of DNA test results: a murder, a burglary, and a sexual assault.[71]

C. Unforeseen Negative Impact of the Johnia Berry Act

Analogizing DNA profiles to medical records or fingerprint retention, courts are holding that comparing profiles in the DNA databases does not violate the Fourth Amendment, as ownership of the profiles (as opposed to the actual DNA sample) belongs to the testing laboratories, not the individual providing the sample.[72] This results in the allegedly constitutional use of a profile given in one matter to be used in another, even unrelated, matter.[73] So

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Johnia Berry Act (Dec. 3, 2007), *available at* http://www.volunteertv.com/home/headlines/12091011.html.

[70] Catharyn Campbell, *New DNA Law Already Proving Valuable: DNA Samples Now Required From All Violent Crime Suspects* (Jul. 2, 2008), *available at http://www.wsmv.com/news/16773599/detail.html#.*

[71] *Id.*

[72] Smith v. State, 744 N.E.2d 437, 439-40 (citing Bickley v. State, 489 S.E.2d 167, 170 (Ga. Ct. App. 1997)); Wilson v. State, 752 A.2d 1250, 1272 (Md. Ct. App. 2000); People v. King, 232 A.D.2d 111, 663 N.Y.S.2d 60, 614-15 (1997)); State v. Notti, 71 P.3d 1233, 1238 (Mont. 2003).

[73] TENN. CODE ANN. § 40-35-321(e)(1) (Supp. 2007); *Smith*, 744 N.E.2d at 438 (holding constitutional the use of a DNA sample from one criminal matter in a separate, unrelated criminal matter); State v. Notti, 71 P.3d 1233, 1237-38 (Mont. 2003) (holding "that a defendant's privacy interest in blood samples or blood profiles is lost when the defendant consents to a blood draw or where it has been obtained [lawfully]") (citing People v. Baylor, 118 Ca.Rptr.2d 518, 521 (Ca. Ct. App. 2002); Wilson v. State, 752 A.2d 1250, 1272 (Md. Ct. App. 2000); Bickley v. State, 489 S.E.2d 167, 170 (Ga. Ct. App. 1997); State v. King, 232 A.D.2d 111, 117-18, 663 N.Y.S.2d 610 (1997); Washington

long as the DNA profile and sample are in the database, even if later events require removal from the database, there appears to be no restriction on the use for comparisons. Even though federal law may prohibit uploading of DNA samples from arrestees to CODIS, there is no similar requirement in Tennessee law prohibiting local and Tennessee database uploading. Therefore, any arrestee required to provide a DNA sample in Tennessee is subject to continuous, systematic comparisons in the local and Tennessee databases absent a legally required expungement.

D. Arrestees' Expectations of Privacy the Issue for Judicial Scrutiny

It remains to be seen whether Tennessee courts will find the Johnia Berry Act of 2007 constitutional. Prior to the Act's passage, the Tennessee Supreme Court upheld Tennessee's DNA collection statutes, applying a totality-of-the-circumstances approach.[74] Constitutionality was supported in part by the fact that Tennessee's DNA statute was limited to identification purposes, which "serve[d] to protect our citizenry from the potential abuses of unlimited discretion by law enforcement agents and officers."[75] The Tennessee Supreme Court also concluded that "the risk of arbitrary or capricious searches [was] . . . eliminated" because the statute "unambiguously specifie[d] who [was] subject to the searches," and the primary purpose was to identify individuals with lessened expectations of privacy."[76] While Tennessee's new legislation unambiguously specifies that arrestees of specific violent

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v. State, 653 So. 2d 362, 364 (Fla. 1994); Smith v. State, 744 N.E.2d 437)).

[74] State v. Scarborough, 201 S.W.3d 607, 611, 618 (Tenn. 2006).

[75] *Id.* at 619.

[76] *Id.* at 621.

crimes are required to provide a DNA sample, the Tennessee courts will need to address whether arrestees are still considered free persons with the heightened expectations of privacy afforded by the Fourth Amendment. If the courts find arrestees to have a lessened expectation of privacy, Tennesseans should demand an explanation of how a person not convicted of a crime is now a person who is presumed guilty until proven innocent and what, if any, checks and balances remain to protect individual freedom from government intrusion.

