The Shattering of a Solid Rock:
Would the DNA Act, as currently enforced by the Federal Government,
Survive a Strict Scrutiny Challenge under the Religious Freedom Restoration Act?

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Dedication

I would like to dedicate this paper to my daughter, Laura, because she is the reason behind, above, and beyond all my dreams.
Introduction

Forensic evidence, and in particular deoxyribonucleic acid (“DNA”) evidence, has made successful breakthroughs in modern-day law enforcement. In today’s society, “forensic DNA typing has rapidly gained approval as admissible, even decisive, evidence concerning tissue material left at a crime scene.”\(^1\) Given the uniqueness of a person’s DNA, forensic DNA evidence has tremendously benefited the criminal system worldwide not only because it helps law enforcement in identifying those guilty of a crime, but because it similarly protects the innocent.\(^2\)

Recognizing these benefits, all 50 states, the District of Columbia, and the federal Government have adopted DNA collection statutes, which, although not identical, are similar to each other.\(^3\) The Federal DNA Analysis Backlog Elimination Act of 2000\(^4\) (“the DNA Act”) requires the mandatory collection of a “DNA sample” from every person convicted of a qualifying federal offense\(^5\) for the purpose of including the offender’s genetic profile in the Combined DNA Index System (“CODIS”) maintained by the Federal Bureau of Investigation (“FBI”).

The DNA Act defines “DNA sample” as “a tissue, fluid or other bodily sample of an individual on which DNA analysis can be carried out.”\(^6\) However, in enforcing the DNA Act, the FBI Federal Convicted Offenders Program (“the Program”) has only validated protocols for

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\(^2\) See United States v. Sczubelek, 402 F.3d 175, 185 (3d Cir. 2005).
\(^3\) See People v. Garvin, 349 Ill. App. 3d 845, 853 (Ill. App. Ct. 2004) (listing DNA statutes and cases from all 50 states); See also http://www.dnaresource.com (regularly-updated list of state DNA collection statutes).
\(^5\) Qualifying Federal offenses include homicide, crimes relating to sexual abuse or sexual exploitation, kidnapping, and offenses involving robbery or burglary, etc. See 42 U.S.C. § 14135a(d).
\(^6\) § 14135a(c)(1).
the collection and analysis of whole blood samples as the DNA sample.

Members of different religious organizations, such as the Jehovah’s Witnesses, sincerely believe that blood is sacred and that giving or receiving blood is prohibited by their religious doctrine. The thesis of this paper is that if a religious objector meets his *prima facie* case, the federal Government will not be able to meet its burden of showing that the mandatory collection of blood by the finger stick technique is the least intrusive means of furthering the Government’s compelling interests under RFRA’s strict scrutiny test.

Part I presents a factual scenario that serves as basis for this paper. Part II serves as an overview to the statutory and regulatory framework of the DNA Act. Part III presents the different challenges to the DNA collections statutes and the reasons why the courts have upheld the challenges. Part IV briefly discusses RFRA and its applicable test. Part V presents an argument of how a religious objector can meet his *prima facie* case and proposes an argument supporting the position that the federal Government will not be able to meet its burden under RFRA’s strict scrutiny test. Part VI presents a brief conclusion.

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7 See Part V of a discussion addressing the Jehovah’s Witnesses position on blood.
I. My Blood is Sacred: A Factual Scenario

Your client was convicted of a qualified federal offense. As such, he is subject to the mandatory collection of a sample of his DNA under the DNA Act and he is required to cooperate with the collection of such sample as a condition of his supervised release.

The Probation Officer has requested your client to provide his blood sample for the creation of his DNA profile. However, your client refused to provide the blood sample as instructed.

The Probation Officer filed a petition requesting the court to compel your client to provide a blood sample for DNA testing or, in the alternative, to revoke or extend the terms of your client’s supervised release. The petition has two counts. Count One alleges that your client violated the law by refusing to submit a blood sample for mandatory DNA testing. Count Two alleges that your client violated a condition of his probation by failing to follow the

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8 Qualifying Federal offenses include homicide, crimes relating to sexual abuse or sexual exploitation, kidnapping, and offenses involving robbery or burglary, etc. See 42 U.S.C. § 14135a(d).
9 See 42 U.S.C. § 14135a(a)(1), and (a)(2) (requiring convicted felons to provide their DNA and genetic profile to be included in CODIS); see also U.S. v. Stegman, 295 F.Supp.2d 542, 549 (D.Md. 2003) (recognizing that the DNA Act applies to current federal prisoners and individuals who are on supervised release, probation, or parole).
10 See § 14135c (requiring cooperation in the collection of a DNA sample as a condition of probation, parole, or supervised release).
11 See § 14135a(a)(2) (requiring the federal probation officer to collect a DNA sample from an individual on federal supervised release).
12 See § 14135a(a)(4)(A) (authorizing the probation officer to use any reasonably and necessary means to detain, restrain, and collect a DNA sample from a supervisee who refuses to give a sample).
13 18 U.S.C. § 3583(e)(2)-(3) (authorizes the Court to revoke or extend the term of supervised release).
14 The failure to provide DNA sample violates two mandatory release conditions: not commit another federal, state, or local offense; and submit to DNA sampling. 18 U.S.C. § 3583(d); U.S.S.G. § 5D1.3(a)(1)&(8).
15 See 42 U.S.C. § 14135a(a)(5) (classifying the convicted offender’s failure to cooperate in the collection of the DNA sample as a class A misdemeanor).
instructions of the probation officer.\footnote{See note 14 supra.}

However, your client is not refusing to provide a DNA sample. As he explained to you, he is refusing to “give blood” because he is a Jehovah’s Witness, and as such he adheres to the belief that to give or receive blood is a violation of God’s laws, and that God will punish those who violates it.\footnote{See In re Estate of Brooks, 205 N.E.2d 435, 437 (Ill. 1965) (“members of the Jehovah’s Witnesses regard themselves commanded by God to neither give nor receive … blood”).} Your client assures you that he is willing to give his DNA sample through buccal swab, hair, body tissue, or any other type of bodily sample from which his DNA profile can be obtained, except blood.

You moved to dismiss under the theory that your client is a religious objector. In your motion to dismiss, you are not challenging the Constitutionality of the DNA Act. Rather, you are claiming that the Federal Convicted Offender Program’s mandatory collection of a blood sample, in the light of other less intrusive methods readily available combined with your client’s religious opposition violates the Religious Freedom Restoration Act (RFRA). You request the Court to allow your client to provide his DNA sample through a saliva swab in lieu of blood.

Will your motion be granted?

II. The DNA Act: An overview of the Act’s statutory and regulatory framework

“DNA, or deoxyribonucleic acid, is the building block for the human body; virtually every cell contains DNA.”\footnote{See U.S. Dep’t of Justice, Understanding DNA Evidence: A Guide for Victim Service Providers, http://ojp.usdoj.gov/nij/publications/dna_evbro/index.html} The DNA in a person’s blood is the same as the DNA in his saliva, skin tissue, hair, and bone. A person’s DNA does not change throughout a person’s life.\footnote{Id.} With
the exception of identical twins, no two people have the same DNA.\textsuperscript{20}

A person’s DNA is unique.\textsuperscript{21} Given its uniqueness, DNA evidence plays an important role in criminal cases throughout the country, both to convict the guilty and to exonerate those wrongly accused or convicted.\textsuperscript{22}

Modern scientific techniques allow people to be identified through their DNA. Recognizing the benefits of DNA collection, Congress enacted the Violent Crime Control and Law Enforcement Act of 1994\textsuperscript{23} (“the 1994 Act”). The 1994 Act authorized the FBI to create an index of DNA samples obtained from convicted offenders, crime scenes, and from unidentified human remains.\textsuperscript{24} In response, the FBI created the Combined DNA Index System (“CODIS”).\textsuperscript{25}

