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RFID IMPLEMENTATION: TESTING IN PRISONS AND PAROLEES FOR THE GREATER GOOD

MIRKO AKRAP*

INTRODUCTION

Technology is taking over the world many steps at a time. Technological advancements are occurring every day with much of it going unnoticed by the average individual. One technology in particular, Radio Frequency Identification (RFID), has replaced the bar code system because of its many positive qualities, one of them being its easy tracking capabilities.¹ Imagine, for example, a scenario in which you walk into a grocery store and proceed to shop. When you are finished shopping, instead of checking out at the register, you walk out of the door and go home. That very brief scenario is possible with the use of RFID technology; stores would have an RFID reader placed above the doors and in every product. The consumer would have his own personal RFID tag that is linked to his or her personal bank account and proceed to go about their daily lives without having to worry about long lines or checkout delays.

RFID tags do not need to be visible in order to be located.² RFID technology allows identification and storage of data when the RFID chip is in range. This means the tags need not be visible or at a perfect angle in order to transmit data.³ The “line of sight” ability is one of the main reasons RFID technology is an advantage to its predecessor.⁴ To put this in perspective, Wal-Mart placed RFID tags on retail pallets in order

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1. Oleg Kobelev, *Big Brother on a Tiny Chip: Ushering in the Age of Global Surveillance Through the Use of Radio Frequency Identification Technology and the Need for Legislative Response*, 6 N.C. J. L. & TECH. 325, 326-327 (Spring 2005).

2. Reuven R. Levary, et al., *Radio Frequency Identification: Legal Aspects*, 12 RICH. J. L. & TECH. 6 (2005). (the traditional bar-code system requires a plain line of sight in order to scan and read the code while the RFID chip requires a range or minimum distance needed by the reader)

3. John M. Eden, *When Big Brother Privatizes: Commercial Surveillance, The Privacy Act of 1974, and The Future of RFID*, 205 DUKE L. & TECH. REV. 20, 8 (2005).

4. Justin M. Schmidt, *Note and Comment: RFID and Privacy: Living in Perfect Harmony*, 34 RUTGERS COMPUTER & TECH. L.J. 247, 253 (2007) (The author follows with the often occurring scenario in which an individual is stuck in the checkout line while the employee tries to scan the defective barcode.)

to track the inventory in a more efficient manner.⁵ Once the pallet arrives, the RFID tag is read by the RFID reader and stored in computer data software.⁶ The tags must only be in range of the specific reader in order to be identified and read.⁷

The retail end is not the only place in which RFID can have a positive impact; some prisons have attempted to use RFID in order to track their inmates and staff.⁸ Along with prisons, the military has been using RFID to track shipments and personnel.⁹ Imagine a society where every prisoner is tagged with an RFID tag. Inmates would be less inclined to attempt an escape, and even if they do escape, RFID tracking would be able to notify law enforcement to apprehend escaping inmates. Also, imagine a society where military weapons, documents, and military personnel are fitted with RFID tags. Weapons that are stolen or lost could be tracked, important government secrets could be found, and soldiers who are captured by enemies are more likely to be located. This comment will argue that RFID tags should be implemented in all prisons as a means to eliminate dangerous risks and maximize safety to protect communities.

With that in mind, there are many Fourth Amendment concerns regarding an individual's right to privacy that must be overcome. The Fourth Amendment reserves the reasonable right of privacy to individuals.¹⁰ However, this comment will show that the privacy implications that are associated with RFID technology do not outweigh the substantial benefits of RFID implementation. Part I of this note provides insight into the common uses of RFID technology that are present today. Moreover, part II provides the background of RFID and the benefits associated with the technology, especially in the prison context. A brief overview of the relevant legislation that was enacted will also be mentioned because it is an essential avenue of implementation. Part III analyzes two separate situations in which RFID technology can be implemented in: within prison walls and outside of prison walls. Further, this section will provide relevant statistics of violence that occurs inside and outside prison walls. Part III (C) examines the privacy rights granted to

5. Mary Catherine O'Connor, *Can RFID save brick-and-mortar retailers after all?*, FORTUNE, (April 16, 2014), <http://www.fortune.com/2014/04/16/can-rfid-save-brick-and-mortar-retailers-after-all/> (The RFID system not only helps in supply chain management but also on the sales floor. The easy tracking capability allows the sales teams know how much inventory is in stock.)

6. *Id.*

7. Schmidtsupra note 4 at 253.

8. Jim McKay, *Prisons Use RFID Systems to Track Inmates*, GOVERNMENT TECHNOLOGY, (May 6, 2008), available at <http://www.govtech.com/public-safety/Prisons-Use-RFID-systems-to-Track.html> (The benefits of using RFID in prisons are virtually endless; administrators can use the tags to track inmates' location which avoids placing adverse inmates close to each other and monitor inmates' movements to limit any dangerous activity they are involved in.)

