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## DNA as the Twenty-First Century Fingerprint: Approval of DNA Collection upon Arrest in *United States v. Mitchell*

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# DNA AS THE TWENTY-FIRST CENTURY FINGERPRINT: APPROVAL OF DNA COLLECTION UPON ARREST IN *UNITED STATES v. MITCHELL*

**Abstract:** On July 25, 2011, in *United States v. Mitchell*, the U.S. Court of Appeals for the Third Circuit held that taking a DNA sample from a pre-trial arrestee did not violate the Fourth Amendment. The court did so by holding that taking DNA profiles serves only to identify arrestees, and thus, like fingerprinting, is an acceptable “booking” practice. Unlike fingerprints, however, DNA profiles contain significant personal information beyond that necessary for mere identification. This Comment argues, therefore, that to determine the reasonableness of this intrusion onto arrestees’ expectations of privacy under the Fourth Amendment, courts must consider both the physical DNA collection and the retention of the sensitive personal information in the DNA profile.

## INTRODUCTION

In July 2011, in *United States v. Mitchell*, the U.S. Court of Appeals for the Third Circuit became the first circuit court to rule on the constitutionality of taking DNA samples from pre-trial arrestees.<sup>1</sup> The closely divided court held that the government did not violate the arrestee’s Fourth Amendment rights by requesting his DNA sample before trial.<sup>2</sup>

The small number of courts to have considered whether sampling arrestees’ DNA is constitutional differ fundamentally in their interpre-

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<sup>1</sup> 652 F.3d 387, 390 (3d Cir. 2011). The Ninth Circuit, the only other circuit to consider whether the DNA Act is constitutional as applied to arrestees or pre-trial detainees, initially upheld the expanded version of the DNA Act, but later withdrew the panel opinion in anticipation of en banc review. *See United States v. Pool*, 621 F.3d 1213, 1215, 1228 (9th Cir. 2010), *reh’g granted*, 646 F.3d 659 (9th Cir.), *vacating as moot*, 659 F.3d 761 (9th Cir. 2011). The appeal was dismissed in September 2011 because the defendant entered a guilty plea, and, absent live controversy, the case was moot. *United States v. Pool*, 659 F.3d 761, 761–62 (9th Cir. 2011).

<sup>2</sup> *Mitchell*, 652 F.3d at 391, 416. The Fourth Amendment guarantees the right to be free from unreasonable searches and seizures. U.S. CONST. amend. IV. Under the Fourth Amendment, courts generally find a search or seizure that is not supported by probable cause or independent suspicion to be unreasonable. *See United States v. Thomas*, No. 10-CR-6172CJS, 2011 WL 1599641, at \*4 (W.D.N.Y. Feb. 14, 2011); *People v. Buza*, 129 Cal. Rptr. 3d 753, 783 (Ct. App.), *reh’g granted and superseded*, 262 P.3d 854 (Cal. 2011).

tations of the role of a DNA sample versus a DNA profile, the scope of private information a DNA sample can potentially reveal, and the level of arrestees' privacy expectations.<sup>3</sup> At the heart of this debate are disagreements not only over how DNA samples and DNA profiles should be analyzed under the Fourth Amendment, but also whether both the sample and the profile must be considered in the analysis.<sup>4</sup>

The difference between a DNA sample and a DNA profile is substantial.<sup>5</sup> On the one hand, a DNA sample is collected upon arrest, contains a vast amount of personal information and in the absence of a clear statutory provision can be retained indefinitely.<sup>6</sup> A DNA profile, on the other hand, is created from the collected sample, contains limited information primarily used for identification, and is protected by a number of statutory provisions.<sup>7</sup>

In sum, courts disagree whether taking a DNA sample can be analogized to a traditional identification procedure, such as fingerprinting, or whether taking a DNA sample implicates so much personal information that it cannot be analogized to traditional identification procedures.<sup>8</sup> Without clear legislative guidance or consistent judicial history, the courts are forced to speculate.<sup>9</sup>

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<sup>3</sup> See *Mitchell*, 652 F.3d at 412–13, 423–24; see, e.g., *Friedman v. Boucher*, 580 F.3d 847, 858 (9th Cir. 2009) (holding search and seizure of pre-trial arrestee's DNA unconstitutional); *United States v. Thomas*, No. 10-CR-6172CJS, 2011 WL 1627321, at \*1 (W.D.N.Y. Apr. 27, 2011) (adopting the magistrate judge's conclusion that the federal DNA statute was constitutional under the Fourth Amendment as applied to the defendant, an indicted, but not convicted, person); *Buza*, 129 Cal. Rptr. 3d at 783 (finding requirement that felony arrestees submit DNA sample without independent suspicion or probable cause unconstitutional); *In re Welfare of C.T.L.*, 722 N.W.2d 484, 492 (Minn. Ct. App. 2006) (concluding that state statute authorizing DNA sampling from indicted, but not yet convicted, individual violates the Fourth Amendment because that individual's privacy interest is not outweighed by the state's interest in DNA analysis); see also Ashley Eiler, Note, *Arrested Development: Reforming the Federal All-Arrestee DNA Collection Statute to Comply with the Fourth Amendment*, 79 GEO. WASH. L. REV. 1201, 1203 (2011).