“CODIS is a national index of DNA samples taken from convicted offenders, crime scenes, victims of crime, and unidentified human remains.”\textsuperscript{26} CODIS databases enables “State and local forensic laboratories to exchange and compare DNA profiles electronically… to link evidence from crime scenes for which there are no suspects to DNA samples of convicted offenders” whose DNA is already in the system.\textsuperscript{27} Currently, every state, the United States

\begin{footnotesize}
\textsuperscript{20} Id.
\textsuperscript{21} See States v. Raines, 857 A.2d 19, 22 (Md. 2004) (accepting DNA evidence and recognizing that the statistical probability of anyone other than appellee being the source of the DNA of the attacker to be one in six billion).
\textsuperscript{22} See note 2 supra.
\textsuperscript{24} See id. § 14132(a)(1).
\textsuperscript{25} See id. § 14132(a) (authorizing the FBI to establish CODIS). Even though the 1994 Act formalized the FBI’s authority to establish a national DNA index for law enforcement purposes, CODIS began as a pilot project in 1990 serving 14 state and local laboratories. In October 1998, the FBI’s National DNA Index System (NDIS) became operational. Today, CODIS is implemented as a distributed database with three hierarchical levels: local, state, and national. See U.S. Dep’t of Justice, The FBI’s Combined DNA Index System Program – CODIS, http://www.fbi.gov/hq/lab/codis/brochure.pdf (last visited Oct. 2006).
\textsuperscript{26} United States v. Miles, 228 F.Supp.2d 1130, 1132 (E.D.Cal. 2002) (internal citations omitted).
\textsuperscript{27} United States v. Szczublek, 402 F.3d 175, 181 (3d Cir. 2005) (rejecting constitutional challenges to the DNA Act) (internal citations omitted).
\end{footnotesize}
Army, the FBI, and Puerto Rico share DNA profiles through CODIS. In an appropriations act, Congress required the Department of Justice to submit to it an implementation plan for collecting DNA samples from qualified convicted offenders. In December 1998, the FBI’s Laboratory submitted to Congress its report titled “Implementation Plan for Collection of DNA Samples from Federal Convicted Offenders pursuant to P.L. 105-229.” As reflected in that report, the Program underwent a thorough investigation and conducted numerous studies to evaluate the different types of DNA samples and decided to collect whole blood via venipuncture as the biological sample for DNA analysis. The decision to collect blood was based on the FBI’s findings that other collection methods of DNA sample, such as buccal swabs, hair, skin cells, etc., did not consistently provide the quality and quantity of DNA necessary for the testing procedures employed.

In April of 1999, the FBI issued its Quality Assurance Standards for Forensic DNA Testing (“Quality Assurance Standards), as required by the 1994 Act. Every laboratory that participates in CODIS must comply with the Quality Assurance Standards.

Congress wanted to expand CODIS by providing legal authority for the collection of DNA samples from qualified convicted offenders.

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31 The finger stick, a less intrusive method than venipuncture, has replaced venipuncture, and is the standard method currently in use for collecting blood samples.
32 FBI Report, p. 19, see note 30 supra.
33 Id.
35 The Quality Assurance Standards cover the following subjects: organization and management, personnel, facilities, evidence control, validation, analytical procedures, equipment calibration and maintenance, reports, review, proficiency testing, corrective action, audits, safety and use of subcontractor laboratories.
DNA samples from persons convicted of Federal crimes.\textsuperscript{36} Therefore, in the exercise of its power under the Commerce Clause, Congress enacted the Federal DNA Analysis Backlog Elimination Act of 2000\textsuperscript{37} ("the DNA Act").

Under the DNA Act a qualified federal convicted offender ("qualified offender") is required to provide a sample of his DNA to include his genetic profile in the Combined DNA Index System ("CODIS") maintained by the Federal Bureau of Investigation ("FBI").\textsuperscript{38} The DNA Act requires the collection of a DNA sample from those who had been convicted of certain federal crimes and who were incarcerated, or on parole, probation, or supervised released.\textsuperscript{39}

The FBI’s Federal Convicted Offenders Program ("the Program") oversees the collection and analysis of DNA samples obtained from the qualified offender. Once a DNA sample is collected from a qualified offender, the completed test kit is sent to the FBI Laboratory for inclusion in CODIS.\textsuperscript{40}

The FBI requires laboratories participating in CODIS to use only validated methods and procedures for DNA analysis.\textsuperscript{41} The Program’s laboratory, as one of the laboratories participating in CODIS, is required to use validated methods and procedures for analyzing the DNA samples. Based in part on the FBI’s determination that blood samples are more reliable and of greater quality, the Program has only validated\textsuperscript{42} protocols for the analysis of blood.\textsuperscript{43}

\textsuperscript{38} Id.
\textsuperscript{39} See 42 U.S.C. § 14135a(d).
\textsuperscript{40} See id. § 14135a(b); See United States v. Hugs, 384 F.3d 762, 769 (9th Cir. 2004).
\textsuperscript{42} Validation is a process by which a procedure is evaluated to determine its efficacy and reliability for DNA analysis and includes: (1) Developmental validation is the acquisition of test data and determination of conditions and limitations of a new or novel DNA methodology for use on samples. (2) Internal validation is an accumulation of test data within the laboratory to demonstrate that established methods and procedures perform as expected in the laboratory.” See
III. Solid as a rock: unsuccessful challenges to the DNA Act

Defendants from all across the nation have challenged the constitutionality of the DNA Act under many constitutional theories. Nonetheless, the courts have overwhelmingly upheld the DNA Act and its analogous state statutes. This section will review some of the most common challenges presented to the courts.

a. The collection of DNA samples under the DNA Act does not violate the Fourth Amendment.

The Fourth Amendment protects the “right of the people to be secure in their persons… against unreasonable searches and seizures.” To pass constitutional muster under the Fourth Amendment, a search must be reasonable because “the touchstone of the Fourth Amendment is reasonableness.”

Those subjected to the mandatory collection of their DNA sample, have claimed that the compelled collection of their DNA sample violates their Fourth Amendment’s rights against


43 See United States v. Kincade, 379 F.3d 813, 816 (9th Cir. 2004), cert. denied, 544 U.S. 924 (2005), (upholding DNA Act under the Fourth Amendment and acknowledging that the FBI guidelines require those subject to the DNA Act to submit to a compulsory blood sampling because the FBI considers DNA information derived from blood samples to be more reliable than that obtained from other sources).


45 Except for the case of United States v. Miles, 228 F.Supp. 2d 1130 (E.D. Cal. 2002) (finding that the DNA Act violates the Fourth Amendment as applied to a defendant who was convicted of a qualifying offense 30 years ago and has fully served his sentence for that crime), this writer has been unable to find any other reported or unreported case finding the DNA Act to be unconstitutional.

46 U.S. Const. amend. IV.

unreasonable searches because it is executed without warrant and without individualized suspicion of any criminal wrongdoing. Courts have been consistent in holding the DNA statutes constitutional under the Fourth Amendment. As one state court judge recognized:

This garden-variety … of case[s] [raising] a Fourth Amendment question… has commanded the attention of federal and state courts across the nation. The same answer keeps coming up-- the Government can require a convicted felon to undergo a blood or saliva test for submission to state and national DNA databanks without individualized suspicion that the felon has committed some other crime.48

However, while unanimous in their decisions to uphold the statutes because its reasonableness, the courts are split as to whether to apply the “totality of the circumstances” test or the “special needs” exception. The difference between the two is simple. To uphold a Government’s action under the “special needs” exception, all that is required is that there is an absence of any law enforcement motive underlying the challenged search. On the other hand, the “totality of the circumstances” test is a more rigorous standard. Under the “totality of the circumstances” standard, to uphold a Government’s action, the court must balance the invasion of defendant’s interest in privacy against the Government’s interest in the search without a warrant supported by probable cause.49

Without excluding the possibility that the totality of the circumstances test might validate the collection of blood of the DNA Act, the Second, Tenth Circuits, along with many federal district courts and at least two state Supreme Courts, have upheld DNA collection statutes under the special needs test arguing that the DNA Act’s primary purpose is not ordinary law

49 For an interesting discussion of these two tests see United States v. Kincade, 379 F.3d 813, 832-32 (9th Cir. 2004).
enforcement. On the other hand, the Fourth, Fifth, and Ninth Circuits, along with a variety of federal district courts and state courts, have endorsed the DNA collection statutes under the totality of the circumstances test. Courts upholding the DNA Act under the totality of the circumstances test have found the Act’s primary purpose to be law enforcement.