VI. The Future of DNA Collection Legislation

In June 2008, the United States House of Representatives fired the latest volley to further expand the scope of CODIS to require all state officials to obtain DNA samples "from all felons who are imprisoned in a prison of such State or unit."[77] The Senate also proposed expanding CODIS's scope to include any individuals convicted of felonies under state laws but did not explicitly contain the "retroactive" language contained in House Bill 5981.[78] The passage of either of these proposed bills would essentially remove the need for state legislation requiring DNA samples from any individual convicted of any felony under state law, bringing such legislation under the purview of federal law.[79] The next step is not hard to predict—all state officials will be required to obtain DNA samples from arrestees under state law and upload them to CODIS, despite the current federal statutory prohibition. Perhaps Congress will simply bypass this step and go straight to DNA sampling of any person facing charges (i.e., person of interest) for state law violations.

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[77] United States House Bill 5981 (May 6, 2008).
[78] United States Senate Bill 3104 (Jun. 10, 2008).
[79] United States House Bill 5981 (May 6, 2008); United States Senate Bill 3104 (Jun. 10, 2008).

The forecast for state and national DNA database use is grand. Within three to five years, it is anticipated that all DNA searches will occur through the CODIS database,[80] suggesting that perhaps local and state databases will be obsolete. In five to ten years, the CODIS database may allow for "real time and immediate search capabilities," and DNA samples may be routinely run on a weekly basis through both the state and national systems.[81] Expanding the scope of DNA databases to include samples given as an employment requirement (i.e., police officers' DNA samples for use in crime scene comparisons to eliminate contamination prints) is also being contemplated.[82] Further, if the goal of "familial DNA searching" to obtain leads to suspects or family members of suspects is realized, no American will be safe from systematic and continuous DNA profile comparisons.[83]

VII. Conclusion

Stephen Saloom, Policy Director at the Innocence Project, applauds the use of DNA collection databases for solving approximately 10% of all crimes, which is primarily comprised of the "more serious felonies: sexual assaults, violent assaults, murders, and the like."[84] However, Mr. Saloom also recognizes that filling DNA databases with samples and profiles of anyone not at least convicted of a felony results in "diminishing returns."[85] Tania Simoncelli, Science Director of the Technology

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[80] Symposium, *A Perfect Match? DNA in Law Enforcement*, Genetics and Public Policy Center at Johns Hopkins University, at *5-6 (Oct. 1, 2007), *available at* http://www.dnapolicy.org/news.release.php?action=detail&pressrelease_id=84.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* at *12.

[85] *Id.* at *13.

Liberty Program at the American Civil Liberties Union, agrees, noting further that, with the rise in DNA analysis errors resulting from overburdening lab technicians with "insurmountable backlogs[,] . . . it would be absolutely tragic if in our enthusiasm for DNA, we ended up creating a whole new round of wrongful convictions, the very sorts of miscarriages of justice that we're aiming to set right with DNA."[86]

"We have been on an incredible slippery slope as the databanks have expanded to evermore categories of convicted individuals and [are] learning that we're in for an even bigger slippery slope down the line."[87] Will the ride be worth it? Will the criminal investigation tool be worth the "life-long genetic surveillance"[88] of innocent United States citizens, given the potential for diminished returns due to inadequate collection processes, administrative and laboratory logjams, and lack of follow-up by law enforcement or prosecutors?[89]

It is obvious that there are many questions still unanswered by our legislatures and many questions unknowingly left unasked by the American people. In Tennessee and across the United States, American citizens need to become informed about DNA legislation, sampling, storage, and searches. The increase in knowledge from a belief in "junk DNA," with no biological significance to the more informed understanding that "junk DNA" contains significant medical and familial lineage implications,[90]

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[86] *Id.* at *11.
[87] *Id.* at *8-9.
[88] *Id.* at *10.
[89] *Id.* at *13-14 (quoting Dr. Frederick Bieber, Journal of Law, the American Society of Law, Medicine, and Ethics (2006)). Dr. Bieber "serves on the advisory boards of the Armed Forces DNA Identification Laboratory of the U.S. Department of Defense, the Department of Forensic Science of the Commonwealth of Virginia, and the National DNA Database of Canada . . . [and] is a database proponent." *Id.*
[90] *Id.* at *6, 9.

indicates that a vast change needs to be made in how DNA sampling is approached and applied. There are many implications, both positive and negative, that need to be explored before legislators and the judiciary continue to support the erosion of Americans' rights to privacy, bodily integrity, life, and liberty for the ordinary purpose of criminal investigation.

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