9. Levary, et al., supra note 2 at 6. (the traditional bar-code system requires a plain line of sight in order to scan and read the code while the RFID chip requires a range or minimum distance needed by the reader)

10. U.S. CONST. amend. IV.

prison inmates (or lack thereof) that would allow RFID to be implemented in prisons. Part III (D) provides current legislation and active federal regulatory agencies that support and attempt to control the use of RFID technology. These agencies are essential for society to be aware of such technologies. The only way to implement RFID is with the support from federal agencies and the public to be aware of its positive and negative effects. The positive effects of notifying and tracking prison inmates and staff will pave the way for RFID tags to be integrated on a mass scale in society. Part IV includes a proposal for implementing RFID technology, both inside and outside of prisons; it will summarize the key points of the comment and allow a reader to visualize RFID technology in use as well as its potential beneficial effects. Lastly, part V concludes with a summary of the main topics mentioned and associated with the comment and proposal.

BACKGROUND

RFID systems are made of three essential parts: a transponder (tag), a receiver (reader), and a data processing system.¹¹ The tags are comprised of a microchip and antenna and are either active or passive.¹² Active means there is a power supply on the actual tag and allows the tag to send signals on its own.¹³ On the other hand, passive tags obtain power from the signal of the reader.¹⁴ The readers are placed at certain prearranged points so they can be in range of a tag.¹⁵ The example used to illustrate how the passive RFID system works is the game “Marco Polo.” The reader sends a signal (“Marco”) and the tag responds, sending its own signal back (“Polo”).¹⁶ Active RFID systems, on the other hand, allow the tags to send their own signal without the receiver calling for one.¹⁷

RFID technology is implemented in many different settings. Examples include toll booths, libraries, hospitals, and livestock.¹⁸ Libraries have tags in books in order to track the inventory, hospitals place tags

11. Sanjay E. Sarma et al., *RFID Systems, Security & Privacy Implications*, 1 (Nov. 1, 2002) (providing a system with all of the major components is essential to the efficiency of the system).

12. *Id.* (active tags have their own power source (battery) and data can be transmitted from long range. Passive tags do not have their own power source but rather picks up a signal from a reader from short range).

13. Position Paper on the Use of RFID in Schools, 1 (Aug. 21, 2012), *available at* <http://www.spsychips.com/school/RFIDShoolPositionPaper.pdf>.

14. Sarma et al., *supra* note 11 at 1.

15. *Id.* at 4. (for example, the interstates have readers at toll booths that read car transponders when they pass through the booths).

16. David J. Warner, *A Call to Action: The Fourth Amendment, the Future of Radio Frequency Identification, and Society*, 40 LOY. L.A. L. REV. 853, 855-56 (2007).

17. *Id.* at 856 (the tag constantly sends a signal with its own power source).

18. *Id.* at 856-857; Harriette Halepis, *Playing The Data Game: Why The NFL Is Now Tracking Players With RFID Chips*, FORBES, (Sept. 12, 2014), *available at* <http://www.forbes.com/sites/centurylink/2014/09/12/playing-the-data-game-why-the-nfl-is-now-tracking-players-with-rfid-chips/> (the National Football League is using RFID tracking technology for compiling “next generation stats.”).

in prescription drugs to identify counterfeit drugs, and tags are placed in livestock to track the whereabouts of potential disease infested meat.¹⁹ However, two areas in which RFID technology is most used are passports and contactless payment systems. In passports, RFID chips contain the same personal information and have extensive security measures in place.²⁰ In order to protect the personal information, the government created a “shield” around the passport, a pin that is associated with each unique passport, and encryption to disrupt any unwarranted readers.²¹ The contactless payment systems are products such as highway toll transponders and credit cards.²² Before RFID technology and toll transponders, drivers had to pull up to the toll booth, stop and hand money to the employee, and wait for the gate to open.²³ Now, RFID chips allow drivers to link a transponder with their bank account and just drive through the toll booths without having to stop.²⁴ The examples mentioned above are just two scenarios that illustrate the various uses and benefits of RFID technology.

REASONS FOR RFID IMPLEMENTATION

When individuals commit certain crimes, their punishment is to serve a period of time in prison. What does society hope to gain from imprisoning certain criminals? The purpose of imprisoning an individual is to punish the individual for the crimes he committed, but can also be rehabilitation and deterrence.²⁵ The nature of being in a prison and rehabilitating inmates deters criminal acts because of their inability to offend outside of prison.²⁶ However, frightening statistics show that a staggering amount of prisoners who are released, reoffend within three to five years of their release.²⁷ Specifically, researchers determined that a little over two-thirds of released inmates get arrested again within three years.²⁸ In addition, a little over three-quarters of released in-

19. Warner, *supra* note 16 at 857.

20. Kyle Sommer, *Riding the Wave: The Uncertain Future of Rfid Legislation*, 35 J. LEGIS. 48, 54-55 (2009) (Passports containing RFID chips include the name, nationality, gender, date of birth, photo, etc. in order to properly identify the individual).