Generally speaking, the DNA Act has been held to be in compliance with the Fourth Amendment under both the special needs test and the totality of the circumstances test because those subject to the DNA Act do not enjoy the same privacy interest as “free persons.” The courts have reasoned that blood tests are common and widely used without involving risk, trauma, or pain, and the DNA profile establishes only the defendant’s identity.

In addition, courts have identified other compelling interests furthered by the DNA Act such as deterring future crimes, reducing recidivism, solving past crimes, and absolving the innocent.

b. The DNA Act is not vague

The DNA Act has been challenged under the theory that the language of the statute is vague because it gives to the probation officer too much discretion. The courts have rejected these challenges. “A statute violates due process of law if it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. The same principles apply to a condition of supervised release.”

In upholding the statute, the Ninth Circuit held that the language of the DNA Act is not

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50 Id. at 830-31.
51 Id. at 831.
52 See, e.g., United States v. Hugs, 384 F.3d 762 (9th Cir. 2004).
53 Id. at 768 (internal citations omitted).
The language of the DNA Act clearly requires the person subject to it to provide a DNA Sample. In addition, the DNA Act does not give a federal probation officer too much discretion because the officer must follow extensive rules, restrictions, and procedures outlined by the FBI, the Attorney General and the Administrative Office of the United States Courts in collecting and maintaining the blood samples.

c. The DNA Act does not violate the Fifth Amendment privilege against self-incrimination.

The Fifth Amendment to the Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. Challengers of the DNA Act have unsuccessfully claimed that compelled extraction of blood samples violates the Fifth Amendment right guaranteed by the Constitution. In rejecting this argument, courts have relied almost exclusively in the Supreme Court decision in *Schmerber v. California*. The following discussion of *Schmerber* illustrates the courts’ rationale in rejecting Fifth Amendment challenges to the DNA Act.

In *Schmerber*, the petitioner was involved in a car accident. While petitioner was in the hospital receiving treatment for his injuries, the police officer requested a blood sample to be withdrawn from petitioner’s body by a physician at the hospital and tested. The blood test

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54 Id. at 769.
55 Id. at 768-69.
56 U.S. Const. amend. V.
59 Id. at 758.
60 Id.
revealed that the petitioner was intoxicated at the time of the offense.\textsuperscript{61} This analysis was admitted into evidence at the trial and the petitioner was convicted for driving an automobile while under the influence of alcohol.\textsuperscript{62} Petitioner objected to the introduction of the analysis into evidence, claiming that it violated his Fifth Amendment privilege against self-incrimination.\textsuperscript{63}

In rejecting the Fifth Amendment challenge, the Supreme Court held that “the privilege [against self-incrimination] protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.”\textsuperscript{64} The Court found that when the issue is solely compelling extraction of blood, and no “shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis,” the person’s testimonial capacities are not implicated and the Fifth Amendment offers no protection.\textsuperscript{65}

Accordingly, the Court held that the blood test evidence was neither testimonial in nature nor related to some communicative act or writing and, therefore, it cannot be excluded on privilege grounds.\textsuperscript{66}

Likewise, courts faced with a challenge to the DNA Act under the privilege against self-incrimination have agreed that while a blood test can be potentially incriminating, it is not testimonial in character nor is it evidence related to any communicative act and as such, the involuntary collection of blood does not implicate the Fifth Amendment.\textsuperscript{67}

\begin{thebibliography}{9}
\bibitem{61} Id. at 759.
\bibitem{62} Id. at 758-59.
\bibitem{63} Id.
\bibitem{64} Id. at 761.
\bibitem{65} Id. at 765.
\bibitem{66} Id. at 765.
\bibitem{67} Id. at 765
\end{thebibliography}
d. The DNA Act is not an unconstitutional Bill of Attainder

The United States Constitution provides that Congress shall not pass a Bill of Attainder. "A Bill of Attainder is a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a jury trial." Therefore, for a law to constitute a Bill of Attainder, three elements must be present in the challenged law. "The law must: (1) single out an identifiable group; (2) inflict punishment; and (3) dispense with a judicial trial."

In attacking the Constitutionality of the DNA Act, defendants advanced the argument that the DNA Act is an unconstitutional Bill of Attainder because the Act exhibits all of the above three elements of a Bill of Attainder. They claim the DNA Act singles out individuals based on their past commission of qualified offenses, punishes them by requiring them to provide blood and by authorizing detention of those who refuse, and imposes punishment without a judicial trial.

In Bill of Attainder cases, the courts have agreed, and the Government has generally conceded, that the DNA Act does single out an identifiable group by requiring application of a DNA collection only to probationers, parolees, or individuals on supervised release. However, courts have found that the other two elements necessary for a Bill of Attainder, i.e. punishment

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68 In United States v. Reynard, the court explained how Bill of Attainder and an Ex Post Facto laws are different, although the concepts overlap. The court explained that an ex post facto law is necessarily backward-looking because it imposes punishment only for past offenses while a Bill of Attainder may punish retroactively it may also punish prospectively. 220 F. Supp. 2d 1142, 1163 (S.D. Cal. 2002).
69 See U.S. Const. art. I, § 9, cl. 3.
70 Vanderlinden v. Kansas, 874 F.Supp. 1210, 1217 (D.Kan. 1995) (holding the DNA is not a Bill of Attainder because the minimal intrusion imposed incident to the statute does not result in punishment).
71 United States v. Reynard, 220 F. Supp. 2d 1142, 1162-63 (S.D. Cal. 2002) (upholding the DNA Act because it is not a Bill of Attainder).
72 Id. at 1163.
73 Id. at 1162-63.
and disposition without a judicial trial, are lacking.\textsuperscript{74}

First, the DNA Act is not a Bill of Attainder because the “punishment” element is lacking. Even though the Act does place a new burden on those subject to it, this burden is not to “punish” the identifiable group; rather, the act promotes non-punitive goals such as the establishment of a national DNA database, and the achievement of greater accuracy in future adjudications of guilt and innocence.\textsuperscript{75} In addition, courts have found that “nothing in the legislative history suggests that members of Congress passed the DNA Act as a means of punishing qualifying individuals.”\textsuperscript{76}

Second, the DNA Act is not a Bill of Attainder because the “dispense without a judicial trial” element is lacking. The DNA Act does not deprive the identifiable group of a judicial trial.\textsuperscript{77} To support this conclusion, the courts found that when a probation officer petitions an Article III Court to revoke a supervised release due to defendant's violation of the DNA Act, the defendant receives a hearing in which he is allowed the opportunity to be heard and to present evidence on his behalf before a neutral fact finder.\textsuperscript{78}

e. The DNA Act does not violate Equal Protection Clause

“The Equal Protection Clause of the Fourteen Amendment provides that no state shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike.”\textsuperscript{79} Thus, “[t]he threshold inquiry in evaluating an equal protection claim is ... whether a person is similarly situated to

\textsuperscript{74} Id.; See also note 70 supra.
\textsuperscript{75} See United States v. Reynard, 220 F. Supp. 2d 1142, 1164 (S.D. Cal. 2002).
\textsuperscript{76} Id. at 1164.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
those persons who allegedly received favorable treatment.” \textsuperscript{80} If the statute classifies by race, sex, alienage, or national origin, the courts must apply a higher scrutiny standard; if the legislation does not classify by race, sex, alienage, or national origin, then the court will apply a “rationally related” standard and the legislation will be presumed to be valid if the classification drawn by the statute is rationally related to a legitimate state interest. \textsuperscript{81}

Defendants challenging the DNA Act have encountered great difficulty in triggering strict scrutiny because from a simple reading of the statute it is clear that the DNA Act is a facially neutral statute. The DNA Act makes no distinction between offenders on the basis of their race, sex, alienage, or national origin because if an offender is convicted of one of the qualifying offenses, then, without regard to the offender’s race, sex, alienage or national origin, he or she is required to submit a DNA sample. \textsuperscript{82} Thus, for a defendant to prove that a facially neutral statute violates equal protection guarantees, he must demonstrate a racially discriminatory purpose behind the statute. \textsuperscript{83}

In Johnson v. Quander, Mr. Johnson challenged both the federal and state DNA Act under the Equal Protection Clause, arguing that the court should analyze his claim under the “strict scrutiny” standard because the statutory provisions of the DNA Act were created and implemented with discriminatory intent. \textsuperscript{84} Specifically, Mr. Johnson argued that the DNA Act affects African Americans males in a disproportionate rate because they are incarcerated at a much higher rate than white males and, therefore, are more likely to be subject to the mandatory

\textsuperscript{80} Women Prisoners of the D.C. Dep’t of Corrections v. District of Columbia, 93 F.3d 910, 924 (D.C. Cir. 1996), cert. denied, 520 U.S. 1196 (1997).