<sup>4</sup> See *Mitchell*, 652 F.3d at 407–08, 412, 420–21.

<sup>5</sup> See *id.* at 406–07, 412, 423 & n.8; see also Linda Bartusiak, Comment, *Plea Bargaining for DNA: Implications on the Right to Privacy*, 13 U. PA. J. CONST. L. 1115, 1121–22 (2011).

<sup>6</sup> See *Mitchell*, 652 F.3d at 406–07, 412, 423 & n.8; see also Bartusiak, *supra* note 5, at 1125–26.

<sup>7</sup> See *Mitchell*, 652 F.3d at 407, 412–13, 423–24.

<sup>8</sup> See, e.g., *Buza*, 129 Cal. Rptr. 3d at 767–70 (rejecting analogy between fingerprinting and DNA testing, reasoning that such an analogy does not account for substantial differences in the type and scope of personal information that can be obtained by each method); *Anderson v. Commonwealth*, 650 S.E.2d 702, 705 (Va. 2007) (concluding that analogous treatment of taking DNA samples and taking fingerprints was “widely accepted” and stressing the identification purpose of DNA sampling).

<sup>9</sup> See *Mitchell*, 652 F.3d at 422, 425.

Thus, the *Mitchell* decision will likely be particularly influential: it comes from the highest court to rule on the issue and has already been cited in several cases.<sup>10</sup> Yet, the *Mitchell* court focused narrowly on DNA profile *use* and avoided ruling on the most debated issue—uncertainty surrounding treatment of the DNA sample.<sup>11</sup> The *Mitchell* court noted the vast amount of personal data contained in a DNA sample, but concluded that because DNA profiles were used solely to establish individuals' identities, they are analogous to fingerprints.<sup>12</sup>

Part I of this Comment provides a brief background of the DNA Act, introduces the *Mitchell* case, and outlines the *Mitchell* court's constitutional analysis of the Act.<sup>13</sup> Then, Part II discusses the majority's focus on the identification function of DNA profiles, a focus which reduced arrestees' expectations of privacy in their DNA profiles to an interest only in their identities.<sup>14</sup> Finally, Part III argues that the *Mitchell* analysis artificially focuses on the *use* of the collected DNA samples and dismisses concerns about the indefinite retention of these privacy-laden samples.<sup>15</sup> This Comment argues that, to provide fair and consistent judicial review, congress should change the statutory language to more clearly delineate between different treatments of information-rich DNA samples and information-limited DNA profiles.<sup>16</sup>

## I. THE DNA ACT AND THE CRUCIAL DISTINCTION BETWEEN A DNA PROFILE AND A DNA SAMPLE

Ruben Mitchell allegedly lost more than forty pounds of cocaine in a misdirected piece of luggage on a Pittsburgh-bound Southwest Airlines flight.<sup>17</sup> After landing, he filed a lost-baggage claim.<sup>18</sup> In March 2009, a grand jury returned a one-count indictment against Mitchell,

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<sup>10</sup> See, e.g., *Commeys v. United States*, No. 11-40164-PBS, 2011 WL 3898018, at \*2 (D. Mass. Aug. 29, 2011); *Mario W. v. Kaipio*, 265 P.3d 389, 395, 399 (Ariz. Ct. App. 2011); *Buza*, 129 Cal. Rptr. 3d at 764.

<sup>11</sup> See *infra* notes 77–98 and accompanying text.

<sup>12</sup> *Mitchell*, 652 F.3d at 410.

<sup>13</sup> See *infra* notes 17–52 and accompanying text.

<sup>14</sup> See *infra* notes 53–76 and accompanying text.

<sup>15</sup> See *infra* notes 77–98 and accompanying text.

<sup>16</sup> See *infra* notes 95–97 and accompanying text.

<sup>17</sup> Joe Mandak, *Feds: Calif.-based Team Flew Coke to Pa., Lost Bag*, UTSANDIEGO.COM (Sept. 22, 2010 3:12PM), <http://www.utsandiego.com/news/2010/sep/22/feds-calif-based-team-flew-coke-to-pa-lost-bag/>.