\textsuperscript{82} Id. at 94-95.

\textsuperscript{83} Id.

\textsuperscript{84} Id. at 93.
The court found that even though a disparate racial impact could be probative of discriminatory intent, the showing of a disparate impact on the African American population by itself was not dispositive; Johnson was still required to show that the DNA was enacted with a discriminatory purpose. The court found that absent a discriminatory intent, Johnson’s claim was to be evaluated under the rational basis standard. As such, plaintiff’s challenge to the DNA Act under the Equal Protection clause must failed if the Act is “rationally related” to a legitimate state interest because under this standard the presumption is that the law is constitutional.

In analyzing a statute under the “rationally related” standard courts must be deferential to the legislative branch. The following excerpt further explain this point:

Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Where there are plausible reasons for Congress’ action, our inquiry is at an end. This standard of review is a paradigm of judicial restraint. The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

The court dismissed Johnson’s Equal Protection Claim holding that the DNA Act met the “rationally related” standard. The court found that the Act met the “rationally related” standard because the DNA Act’s primarily purpose is to promote public safety by solving past and future

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85 Id.
86 Id. at 94.
87 Id.
f. The DNA Act does not violate the Ex Post Facto Clause

Under the DNA Act, all persons convicted of a qualified offense are subject to the mandatory collection of their DNA sample. This requirement applies equally to those convicted of a qualified offense after the enactment of the Act as well as those who were convicted before the enactment of the Act. The United States Constitution prohibits both the States and Congress from enacting any *ex post facto* law. For this reason, it is not surprising that the DNA and its analogous state statutes have been challenged under the theory that the Act violates the *ex post facto* clause of the Constitution.

An *ex post facto* law is “a law that applies retroactively, especially in a way that negatively affects a person’s rights, by criminalizing an action that was legal when it was committed.” For a law to be *ex post facto* two elements must be met: the law must apply to events that occurred before its enactment, and it must disadvantage the offender affected by it. A law disadvantages the offender if such law aggravates a crime, and inflicts a greater

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90 See note 68 *supra*.
91 See, e.g., *Cannon v. S.C. Dep’t of Prob.*, 604 S.E.2d 709 (S.C. Ct. App. 2004) (upholding South Carolina DNA Act and rejecting ex post facto claim of a probationee who was convicted of a qualified offense 23 years prior to the enactment of the Act and was to remain on probation for life); *United States v. Szulebelek*, 255 F. Supp. 2d 315, 316 (D. Del. 2003) (upholding federal DNA Act and rejecting ex post facto claim of a supervisee who was convicted of a qualified offense six years prior to the enactment of the Act); *Vore v. U.S. Department of Justice*, 281 F. Supp. 2d 1129, 1138 (D. Ariz. 2003) (upholding the DNA Act even though the Act was enacted three years after defendant conviction of a qualified offense); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992) (upholding Virginia DNA statute and rejecting the *Ex Post Facto* Clause claim because a statute that is not penal cannot be *ex post facto*).
92 U.S. Cons. Art. I § 10 cl. 1 (as applied to the states) and U.S. Cons. Art. I § 9 cl. 3 (as applied to the federal Government).
93 *See States v. Raines*, 857 A.2d 19, 22 (Md. 2004) (finding the DNA Act constitutional and rejecting the *Ex Post Facto* Clause claim under both the Maryland and United States Constitution) (internal citations omitted).
94 *Id.* at 34.
punishment than the law annexed to the crime when committed.95

In ascertaining the constitutionality of the DNA Act under the ex post facto clause of the Constitution, courts, in general, look as to whether the Act in question is civil or punitive in nature. To do so, many courts addressing the issue have looked for guidance from two major cases: *States v. Raines* and *Smith v. Doe*.96 In *Smith*, the United States Supreme Court explained:

> If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the] intention to deem it civil.97

In general, every court has found that the DNA Act was not enacted with the purpose of punishing criminals for crimes already committed at the time of the enactment of the law.98 The rationale for this conclusion seems to be that the main purpose of the Act was to create a database to protect public safety by providing means to identify persons regardless of whether the person to be identified is the assailant, the victim, or one involved in crimes or accidents.99

In addition, there is consensus among the courts that the DNA Act does not amend substantive criminal laws.100 Even though the DNA Act does criminalize the qualified offender’s refusal to provide a DNA sample, it has been held that “such non-compliance is punished as a separate offense, which diminishes potential ex post facto problems.”101

**g. Other challenges to the DNA Act.**

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95 *Id.*
96 *Id.* at 35; *Smith v. Doe*, 538 U.S. 84 (2003) (upholding the Alaska Sex Offender Registration Act and rejecting *Ex Post Facto* Clause claim).
98 *See* note 91 *supra*.
99 *Id.*
101 *Id.*
As the title of this chapter suggests, the DNA Act has proven to be as “solid as a rock,” surviving every challenge it has faced. In addition to those already mentioned in the above-discussed sections, the DNA Act has also survived challenges under both the Commerce Clause\textsuperscript{102} and Separation of Powers Clause\textsuperscript{103} of the United States Constitution.

IV. The Religious Freedom Restoration Act: an overview

In 1990, the United States Supreme Court issued its decision in the case of Employment Division v. Smith.\textsuperscript{104} In Smith, the plaintiffs were members of the Native American Church.\textsuperscript{105} They were fired from their employment because they ingested peyote during a sacramental ceremony.\textsuperscript{106} The Employment Division denied unemployment compensation to the plaintiffs because under Oregon Law the use of peyote was a criminal act.\textsuperscript{107} As such, the discharge was categorized as a work-related misconduct that disqualified the employees from unemployment compensation benefits.\textsuperscript{108}

The United States Supreme Court found the Oregon criminal law to be constitutional. The Court held that religion-neutral laws of general applicability need not to be justified under the strict scrutiny test even if such law has the effect of burdening a particular religious

\textsuperscript{102} Id. at 1173 (upholding the DNA Act as a valid exercise of Congress’ commerce power because the Act regulates a ‘thing in interstate commerce’ by regulating the collection and distribution of the DNA data for distribution and use around the country).
\textsuperscript{103} See United States v. Sczubelek, 255 F.Supp.2d 315, 324 (D.Del. 2003), aff’d, 402 F.3d 175, 185 (3d Cir. 2005) (upholding the Federal DNA Act and rejecting the proposition that the Act violated the separation of power clause by requiring probation officers to conduct law enforcement activities because probation officers have an inherent duty of assuring defendants compliance with the conditions imposed by their sentences).
\textsuperscript{104} Employment Division v. Smith, 494 U.S. 872 (1990) (holding that religion-neutrals law of general applicability need not to be justified under the strict scrutiny test, even if such law have the effect of burdening a particular religious practice).
\textsuperscript{105} Id. at 874.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
As response to the Supreme Court’s holding in *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (“RFRA”). RFRA had two main purposes. First, Congress wanted to supersede *Smith* and restored the compelling interest test by recognized that religion-neutral laws could burden a person’s religious exercise as much as a facially discriminatory one. Second, Congress wanted to provide a claim or defense to those whose religious exercise is substantially burdened by the Government.

RFRA prohibits the “Government” from substantially burdening a person’s exercise of religion, even if the burden results from a rule of general applicability. However, in enacting RFRA, Congress carved an exception by providing that laws of general applicability that substantially burdens a person’s religion may nonetheless be constitutional if the Government can show that application of the law to the person’s religion (1) furthers a compelling Government interest; and (2) is the least restrictive means of furthering that compelling interest.

In 1997, the United States Supreme Court addressed the constitutionality of RFRA in the case of *City of Boerne v. Flores*. In *Boerne*, the Supreme Court held RFRA unconstitutional as applied to the States finding that Congress exceeded its remedial authority under section 5 of

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109 *Id.* at 886.
111 See 42 U.S.C. § 2000bb-a(4) and b(1).
112§ 2000bb-2(2).
113 § 2000bb-1(a).
114 § 2000bb-1(b); See also Gonzales v. *O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (U.S. 2006) (applying RFRA’s compelling test to strike down the Government’s claim of compelling interest in a case addressing the use of hallucinogen by a religious group).
115 *City of Boerne v. Flores*, 521 U.S. 507 (1997) (addressing a dispute over a zoning board denial of a building permit to a church and holding RFRA to be unconstitutional as applied to the states).
the Fourteenth Amendment. The Supreme Court holding in Boerne is silent as to RFRA’s constitutionality as applied to federal law. Since Congress’ power to regulate in the federal sphere arises from its enumerated powers under Article I and not from its Fourteenth Amendment enforcement authority, courts have found that Boerne does not apply to the federal Government.

V. The shattering of a solid rock: An argument against the constitutionality of the DNA Act, as enforced by the federal Government, if challenged by a religious objector as a violation of his Free Exercise right under RFRA

Undisputably, any defendant challenging the DNA Act or its analogous state statutes would be “faced with a tidal wave of authority against [his] position [because] [e]very court of review that has decided the issue has upheld the DNA testing statute[s].” Indeed, the DNA Act has been challenged and upheld under many constitutional theories. However, there is no reported or unreported decision fully addressing whether or not the Federal DNA Act, as enforced by the Program, would survive muster under RFRA’s strict scrutiny test if challenged by a qualified offender whose religious beliefs prohibits him from “giving” blood.

116 Id. at 512, 534-35.
117 See, e.g., Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1120 (9th Cir. 2000), cert. denied, 532 U.S. 958 (2001) (the Supreme Court invalidated RFRA only as applied to state and local law, not as applied to the federal Government); See also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 126 S. Ct. 1211 (U.S. 2006) (applying RFRA’s compelling test to strike down the Government’s claim of compelling interest in a case addressing the use of hallucinogen by a religious group).
119 See section III of this article, supra, for a discussion of the challenges that has been raised against the DNA Act.
120 This writer has been unable to find any case law addressing whether or not the taking of blood could survive strict scrutiny under RFRA. This writer is aware, however, of the following relevant cases: U.S. v. Brown, 330 F.3d 1073 (8th Cir. 2003) (dismissing defendant’s claim at the initial stage of a RFRA’s inquiry for failure to show that forbidding blood sample was a central tenet of his religion), United States v. Holmes, No. CR.S-02-349-DFL (E.D.Cal. filed Oct. 13, 2002).
The DNA Act neither specifies nor precludes a particular method for collecting a qualified offender’s DNA. In fact, the Act only requires the collection of a “DNA sample.” Under the DNA Act, a “DNA sample” is defined as “a tissue, fluid or other bodily sample of an individual on which DNA analysis can be carried out.” However, in enforcing the federal DNA Act, the Program has only validated protocols for the collection and analysis of whole blood samples.

In *United States v. Kincade*, the Ninth Circuit emphasized that its constitutional analysis of the DNA Act was limited to “the program before [them], as it is designed and as it has been implemented.” At the beginning of its opinion, the court recognized that the Program, as implemented, requires blood samples. The following excerpt further clarifies this point:

> [b]ecause the Federal Bureau of Investigations (“the Bureau”) considers DNA information derived from blood samples to be more reliable than that obtained from other sources (in part because blood is easier to test and to preserve than hair, saliva, or skin cells), Bureau guidelines require those in federal custody and subject to the DNA Act (“qualified offenders”) to submit to compulsory blood sampling.

2005) (challenging Federal DNA Act on religious belief grounds which as of Nov. 25, 2006, has not been adjudicated by the court), *United States v. Lamo*, No. CR. S-05-022-FCD (E.D.Cal. filed May 9, 2006) (same), *United States v. Kincade*, 379 F.3d 813, 821, n.12 (9th Cir. 2004) (addressing the DNA Act under the Forth Amendment and acknowledging, without addressing it, that an application of the DNA Act to persons holding sincere religious objections may potentially raised free exercise issues), *Yusov v. Martinez*, 2000 WL 1593387 (S.D.N.Y. 2000) (granting probation officer’s motion to dismiss parolee’s civil suit seeking to preclude the collection from him of any form of bodily sample for inclusion in the state’s DNA database pursuant to NY DNA statute for failure to state a claim under the First Amendment). While *Brown, Holmes, Lamo, Kincade* and *Yusov* may be instructive, they are certainly not dispositive of this particular issue.

121 42 U.S.C. § 14135a(c)(1).
122 *See* note 32 *supra*.
123 *United States v. Kincade*, 379 F.3d 813, 838 (9th Cir. 2004).
124 *United States v. Kincade*, 379 F.3d 813, 816 (9th Cir. 2004), cert. denied, 544 U.S. 924, (acknowledging that the FBI guidelines require those subject to the DNA Act to submit to a compulsory blood sampling because the FBI considers DNA information derived from blood samples to be more reliable than that obtained from other sources).
Even though the FBI requires the extraction of blood as the DNA sample to be collected under the Program, the extraction of blood is prohibited under the doctrine of at least one religion, such as the Jehovah’s Witnesses.¹²⁵

a. Meeting the sincerity threshold: A Jehovah’s Witness’ perspective on Blood & Religion

In determining a religious belief the court will not look into the ‘truth’ of a belief,¹²⁶ because “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit… protection.”¹²⁷ Guided by these limitations, the function of the court is to determine whether the person holds an honest conviction that such activity is forbidden by his religion.¹²⁸ This is the “threshold question of sincerity which must be resolved in every case.”¹²⁹ A claimant meets this initial burden if he or she proves that the beliefs are truly held and religious in nature.¹³⁰

In United States v. Brown, Brown was arrested for rape and kidnapping.¹³¹ After Brown’s indictment, the Government moved for production of his blood sample for DNA testing.¹³² Brown objected arguing that the extraction of blood sample would violate his right to

¹²⁵ Being that there are “approximately two million Jehovah’s Witnesses living in the United States,” for purposes of this paper, we will limit our analysis to the Jehovah’s Witnesses doctrine on blood. See In re Petition to Compel Cooperation with Child Abuse Investigation, 875 A.2d 365, 370 (Pa.Super. Ct. 2005).
¹²⁶ Martinelli v. Dugger, 817 F.2d 1499, 1504 (11th Cir.1987) (internal citations omitted).
¹²⁸ Id. at 716.
¹²⁹ Martinelli v. Dugger, 817 F.2d 1499, 1504 (11th Cir. 1987).
¹³⁰ Id.
¹³¹ U.S. v. Brown, 330 F.3d 1073, 1076 (8th Cir. 2003) (dismissing defendant’s claim at the first stage of a RFRA inquiry for failure to show that forbidding blood samples is in conflict with God’s stated principles under the Jehovah's Witness religion).
¹³² Id.
religious freedom as a Jehovah’s Witness under both RFRA and the Free Exercise Clause of the First Amendment to the Constitution.133

During the evidentiary hearing, the court evaluated the evidence presented by the parties. First, the court heard testimony from Brown regarding his religious belief. Second, the court heard testimony from both an Elder134 and an administrator of a local Jehovah’s Witness congregation who contradicted Brown’s testimony.135 Finally, the court heard from an FBI agent who testified as to the importance of obtaining Brown’s blood sample for law enforcement.136

The court granted the involuntary collection of the blood sample finding that Brown failed to meet his initial threshold because he did not show that he holds a belief that was honest and religious in nature.137 In affirming, the Eight Circuit pointed out the fact that one of the Jehovah’s Witnesses publications, submitted by Brown as evidence, stated “tests involving an individual’s own blood are not so clearly in conflict with God’s stated principles.”138 For the Brown court, Brown’s religious objection as a Jehovah’s Witness was insufficient to prevent collection of his blood.