<sup>18</sup> *Id.*

charging him with attempted possession with intent to distribute five kilograms or more of cocaine.<sup>19</sup> Mitchell was arrested and detained.<sup>20</sup>

During his initial appearance before a magistrate judge, the government requested a sample of Mitchell's DNA.<sup>21</sup> Mitchell, however, objected to this pre-trial collection.<sup>22</sup> The district court found that pre-trial DNA collection constituted an unreasonable invasion of Mitchell's privacy and was unconstitutional under the Fourth Amendment, which protects against unreasonable searches and seizures.<sup>23</sup> The government appealed, and a closely divided Court of Appeals for the Third Circuit reversed.<sup>24</sup>

In its request for Mitchell's DNA sample, the government relied on the DNA Act, which authorizes collection of DNA samples.<sup>25</sup> Initially, the DNA Act required collection of DNA samples from individuals convicted of a qualifying federal offenses, and from "individual[s] on probation, parole, or supervised release."<sup>26</sup> In 2006, the scope of the DNA Act was expanded to encompass individuals who are merely arrested or facing charges.<sup>27</sup>

Under the Act, collected DNA samples must be forwarded to the Federal Bureau of Investigation (FBI).<sup>28</sup> Those samples are analyzed and used to create limited DNA profiles, which are subsequently uploaded to the Combined DNA Index System (CODIS).<sup>29</sup> The FBI limits

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<sup>19</sup> *United States v. Mitchell*, 681 F. Supp. 2d 597, 599 (W.D. Pa. 2009), *rev'd*, 652 F.3d 387 (3d Cir. 2011).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 602.

<sup>24</sup> *Mitchell*, 652 F.3d at 390.

<sup>25</sup> 42 U.S.C. § 14135a (2006).

<sup>26</sup> *Mitchell*, 652 F.3d at 399.

<sup>27</sup> *See* 42 U.S.C. § 14135a(a)(1)(A); *see also Buza*, 129 Cal. Rptr. 3d at 759 (noting that in 2006 congress "further expanded the reach" of the DNA Act when it extended the Act's application to arrestees).

<sup>28</sup> 42 U.S.C. § 14135a(b).

<sup>29</sup> *Id.* CODIS, the Combined DNA Indexing System, is an "interconnected series of computerized DNA databases," that links all of the DNA profiles created from the local, state, and federal laboratories. Derek Regensburger, *DNA Databases and the Fourth Amendment: The Time Has Come to Reexamine the Special Needs Exception to the Warrant Requirement and the Primary Purpose Test*, 19 ALB. L.J. SCI. & TECH. 319, 328 (2009); Sonia M. Suter, *All in the Family: Privacy and DNA Familial Searching*, 23 HARV. J.L. & TECH. 309, 316 (2010). CODIS facilitates cooperation among federal, state, and local DNA forensic labs allowing them to exchange and compare stored DNA profiles electronically and identify potential suspects by searching crime scene samples to against existing criminal profiles. *See* Regensburger, *supra* note 29, at 329; *see also* H.R. REP. NO. 106-900 (I), at 8 (2000) (praising DNA sampling as one of the "most important advances in criminal identification methods" and not-

the information that can be stored in CODIS, and does not associate names or other personal identifiers with the DNA samples.<sup>30</sup> In fact, CODIS can only store: (1) the DNA profile; (2) a number identifying the agency that submitted it; (3) the sample's identification number, which is assigned at the time of sample collection; and (4) information identifying the laboratory technician who created the profile.<sup>31</sup>

The DNA Act does not specify the portion of the DNA sequence that should be used to create the DNA profile.<sup>32</sup> FBI policy, however, is to use what is commonly called "junk DNA."<sup>33</sup> Absent a statutory requirement, the FBI is not required to limit its use to "junk DNA."<sup>34</sup> Some critics have argued, for example, that safeguards placed on the use of collected material cannot "immunize an impermissible search."<sup>35</sup>

Under the current practice, the DNA profiles in CODIS are created using short tandem repeat ("STR") technology.<sup>36</sup> STRs are repeated sequences of the "base pairs" of DNA, and are found at thirteen regions on an individual's DNA.<sup>37</sup> These thirteen non-genic regions are not associated with any known functions or traits and, thus, are referred to as "junk DNA."<sup>38</sup>

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ing that "CODIS allows State 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").

<sup>30</sup> *Mitchell*, 652 F.3d at 400 (citing FEDERAL BUREAU OF INVESTIGATION, *CODIS and NDIS Fact Sheet*, <http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet> (last visited Apr. 5, 2012)); see also *Buza*, 129 Cal. Rptr. 3d at 758 (noting that DNA profiles stored in CODIS do not include individual names of offenders, arrestees or detainees, or any information related to particular cases, but only a "specimen identification number, an identifier for the agency that provided the sample," and the name of the technician who conducted the analysis).

<sup>31</sup> *Mitchell*, 652 F.3d at 400 (citing *CODIS and NDIS Fact Sheet*, *supra* note 30).

<sup>32</sup> *Id.*; see 42 U.S.C. § 14135a(c)(2).