After Brown, it can be suggested that a Jehovah’s Witnesses claim for exemption as conscious religious objector will be weak. However, Brown, even though instructive, is not dispositive as to whether or not a Jehovah’s Witness can prove that the extraction and storage of his blood for law enforcement purposes is prohibited by his religion and that he sincerely believes so. Two main reasons support this position. First, the court did not consider the emergent powerful movement inside of the Jehovah’s Witnesses that has created conflicts among

133 Id.
134 An elder is a spiritually mature man appointed to teach the congregation, according to the Jehovah’s Witness doctrine.
136 Id.
137 Id. at 1076.
138 Id. at 1077, n.3.
its members as to whether or not blood should be given or received. Second, the Brown court never addressed the issue of whether or not the Government can meet RFRA’s strict scrutiny test once a Jehovah’s Witness meets the prima facie case. Observe that the court dismissed Brown’s claim during the first stage of a RFRA claim and, therefore, did not entertain the issue further.

As a result, what we can learn from Brown is that a Jehovah’s Witness, who sincerely believes that blood shall not be given, will be able to meet his initial burden if he can show, using the correct evidence, that his beliefs are truly held and religious in nature based on a doctrine of his religion. Once he meets that burden, it is unlikely that the court will consider whether the beliefs make sense or not. To that extent, the Supreme Court has clearly stated “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit … protection.”

Over the past five decades, the Watchtower Society has shown some shifts in their policy on blood and medicine. These shifts in policy can be attributed to the significant

139 The Associated Jehovah’s Witnesses for Reform on Blood is a anonymous organization with the objective “to educate Jehovah’s Witnesses… regarding … the irrational aspects of the Watchtower Society’s policy on the use of blood … and to promote reform of the Watchtower’s policy so that each Jehovah’s Witness can have a free and informed choice regarding their health care - without fear of control or sanctions from the Watchtower Society (and member congregations) that can separate them from their family members and friends.” See www.ajwr.org/about (last visited November 30, 2006) (emphasis added).

140 A prima facie case is shown when application of the challenged law “would (1) substantially burden (2) a sincere (3) religious exercise.” Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 126 S. Ct. 1211, 1219 (2006).

141 See generally Martinelli v. Dugger, 817 F.2d 1499, 1504 (11th Cir. 1987).


143 Watchtower Society is the legal organization in charge of interpreting the beliefs, teachings, and activities of the Jehovah’s Witnesses. See official website www.watchtower.org.

144 See, e.g., Opposition to blood Transfusion, http://www.religioustolerance.org/witness5.htm ("In 1967, [Watchtower Society] said that organ transplants [were] form of cannibalism and [were] to be shunned. [Watchtower Society] reversed this decision in 1980 and made transplants as matter of personal conscience… an unknown number of Jehovah’s Witnesses had died …
number of Jehovah’s Witnesses who either openly or anonymously have expressed disagreement with the Watchtower Society’s blood policy.  

The most recent Watchtower policy on blood said that “when it comes to fractions of any of the primary [blood] components, each Christian, after careful and prayerful meditation, must conscientiously decide for himself.”

Thus, this policy seems to shift the decision to the individual but only after the individual exercised “careful and prayerful meditation.”

However, this new policy, as well as the movement in favor of a reform on blood policy, has nothing to do with giving blood for law enforcement purpose, but for health care purposes.

Still, one of the tenets of the Jehovah’s Witness doctrine is that “the Bible clearly indicates that blood is sacred and is not to be used for human consumption.”

When it comes to the use, disposition, or storage of blood “Christians face a very serious decision. They must carefully and prayerfully meditate on Bible principles concerning the sacredness of blood. With a keen desire to maintain a good relationship with Jehovah, each must be guided by his Bible-trained conscience.” It is due to a peculiar understanding of scripture, specifically in the Old Testament, that “members of the Jehovah’s Witnesses regard themselves commanded by God to neither give nor receive … blood.”

because they had refused available transplants.”) (last visited November 29, 2006).

See note 139 supra.


Id.

See note 139 supra (one of the Associated Jehovah’s Witnesses for Reform on Blood objective is to promote reform so that each Jehovah’s Witness can have a free and informed choice regarding their health care) (emphasis added).


See In re Estate of Brooks, 205 N.E.2d 435, 437 (Ill. 1965) (holding that Jehovah’s Witness’ woman, who did not have minor children to be cared for, can refuse to receive blood transfusion).
Witness’ doctrine, blood has a symbolic and important meaning:

[Blood] stood for life provided by the Creator. By treating blood as special, the people showed dependence on him for life. Yes, the chief reason why they were not to take in blood was, not that it was unhealthy, but that it had special meaning to God.\(^{152}\)

Many authors have written books explaining the Bible. A great number of them agreed with the proposition that many Biblical teachings of blood dictate the way in which Jehovah’s Witnesses view its usage. Indeed, “[t]he Bible shows that blood is more than a complex biologic fluid. It mentions blood over 400 times.”\(^{153}\)

In relevant parts, the Book of Genesis states “your blood of your souls shall I ask back; Anyone shedding man’s blood, by man will his own blood be shed, for in God’s image he made man.”\(^{154}\) Genesis also commands, “do not spill blood.”\(^{155}\) The following excerpt further explain the readings of the above verses:

[b]oth in vss. 4-5 and in vs. 6 [of the Book of Genesis] a sacred quality is ascribed to blood. [B]lood was considered in a primitive anthropology to be the sign and source of life, therefore taboo to man and reserved to God. In the later legislation (Leviticus 17:10-14, P) the law was spelt out in considerable detail. Here in Genesis a somewhat surprising explanation is given why if anyone sheds the blood of man, by man shall his blood be shed. The explanation is not … that a quid pro quo is demanded…. Instead, it is because in the image of God, has man been made.\(^{156}\)

“The Bible tells Christians to ‘abstain from blood’”\(^{157}\) because “blood is the soul.”\(^{158}\)


\(^{153}\) Id.

\(^{154}\) See New World Translation of the Holy Scriptures, The Book of Genesis, 9:005, 06 respectively.

\(^{155}\) Id. at 37:22.


[A Jehovah’s Witness] cannot drain from [their] body part of that blood, which represents [their] life, and still love God with [their] whole soul, because [by giving their blood, they] have taken away part of [their] soul -[their] blood - and given it to someone else … any violation of the law on blood [is] a serious sin against God, and God himself would call the law violator to account.159

For many Jehovah’s Witnesses, God’s law on blood is not to be ignored. Even in situations where life-threatening emergencies arises, many Jehovah’s Witnesses adhere to the belief that “the Creator’s ban on taking in blood to sustain life …. Hence, precious as life is, our Life-Giver never said that his standards could be ignored in an emergency.”160 In fact, every year, many Jehovah’s Witnesses give their lives and vehemently affirms their believes by rejecting the taking or giving of blood-based products.161

Based on the above discussion, a qualified Jehovah’s Witness offender (“religious objector”) may be able to successfully show that giving blood is prohibited by his religions and that he holds a sincere belief that blood should not be given. Once he is able to meet this threshold, he prevents the court from dismissing his claim and forces it to continue the inquiry under RFRA.

b. The substantial burden threshold: Does requiring a Jehovah’s Witness, who sincerely believes that blood is sacred and cannot be given, to submit to a blood sample for DNA profiling purposes substantially burden his religious belief?