<sup>33</sup> *Mitchell*, 652 F.3d at 400.

<sup>34</sup> See *id.* at 424 (Rendell, J., dissenting).

<sup>35</sup> See *id.*

<sup>36</sup> *Id.* at 400 (majority opinion).

<sup>37</sup> *Id.* (citing *United States v. Kincade*, 379 F.3d 813, 818 (9th Cir. 2004)). "For example, one person might have two copies of the first marker that are four and eight repeats long, copies of the second that are eleven and twenty-three copies long, copies of the third that are three and ten copies long, and so on through all thirteen markers." *Id.* at 401 (internal quotation marks and alteration omitted).

<sup>38</sup> NAT'L RESEARCH COUNCIL, *THE EVALUATION OF FORENSIC DNA EVIDENCE* 65, 117 (1996); see *Mitchell*, 652 F.3d at 400 (citing *Kincade*, 379 F.3d at 818); Regensburger, *supra* note 29, at 326 ("[G]enes comprise only about 3% of the total base pairs on the DNA molecule. Much of the remainder of human DNA consists of non-coding regions which have little or no apparent biological function.").

According to the government, because the DNA profile is created from non-genic markers, it contains only identifying information.<sup>39</sup> Nonetheless, although these markers are not currently associated with any disease or known function, they could potentially be used in future “screening tests” to diagnose medical conditions or obtain information about individuals’ family members.<sup>40</sup> Although Mitchell argued that as technology progresses, scientists might be able to mine more personal data from these thirteen “junk DNA” markers, the court refused to factor this future and “merely hypothetical,” though not unforeseeable, risk in its evaluation of the DNA Act.<sup>41</sup> The court acknowledged, however, that if future technology enabled scientists to extract more information from junk DNA, reconsideration of the Fourth Amendment analysis might be appropriate.<sup>42</sup> The court stressed that statutory provisions limit the use of DNA profiles to four narrowly-defined purposes.<sup>43</sup>

Despite the existing statutory safeguards imposing criminal liability for misuse of DNA samples, samples can hypothetically be used later to obtain personal information beyond mere identification.<sup>44</sup> This risk has prompted some courts to voice concerns that the “privacy-laden” DNA samples are retained by the government even after DNA profiles are created and uploaded in CODIS.<sup>45</sup> Although the DNA Act provides

<sup>39</sup> *Buza*, 129 Cal. Rptr. 3d at 757 (citing *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1190 (N.D. Cal. 2009)).

<sup>40</sup> *E.g.*, Regensburger, *supra* note 29, at 330 (citing Simon A. Cole, *Is the “Junk” DNA Designation Bunk?*, 102 Nw. U. L. REV. 54, 56–57 (2007)); Daniel J. Solove, Essay, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1531 (2010).

<sup>41</sup> *Mitchell*, 652 F.3d at 408.

<sup>42</sup> *Id.* “The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.” *Id.* (quoting *City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010)).

<sup>43</sup> *Id.* (citing 42 U.S.C. § 14132(b)(3) (2006)). According to the statute, the index can only include information on DNA records that are maintained by federal, state, and local criminal justice agencies under to limited disclosure rules. 42 U.S.C. § 14132(b)(3). The disclosure of stored DNA samples and analyses is only authorized (A) to criminal justice agencies for purposes of law enforcement identification; (B) in judicial proceedings, if admissible otherwise; (C) for criminal defense purposes, to a defendant, “who shall have access to samples and analyses performed in connection with the case in which such defendant is charged;” or (D) for population statistics or identification research or for quality control purposes but only if all personal details are removed. *Id.*

<sup>44</sup> Regensburger, *supra* note 29, at 391 (noting that DNA can potentially be tested for other purposes, such as a person’s disposition to violence or substance abuse, and arguing that absent any provisions for their destruction, the samples can be retained by the government indefinitely without protection from future abuse).

<sup>45</sup> *Mitchell*, 652 F.3d at 412 (referring to 42 U.S.C. § 14132(d)(1)(A) and noting that the statute is silent as to how to treat the DNA sample when the offender is released from supervision); *Buza*, 129 Cal. Rptr. 3d at 782–83 (noting that DNA sampling of arrestee is

that the DNA profile should be expunged from CODIS if the arrested individual is acquitted or the charges are dropped, the statute is silent about the stored DNA sample.<sup>46</sup>

These concerns grew after 2006, when the scope of the DNA Act was expanded to include pre-trial arrestees.<sup>47</sup> Although arrestees are “legally innocent,” their DNA profiles and associated DNA samples remain in CODIS indefinitely “unless and until [the arrestees] are able to successfully negotiate a lengthy and burdensome expungement process that is far from guaranteed to succeed.”<sup>48</sup>

As applied to convicted individuals, the DNA Act, has survived numerous Fourth Amendment challenges, concerning both DNA collection and DNA analysis.<sup>49</sup> The legal status of DNA collection from arrestees, however, is still in flux.<sup>50</sup> Indeed, to date, there have been few challenges to the expanded Act as applied to pre-trial arrestees.<sup>51</sup> Furthermore, the few courts that have considered these challenges have disagreed whether the information contained in DNA profiles and DNA samples are protected by the Fourth Amendment guarantee against unreasonable searches and seizures.<sup>52</sup>

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“problematic” and voicing concerns that DNA samples can be retained indefinitely by the government even if the arrestee is not convicted).