159 See note 151 supra.
160 See note 152 supra.
161 For examples of Jehovah’s Witnesses who do not accept blood transfusion not even in life-risk situations see Munn v. Algee, 924 F.2d 568 (5th Circ. 1991) (Jehovah’s Witness woman died after refusing blood transfusion, including transfusion of her own blood), In re E.G., 549 N.E.2d 322 (Ill. 1989) (17-year-old Jehovah's Witness with leukemia allowed to make decision regarding refusal of blood transfusion as a mature minor even though the age of majority in Illinois is 18); see also note 151 supra.
Once the religious objector meets the initial threshold question of sincerity, the court would be bound to entertain whether or not the taking of blood, using the finger stick testing, as applied to him, substantially burdens his religious belief under RFRA.\textsuperscript{162} Under RFRA, the Government shall not “substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability.”\textsuperscript{163} Evaluating whether or not a particular Government action substantially burdens someone’s religion is not a simple determination. The Supreme Court has recognized this task to be difficult to contest because not all the burdens imposed on a religion are unconstitutional.\textsuperscript{164} To be unconstitutional, the burden “must be more than an inconvenience”\textsuperscript{165} it must be substantial, and the person claiming adherence to the religion has the burden to prove that the statute “puts substantial pressure on and adherent to modify his behavior and to violate his beliefs including when, if enforced, it results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.”\textsuperscript{166}

Arguably, subjecting a Jehovah’s Witness to provide a blood sample can be characterized as not interfering with his ability to attend religious services, pray, or fulfill his religious duties; after all, the blood test is a one-time procedure and does not involve an ongoing future restriction of the Jehovah’s Witness’ ability to exercise his religion. However, the analysis cannot be superficial.

\textsuperscript{162} Note that in \textit{Brown}, the defendant was unable to meet the sincerity threshold the court never had the opportunity to address whether or not the taking of blood for DNA profiling substantially burdened his religious belief. \textit{See Brown}, note 31 \textit{supra}.
\textsuperscript{163} \textit{Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal}, 126 S. Ct. 1211, 1217 (2006) (applying RFRA’s compelling test to strike down the Government’s claim of compelling interest in a case addressing the use of hallucinogen by a religious group).
\textsuperscript{165} \textit{Worldwide Church of God v. Phila. Church of God, Inc.}, 227 F.3d 1121 (9th Cir. 2000).
\textsuperscript{166} \textit{Guam v. Guerrero}, 290 F.3d 1210, 1222 (9th Cir. 2002).
By requiring collection of blood from a Jehovah’s Witness, the Program is requiring from him to “modify” his behavior and to “violate” his belief, the exact conduct that RFRA prohibits. As explained earlier, for many Jehovah’s Witnesses a violation of God’s law on blood is a serious sin against God, and God himself will hold the violator accountable. Moreover, the Program forces and pressures a Jehovah’s Witness to choose between the law of God and man’s made law. While man-made law will subject him to criminal prosecution for violating the law, God’s law will punish him and make him accountable to God. Therefore, by placing the Jehovah’s Witness in a position where he must choose between his beliefs or criminal prosecution, the Program substantially burdens his religious beliefs.

c. The Strict Scrutiny analysis: Is the Program’s mandatory collection of blood for DNA testing a compelling Government interest and the least intrusive means of advancing that interest?

Once the Jehovah’s Witness has been able to state a prima facie case the inquiry is not over. RFRA “essentially requires the Government to justify any regulation imposing a substantial burden on the free exercise of religion by showing that the regulation satisfies strict scrutiny.” As the Supreme Court recently explained:

RFRA and its strict scrutiny test contemplate an inquiry more focused than [a] Government’s categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through

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167 Id.
168 See note 151 supra.
169 The failure to provide DNA sample violates two mandatory release conditions: not commit another federal, state, or local offense; and submit to DNA sampling. 18 U.S.C. §§ 3583(d); U.S.S.G. § 5D1.3(a)(1)&(8).
170 Braunfeld v. Brown, 366 U.S. 599, 605 (1961) (a law causes a substantial burden “if it results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.”).
171 See note 140 supra.
172 Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1120 (9th Cir. 2000) (internal citations omitted).
application of the challenged law “to the person”--- the particular claimant whose sincere exercise of religion is being substantially burdened.\textsuperscript{173}

Thus, the Government may substantially burden a Jehovah’s Witness’ exercise of religion if it can clearly demonstrate that application of the burden to him is in furtherance of a compelling Government interest and is the least restrictive means of furthering that compelling Government interest.\textsuperscript{174}

\textbf{i. The Government wants your blood: The showing of a compelling Government interest}

The Government has the burden to prove that the Program, as it is, is in furtherance of a compelling Government interest.\textsuperscript{175} In determining whether the Government has a compelling interest in a particular regulation, the courts look at the “importance of the value underlying the regulation.”\textsuperscript{176}

As discussed earlier, the DNA Act has been challenged and overwhelmingly upheld. As such, states and federal courts have identified a plethora of arguments to show and support the Government’s compelling interest. This section will briefly discuss the some of the three most compelling interests commonly identified by the courts.

- **Compelling Government interest: to solve crimes using DNA databases**

The Government has a compelling interest in using CODIS to solve crimes and “bring closure to countless victims of crime who long have languished in the knowledge

\textsuperscript{173} Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 126 S. Ct. 1211, 1220 (U.S. 2006) (applying RFRA’s compelling test to strike down the Government’s claim of compelling interest in a case addressing the use of hallucinogen by a religious group).

\textsuperscript{174} Id. at 1217.

\textsuperscript{175} Id. at 1219.

\textsuperscript{176} Callahan v. Woods, 736 F.2d 1269, 1274 (9th Cir. 1984).
that perpetrators remain at large.”

CODIS’s success depends on both timely collection and accurate analysis of DNA samples because “[u]ltimately, the success of the CODIS program will be measured by the crimes it helps to solve. . . . As of September 2006, CODIS has produced over 36,800 hits assisting in more than 39,200 investigations.”

- **Compelling Government interest: to protect society by preventing crimes**

Protecting society and its citizens from crimes is a compelling Government interest. Including a felon’s DNA profile in the database serves the goal of preventing or at least discouraging the individual to commit other offenses.

According to a study completed by the National Institute of Justice, the average rapist commits 8-12 sexual assaults. If law enforcement could immediately apprehend the rapist after the first sexual offense, then a minimum of 7 rapes would be prevented per offender. . . . DNA database requirements significantly impact the number and frequency of rapes and other repeat violent crimes in this country.

Courts have recognized that the recidivism rate of supervisees is “astounding.” In fact “out of 108,580 persons released from prisons in 11 States in 1983, an estimated 62.5% were rearrested for a felony or serious misdemeanor within 3 years, 46.8% were reconvicted, and

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177 United States v. Kincade, 379 F.3d 813, 839 (9th Cir. 2004).
178 Measuring Success, http://www.fbi.gov/hq/lab/codis/success.htm (last visited December 2006). For an interesting discussion of the most notables crimes solved by DNA evidence see also Frederick R. Bibier, Turning Base Hits into Earned Runs: Improving the Effectiveness of Forensic DNA Data Bank Programs, 34 J.L. Med. & Ethics 222, 225 (Summer 2006).
180 See note 177 supra. But see U.S. v. Miles, 228, F.Supp.2d 1130, 1139 (E.D.Cal. 2002) (finding that Government’s interest in reducing recidivism is collateral to the law enforcement purposes of the Act and that the Act’s legislative history does not reflect that Congress was overwhelmingly concerned with deterring convicted felons from committing crime in the future).
41.4% returned to prison or jail.”\textsuperscript{181}

The interest in reducing recidivism is in line with the core purposes of supervised release: rehabilitating convicted offenders and protecting society by deterring recidivism.

- **Compelling Government interest: To exonerate the Innocent**

Government interest in ensuring that innocent people are not wrongfully convicted is compelling.\textsuperscript{182} An accurate DNA profile can help clarify whether or not a person was at a crime scene.

DNA evidence is like “the finger of God.” In more than one hundred cases over the past twelve years, DNA evidence has been utilized in the postconviction stage to prove “beyond any doubt” that the convicted individual never committed the crime. Those cases demonstrate that DNA evidence can exonerate a defendant, even when innocence is not expected, who the criminal justice system has erroneously convicted.\textsuperscript{183}

Even though including an individual’s DNA in the database may have the effect of inculpating him, it may also have the effect of exonerating him and “the interest in accurate criminal investigations and prosecutions is a compelling interest that the DNA Act can reasonably be said to advance.”\textsuperscript{184}

In sum, the Government’s compelling interest under the DNA Act is further justified because the Act only applies to “federal convicted offenders of a qualified offense,” and not to the general population.\textsuperscript{185} Courts have consistently held that felons “do not enjoy the absolute


\textsuperscript{182} *United States v. Sczubelek*, 402 F.3d 175, 185 (3d Cir. 2005).