<sup>46</sup> 42 U.S.C. § 14132 (d)(1)(A). According to the Federal Bureau of Investigation’s website, however, although the expungement process is lengthy, it applies not only to DNA profiles, but also to the collected and stored DNA sample. FEDERAL BUREAU OF INVESTIGATION, *CODIS—Expungement Policy*, [http://www.fbi.gov/about-us/lab/codis/codis\\_expungement](http://www.fbi.gov/about-us/lab/codis/codis_expungement) (last visited Apr. 5, 2012). The statute itself, however, references only the DNA profile stored in CODIS and does not address its application to the sample itself. See 42 U.S.C. § 14132.

<sup>47</sup> See *Mitchell*, 681 F. Supp. 2d at 607; *Buza*, 129 Cal. Rptr. 3d at 759.

<sup>48</sup> *Buza*, 129 Cal. Rptr. 3d at 782–83.

<sup>49</sup> See *Mitchell*, 652 F.3d at 402 & n.13 (citing more than ten federal circuit cases). To date, every federal circuit court that has heard a convicted individual’s challenge to the DNA Act has upheld its constitutionality. *Id.* at 402; see *United States v. Amerson*, 483 F.3d 73, 78 n.3 (2d Cir. 2007) (referring to over thirty decisions in which courts have upheld DNA indexing statutes); *Thomas*, 2011 WL 1599641, at \*5 (noting that the “overwhelming majority” of district and state courts that considered challenges to DNA Act or similar state laws held that the statutes did not violate the Fourth Amendment).

<sup>50</sup> See Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 316 n.114 (2010); see, e.g., *Thomas*, 2011 WL 1627321, at \*1; *Buza*, 129 Cal. Rptr. 3d at 783.

<sup>51</sup> See *Mitchell*, 652 F.3d at 412–13, 423–24; see, e.g., *Boucher*, 580 F.3d at 858; *Thomas*, 2011 WL 1627321, at \*1; *Buza*, 129 Cal. Rptr. 3d at 783; *In re Welfare of C.T.L.*, 722 N.W.2d at 492.

<sup>52</sup> See *Mitchell*, 652 F.3d at 390; see also U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . but upon probable cause . . .”); *supra* note 3 (discussing the split in the courts’ decisions).



## II. DNA PROFILE: JUST A MODERN FINGERPRINT?

The Fourth Amendment guarantees individuals the right to be secure against unreasonable searches and seizures, absent a warrant supported by probable cause.<sup>53</sup> To determine whether a government action violates the Fourth Amendment courts balance the degree of intrusion on an individual's privacy against the degree to which the search was necessary to promote legitimate governmental interests.<sup>54</sup> This balancing of individual and governmental interests is traditionally considered the "key principle" of Fourth Amendment analysis.<sup>55</sup> Under this balancing test, courts consider the totality of circumstances, analyzing the degree to which the DNA sampling intrudes upon an individual's privacy and the degree to which such collection is necessary to promote "legitimate governmental interests."<sup>56</sup>

Most courts have agreed that because DNA sampling improves accuracy in the investigation and prosecution of criminal cases and assists in solving crimes, it serves important and legitimate law enforcement interests.<sup>57</sup> Courts have disagreed, however, regarding the extent to which DNA collection intrudes on an individual's privacy.<sup>58</sup> For one, courts differ over whether arrestees have diminished expectations of privacy in their identities.<sup>59</sup> Furthermore, courts disagree about the amount of information contained in a DNA sample.<sup>60</sup>

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<sup>53</sup> U.S. CONST. amend. IV.

<sup>54</sup> See *Mitchell v. United States*, 652 F.3d 387, 390 (3d Cir. 2011).

<sup>55</sup> See *Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

<sup>56</sup> See *Mitchell*, 652 F.3d at 390, 403 (citing *Samson v. California*, 547 U.S. 843, 848 (2006)). The *Mitchell* court noted that the majority of circuits applied a totality of the circumstances approach in their analyses of the DNA Act's constitutionality as applied to convicted felons. *Id.* at 403 & n.15. The same test was also applied in cases involving arrestees and pre-trial detainees. See *People v. Buza*, 129 Cal. Rptr. 3d 753, 761, 763 (Ct. App.) (noting that California courts usually employ a totality of the circumstances test to evaluate whether the warrantless search is reasonable), *reh'g granted and superseded*, 262 P.3d 854 (Cal. 2011).

<sup>57</sup> See *Mitchell*, 652 F.3d at 404; *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1199 (N.D. Cal. 2009).

<sup>58</sup> See, e.g., *Mitchell*, 652 F.3d at 407, 422–23; *Buza*, 129 Cal. Rptr. 3d at 783.

<sup>59</sup> Compare *Haskell*, 677 F. Supp. 2d at 1197–98 (noting that arrestees' privacy interests are greater than those of prisoners and less than those of general population), with *Mitchell*, 681 F. Supp. 2d at 607 (refusing to diminish arrestee's expectation of privacy based solely upon his status as an arrestee).

<sup>60</sup> Compare *Mitchell*, 652 F.3d at 412–13 (holding that DNA sampling is nothing more than a more precise method of establishing identity and therefore is equivalent to fingerprinting), with *Buza*, 129 Cal. Rptr. 3d at 782 (remarking on the "extraordinary amount" of "stigmatizing" personal data can be obtained from a DNA sample).

On the one hand, some courts have focused on the *use* of DNA samples as a means of identification, and have upheld the constitutionality of DNA sampling from pre-trial arrestees.<sup>61</sup> Those courts, in considering the extent to which DNA sampling intrudes on an individual's reasonable expectation of privacy have concluded that the intrusion is minor, implicating only an individual's identity interest.<sup>62</sup> On the other hand, other courts have found that the extraction of DNA before conviction is unconstitutional by reasoning that DNA samples can reveal extensive personal data, and that the DNA Act does not provide clear guidelines about sample retention.<sup>63</sup> These courts have expressed concerns over the "Orwellian prospects," that the DNA Act raises, because DNA samples could potentially be retained indefinitely, and because the Act implicates the privacy rights of pre-conviction individuals, who have greater privacy expectations than convicts.<sup>64</sup>

Some courts have concluded that a limited DNA profile contains only identification information and, as a result, have analogized DNA sampling to fingerprinting.<sup>65</sup> Under this reasoning, DNA profiles are constitutional because the use of DNA profiles is akin to fingerprinting, a long accepted booking procedure.<sup>66</sup> Yet, these courts, like the *Mitchell* court, have declined to consider the privacy concerns implicated by the indefinite retention of the DNA sample.<sup>67</sup> For example, in 2010, in *United States v. Pool*, the Ninth Circuit authorized the government to collect a DNA sample to create a DNA profile, but did not address whether the government could retain the sample after the profile is

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<sup>61</sup> *E.g.*, *Mitchell*, 652 F.3d at 410; *United States v. Pool*, 621 F.3d 1213, 1228 (9th Cir. 2010), *reh'g granted*, 646 F.3d 659 (9th Cir.), *vacating as moot*, 659 F.3d 761 (9th Cir. 2011); *United States v. Thomas*, No. 10-CR-6172CJS, 2011 WL 1627321, at \*6 (W.D.N.Y. Apr. 27, 2011). In 2010, in *United States v. Pool*, the Ninth Circuit held that DNA sampling was used solely for identification and noted that there was no evidence of the government's intent to use the information for any other purposes. 621 F.3d at 1228. Similarly, in 2011, in *United States v. Thomas*, the U.S. District Court for the Western District of New York held that the purpose of DNA sampling is to collect identifying information, not to "uncover evidence of wrongdoing or solve a particular crime." 2011 WL 1627321, at \*6.

<sup>62</sup> *E.g.*, *Brown v. City of Franklin*, No. 3-10-1146, 2011 WL 2971092, at \*4 (M.D. Tenn. July 20, 2011); *Thomas*, 2011 WL 162732, at \*9; *Anderson v. Commonwealth*, 650 S.E.2d 702, 706 (Va. 2007).

<sup>63</sup> *E.g.*, *Mitchell*, 652 F.3d 423–24 (Rendell, J., dissenting); *Buza*, 129 Cal. Rptr. 3d at 780, 783.

<sup>64</sup> *E.g.*, *Buza*, 129 Cal. Rptr. 3d at 780, 783; *In re Welfare of C.T.L.*, 722 N.W.2d 484, 491 (Minn. Ct. App. 2006).

<sup>65</sup> *See, e.g.*, *Mitchell*, 652 F.3d at 413; *Anderson*, 650 S.E.2d at 705, 706.

<sup>66</sup> *Mitchell*, 652 F.3d at 413.