\textsuperscript{184} See note 182 ante.

\textsuperscript{185} See 42 U.S.C. § 14135a(d) (requiring the collection of DNA sample only from those who had been convicted of certain federal crimes and who were incarcerated, or on parole, probation, or
liberty to which every citizen is entitled.”¹⁸⁶ Indeed, “[as] to convicted persons, there is no question but that the state’s interest extends to maintaining a permanent record of identity to be used as an aid in solving past and future crimes, and this interest overcomes any privacy rights the individual might retain.”¹⁸⁷

Based on the above discussion, the Government may be able to meet its burden of showing a compelling interest under the first prong of RFRA’s strict scrutiny test.

**ii. Shattering the rock: A proposed argument to support the failure of the Program under the “least intrusive” prong of RFRA’s Strict Scrutiny test**

The Supreme Court has recognized that “the Government must shoulder a heavy burden to defend a regulation affecting religious actions [because] the challenged regulation must be the least restrictive means of furthering a compelling state interest.”¹⁸⁸ Because almost any law can be related to a genuine Government concern, the “least restrictive” inquiry is the critical test of the Free Exercise analysis.¹⁸⁹

The least restrictive test forces the courts to “measure the importance of a regulation by ascertaining the marginal benefit of applying it to all individuals, rather than to all individuals supervised released).

¹⁸⁶ United States v. Knights, 534 U.S. 112, 120 n.6 (2001) (upholding officer’s search of probationer’s apartment because it was supported by reasonable suspicion without deciding “whether the probation condition so diminished or completely eliminated [the probationer’s] reasonable expectation of privacy [to the extent that] a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment”).

¹⁸⁷ People v. King, 82 Cal. App. 4th 1363, 1374 (Cal. App. 2000), cert. denied, 532 U.S. 950 (2001); See also McKune v. Lile, 536 U.S. 24, 36 (2002) (“A broad range of choices that might infringe constitutional rights in a free society falls within the expected conditions ... of those who have suffered a lawful conviction.”).

¹⁸⁸ Callahan v. Woods, 736 F.2d 1269, 1272 (9th Cir. 1984).

¹⁸⁹ Id.
except those holding a conflicting religious conviction.”\textsuperscript{190} Generally, a “least restrictive” inquiry follows the following analysis:

If the compelling state goal can be accomplished despite the exemption of a particular individual, then a regulation which denies an exemption is not the least restrictive means of furthering the state interest. A synthesis of the two prongs is therefore the question whether the Government has a compelling interest in not exempting a religious individual from a particular regulation.\textsuperscript{191}

It is indisputable that DNA testing advances each of the Government’s compelling interest because of its “ability to match DNA profiles derived from crime scene evidence to DNA profiles in an existing data bank.”\textsuperscript{192} But, is the collection of “blood” the least intrusive means of obtaining a DNA sample from a federal convicted offender whose religious beliefs prohibits him from “giving” blood? Would the Government’s compelling interests be undermined if buccal swabs is given in lieu of blood? Each of these questions should be answered in the negative for the reasons stated below.

First, the DNA Act, as enacted and as it is currently enforced, neither requires nor precludes the use of a particular method of collecting the DNA samples. In fact, the Act only requires collection of a “DNA sample,” and defines “DNA sample” as “a tissue, fluid or other bodily sample of an individual on which DNA analysis can be carried out.”\textsuperscript{193} Congress’ broad definition of a “DNA sample” recognizes that “[o]nly one-tenth of a single percent of DNA (about 3 million bases) differs from one person to the next . . . and a DNA profile of an individual [can be generated by] using samples from blood, bone, hair, [etc.].”\textsuperscript{194}

\begin{footnotes}
\item[190] Id.
\item[191] Id. at 1272-1273.
\item[193] 42 U.S.C.S. § 14135a(c)(1).
\item[194] Human Genome Project, \textit{How is DNA typing done}.
\end{footnotes}
Second, there are other least intrusive means available. The FBI’s decision to collect whole blood was based on the result of a series of studies that concluded in 1998.\textsuperscript{195} However, these studies are obsolete; it has been eight (8) years since then. With today’s technology, DNA samples from Buccal swabs provides the same quantity and quality as a DNA sample from blood.

Furthermore, in enforcing similar DNA statutes, every state provides less intrusive means to collect DNA samples. For example, the state of New York uses buccal swab as their primary means of securing a DNA specimen from designated offenders.\textsuperscript{196} New York uses the buccal swab because “it is less intrusive, less expensive, and much easier to administer and to process in the laboratory.”\textsuperscript{197} In California, buccal samples are the primary method of collecting DNA samples for California’s Data Bank Program.\textsuperscript{198} California adopted buccal swabs in January 2005 “in the interest of financial cost and public health.”\textsuperscript{199} In Michigan, only blood samples were collected. Today, however, buccal swabs are the most common method.\textsuperscript{200}

Fourth, the fact that the Program cannot process buccal swabs samples for lack of validated protocols is not controlling. What is important here is the fact that the FBI, as a whole, does have the capacity to either validate protocols for the analysis of samples other than blood or to analyze and create DNA profiles from samples other than blood.

\textsuperscript{195} See note 30 supra.
\textsuperscript{196} See New York State, Division of State Police, New DNA Collection Method, http://www.troopers.state.ny.us/Forensic%5FScience/DNA/New%5FCollection%5FMethod/ (last visited October 2006).
\textsuperscript{197} Id.
\textsuperscript{199} Id.
In the FBI, forensic DNA identification analysis is divided in two different programs: the Forensic Casework and the Convicted Offender Analysis. Even though the FBI has not validated protocols for the analysis of other samples for its Convicted Offender Program, it has for its Forensic Casework. In fact, the FBI forensic laboratory analyzes and generates DNA profiles from samples “in body fluids, stains, and other biological tissues… and compare [them] with the results of DNA analysis of known samples [to] associate victims(s) and/or suspect(s) with each other or with a crime scene.”201

The FBI justified its adoption of different standards as “an acknowledgment of the differences in the nature or type of sample, the typical sample quantity and potential for reanalysis, and specialization that may exist in a laboratory.”202 This justification, however, is not persuasive. The FBI justification lacks merit in the light of a religious objector claim, the fact that every state does process other samples for the enforcement of similar state statutes and the fact that the FBI does have the capacity to either validate new protocols or to analyze DNA samples other than blood.

Finally, all Government’s compelling purposes can be accomplished if an exception is granted. Allowing the religious objector to provide his DNA sample through buccal swab or any other sample from which his DNA profile can be obtained in lieu of blood, does not undermine any of the Government’s purposes nor affect the Government’s ability to administer the program effectively and efficiently.203 To the contrary, by submitting his DNA profile through buccal swabs, the individual’s religious

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203 See United States v. Lee, 455 U.S. 252, 259-60 (1982) (denying Amish claim that the paying of tax burdens his religious belief, among others, because accommodating the belief would defeat the taxation system).
beliefs will not be burdened and each of the Government’s compelling interests will be fully satisfied because his DNA profile will be included in the CODIS database and as such it will help to solve and prevent crimes as well as to exonerate the innocent.

VI. Conclusion

DNA evidence has been proved to be an indispensable tool for state, local, and federal law enforcement. However, as discussed in the preceding sections, it is unlikely that the mandatory collection of whole blood as required by the Program would survive strict scrutiny if challenged by a qualified religious objector because the collection of blood is not the least intrusive means by which the Government’s compelling interests can be achieved.  

204 Currently, there is an effort to expand DNA statutes to require collection from all arrestees in the United States. See DNA Fingerprint Act of 2005, S. 1606, 109th Cong. § 1 (2005) (Introduced in Senate, currently referred to the Committee on the Judiciary) available at http://www.thomas.gov/cgi-bin/query/D?c109:8:/temp/~c109qmkl06:. However, based on the factual scenario presented in this paper, the result will still be the same unless the FBI decides to either switch or incorporate other methods for the collection of DNA samples.