<sup>67</sup> *See, e.g. Mitchell*, 652 F.3d at 412; *Pool*, 621 F.3d at 1233 (Lucero, J., concurring).

created.<sup>68</sup> Other courts, however, have concluded that “complex, comprehensive and inherently private information” contained in such samples is entirely unnecessary for identification purposes and any comparison to fingerprinting is “pure folly.”<sup>69</sup>

The *Mitchell* court declined to consider concerns about the potentially indefinite retention of the DNA sample, in part, because Mitchell’s DNA sample had not yet been collected, precluding him from challenging its retention.<sup>70</sup> Although the court acknowledged that a “vast amount of sensitive information” can be extracted from the DNA sample, it found such concerns speculative and was “reassured by the numerous protections” created by the legislature.<sup>71</sup> For example, the DNA Act limits the use of DNA profiles and criminalizes any mistreatment of either the DNA sample or DNA profile.<sup>72</sup> The *Mitchell* court found that these criminal penalties substantially curbed any hypothetical abuse.<sup>73</sup>

Furthermore, in *Mitchell*, the Third Circuit framed the inquiry around whether pre-trial arrestees have expectations of privacy in their *identities*—an interest upon which law enforcement is permitted to intrude as part of routine booking procedures, such as fingerprinting.<sup>74</sup> The Third Circuit only briefly addressed the private information contained in DNA samples, and relied on the statutory safeguards to protect against the samples’ misuse.<sup>75</sup> In doing so, the court did not consider whether privacy interests of pre-trial arrestees differ from those of convicted felons.<sup>76</sup>

### III. UNJUSTIFIED DISTINCTION IN THE TREATMENT OF DNA SAMPLES AND DNA PROFILES DISTORTS COURTS’ ANALYSES AND IGNORES IMPORTANT PRIVACY CONCERNS

The *Mitchell* court broadly expanded the scope of information available to the government, and became the first federal circuit court to rule that DNA testing of pre-trial arrestees does not violate the

<sup>68</sup> *Pool*, 621 F.3d at 1232 (Lucero, J., concurring).

<sup>69</sup> *See Mitchell*, 681 F. Supp. 2d at 608; *see also Buza*, 129 Cal. Rptr. 3d at 783 (commenting that due to the very nature of DNA analysis, DNA tests cannot be used to immediately identify the suspect and finding DNA sampling without probable cause unconstitutional).

<sup>70</sup> *Mitchell*, 652 F.3d at 412.

<sup>71</sup> *Id.* at 407.

<sup>72</sup> *Id.* (citing 42 U.S.C. § 14135e(c)); *see also supra* note 43 (discussing statutory limits on the use of DNA profile).

<sup>73</sup> *Mitchell*, 652 F.3d at 407.

<sup>74</sup> *See id.* at 390.

<sup>75</sup> *See id.* at 409–11.

<sup>76</sup> *See id.*

Fourth Amendment.<sup>77</sup> The court reached this conclusion by focusing only on the *use* of collected DNA samples as a means of identification.<sup>78</sup> Yet, in doing so, the court dismissed concerns about the information contained in the DNA sample itself.<sup>79</sup> Furthermore, it extended the application of the DNA Act to arrestees, who have higher privacy expectations than convicts, and declined to address the government's potentially indefinite retention of DNA samples.<sup>80</sup>

The entire DNA sample remains in the government's custody, thereby opening up an "unquestionable opportunity for abuse."<sup>81</sup> The *Mitchell* court briefly acknowledged the wealth of private information that can be obtained from DNA samples.<sup>82</sup> The court stressed, the speculative nature of concerns arising from the potential wealth of information available to the government.<sup>83</sup> Furthermore, according to the court, statutory provisions that impose strict criminal sanctions for the misuse of DNA samples are sufficient to curb abuse.<sup>84</sup> Yet, statutory provisions may change in the future and imposition of criminal liability does not always guarantee against misuse.<sup>85</sup> Furthermore, the *Mitchell* court did not address the extent of personal information contained in the DNA sample.<sup>86</sup> Nor did it consider the implications of the samples' potentially indefinite retention.<sup>87</sup> Instead, the court upheld the DNA Act based merely on its approval of DNA profiles' function.<sup>88</sup>

Instead of merely considering the DNA profiles, courts should consider both the DNA sample and the DNA profile to analyze the privacy concerns raised by DNA sampling.<sup>89</sup> The court's focus on the DNA

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<sup>77</sup> 652 F.3d 387, 390, 402 (3d Cir. 2011).

<sup>78</sup> *See id.* at 411–12.

<sup>79</sup> *See id.*

<sup>80</sup> *See id.* at 412.

<sup>81</sup> *See* United States v. Pool, 621 F.3d 1213, 1232 (9th Cir. 2010) (Lucero, J., concurring), *reh'g granted*, 646 F.3d 659 (9th Cir.), *vacating as moot*, 659 F.3d 761 (9th Cir. 2011); *see also* Crawford v. Washington, 541 U.S. 36, 67 (2004) (noting that the government can not always be trusted to safeguard individuals' rights).

<sup>82</sup> *Mitchell*, 652 F.3d at 407.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *See id.* at 423–24 (Rendell, J., dissenting).

<sup>86</sup> *See id.* at 407 (majority opinion).

<sup>87</sup> *See id.* at 412–13.

<sup>88</sup> *See Mitchell*, 652 F.3d at 412–13.

<sup>89</sup> *See infra* notes 90–98 and accompanying text.

profile and its identification function ignores that the DNA sample implicates private information far beyond an individual's identity.<sup>90</sup>

Although the use of DNA profiles can be compared to the use of fingerprinting, which arrestees are already subjected to during routine booking, DNA profiles impose a substantially greater intrusion.<sup>91</sup> "Privacy-laden" DNA samples are not destroyed once DNA profiles are created and could potentially be used to obtain sensitive personal information beyond that necessary for identification.<sup>92</sup> Furthermore, although some have argued that the government has neither the time nor the funds to conduct in-depth analyses of DNA samples, those practical limitations are not sufficient to make the statute constitutional.<sup>93</sup> The limits currently imposed on the use of collected DNA does not "immunize" the government from the constitutional requirements of the Fourth Amendment.<sup>94</sup>

Although some courts have limited their constitutional reviews by only considering the identification function of DNA profiles, courts will continue to disagree as long the constraints on DNA sampling remain ambiguous.<sup>95</sup> Thus, in addition to statutory penalties for improper use of information, the government should introduce further restrictions on the analysis of DNA samples collected from arrestees prior to trial.<sup>96</sup>

A statutory provision for the automatic deletion of collected DNA samples on dismissal of charges would help prevent potential abuses of the vast amount of information that can be mined from "privacy-laden" DNA.<sup>97</sup> Although some scholars argue for a policy prohibiting analysis of collected DNA samples until the arrested individual is convicted,

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<sup>90</sup> Corey Preston, Note, *Faulty Foundations: How the False Analogy to Routine Fingerprinting Undermines the Argument for Arrestee DNA Sampling*, 19 WM. & MARY BILL RTS. J. 475, 498 (2010).

<sup>91</sup> See *Mitchell*, 652 F.3d at 412–13.

<sup>92</sup> *Id.* at 424 (Rendell, J., dissenting) (arguing that because even "junk DNA" used in a DNA profile might contain "extremely private and sensitive information," it is unwise to focus solely on the government's claim that the data is used only for identification purposes). The *Mitchell* dissent further compared DNA sampling to seizure of personal medical records, and noted that focusing only on the use of the extracted information is similar to concluding "that if the Government seizes personal medical information about you but can only use the subset of that information that serves to identify you, your privacy interest in the information taken is confined to a mere interest in your identity. Nothing could be further from the truth." *Id.*

<sup>93</sup> See Regensburger, *supra* note 29, at 331.

<sup>94</sup> See *Mitchell*, 652 F.3d at 416 (Rendell, J., dissenting).

<sup>95</sup> See Preston, *supra* note 90, at 505–06.

<sup>96</sup> See Eiler, *supra* note 3, at 1236.

<sup>97</sup> See Paul M. Monteleoni, Note, *DNA Databases, Universality, and the Fourth Amendment*, 82 N.Y.U. L. REV. 247, 257–58 (2007).

such a policy would provide only temporary privacy protection, fails to address long-term dangers associated with retention of the DNA sample, and downplays the important role DNA profiles can play in pre-trial decisions.<sup>98</sup>

### CONCLUSION

In *Mitchell*, the Third Circuit became the first federal circuit court to uphold the constitutionality of the DNA sampling of pre-trial arrestees. The court did so by limiting the inquiry to the arrestees' privacy interest in their identities, and by holding that DNA profiles served exclusively identification purposes, similar to fingerprinting. The court's decision, however, did not address concerns about the extensive personal information that can be mined from the indefinitely retained DNA sample.

Thus, application of the Third Circuit's approach is bound to produce different results among the courts, because courts continue to disagree about whether it is proper to reduce collection and retention of the DNA sample itself to the identification function of the limited DNA profile. Indeed, the Third Circuit limited its review to the *use* of the DNA sample without giving proper weight to the fact that DNA samples themselves can serve purposes beyond identification.

Changes to the language of the DNA Act as it pertains to arrestees would reduce the potential for abuse of privacy-laden DNA samples. Provisions for automatic destruction of the DNA sample if the arrest does not result in a conviction or after a limited DNA profile has been created, might prevent arrested individuals, presumed innocent at the time the DNA sample is obtained, from being exposed to the collection of personal information far exceeding mere personal identification.

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<sup>98</sup> See *Mitchell*, 652 F.3d at 420 & n.4 (noting that whether an arrestee has been previously implicated in crimes and as a result poses a threat to the society is an important factor in courts' bail decisions).