21. *Id.* at 55 (this specific security measure is an example that can be copied and used in many future objects that have RFID chips).

22. Schmidt, *supra* note 4 at 255-256.

23. *Id.* (implementing the RFID technology has been beneficial for drivers, especially the highways that have open road tolls in which the car does not have to stop at all).

24. *Id.* (rather than wasting time stopping and pulling money out, drivers load their transponders with money and drive through the booths without a worry.).

25. Dianne Clemens, *Point of View: Prison: To Punish or to Reform*, PBS, (last visited on Nov. 21, 2014 at 12:19PM), available at http://www.pbs.org/pov/whatiwant/special_prison.php (citing the possible purposes of imprisonment).

26. *Id.* (stating the logic that while in prison you cannot commit crimes in the community, which enhances the safety of our communities).

27. Alexia D. Cooper et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, U.S. DEP'T OF JUSTICE, 1 (April 2014), available at <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

28. *Id.*

mates get arrested within five years of release.²⁹ These statistics are evidence that tend to show prison systems are failing to rehabilitate and deter inmates from reoffending. Thus, RFID technology should be implemented as an effort to deter criminal reoffending and provide safety in the communities.

Inmates have limited rights once they are booked in correctional facilities. The Supreme Court has held that Fourth Amendment rights are severely limited in the prison context.³⁰ The longstanding standard is that inmates retain some constitutional rights but prison authority is inclined to make the best decisions involving administrative actions.³¹ As a result, if the prisoner claims his constitutional rights were violated due to a prison regulation, the prisoner has the burden to show that the challenged regulation is unreasonable.³² While inmates have the opportunity for relief, courts generally favor prison administration for the sake of safety.³³ These factors, albeit important, will not be the focus of RFID technology. The focus will be on the reasonable expectation of privacy standard. The reasonable expectation standard was promulgated by the court in *Katz v. United States*.³⁴ In that case, Justice Harlan's concurring opinion stated that in order for a search to be determined, the individual must have a subjective expectation of privacy and society must be willing to recognize that expectation is reasonable.³⁵ This standard will be analyzed in this comment due to the nature of RFID implementation. On the one hand, prisoners will have a subjective expectation of privacy and contend society is willing to accept that view. On the other hand, prisoners' subjective expectation of privacy will not be reasonable and society will not be willing to recognize that expectation as reasonable because of the very nature of incarceration; rights are severely limited when incarcerated.

BENEFITS OF RFID IN PRISONS

Prisons have experimented with RFID technology in the recent past.³⁶ Active RFID technology has been offered to correctional institutions to track inventory as well as inmates and staff.³⁷ Bracelets or

29. *Id.*

30. Karoline E. Jackson, Notes: The Legitimacy of Cross-Gender Searches and Surveillance in Prisons: Defining an Appropriate and Uniform Review, 73 IND. L. J. 959, 963 (1998).

31. *United States v. Ghailani*, 751 F. Supp. 2d 508, 513 (S.D.N.Y. 2010) (providing inmates with some rights should be left to the discretion of the institution because they have the most knowledge and experience with inmate violence).

32. *Id.*

33. *Tuft v. Texas*, 410 F. Appx. 770, 776 (5th circ. 2011).

34. *Katz v. United States*, 389 U.S. 347 (1967).

35. *Id.* at 348 (Harlan J., concurring).

36. McKay, *supra* note 8.

37. LAURA J. HICKMAN ET AL., UNPUBLISHED REPORT, *TRACKING INMATES AND LOCATING STAFF WITH ACTIVE RADIO-FREQUENCY IDENTIFICATION (RFID): EARLY LESSONS LEARNED IN ONE U.S. CORRECTIONAL FACILITY*, DEPT. OF JUSTICE, 2 (June 2010), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/230781.pdf>.

wrist-bands imbedded with RFID chips can monitor inmates' and staffs' movements in order to ensure a safer environment, or at least increase the level of safety in the institution.³⁸ Additionally, real time tracking can enhance the ability for head counts and increase efficiency in monitoring by staff.³⁹ Along with inmates, prison staff would be required to wear RFID devices.⁴⁰ Especially in minimum-security prisons, RFID benefits would be maximized. In minimum-security prisons, inmates have the opportunity to leave, albeit illegally, because the institutions do not have fencing surrounding it.⁴¹ By implementing RFID technology, if inmates leave the predetermined perimeter, the system is alerted instantaneously.⁴² A supplier of RFID technology emphasized that if an inmate is needed, or even worse, cannot be found, prison staffs do not have to go searching in hopes of finding the inmate because of the RFID tracking.⁴³ The benefits of RFID are limitless and implementing them in prisons will show that RFID technology can improve efficiency and safety. Safety is of utmost importance inside and especially outside of prison walls. Therefore, this comment will analyze the different ways efficiency and safety is possible when implementing RFID technology.

EFFECTS OF LEGISLATION ON RFID IMPLEMENTATION

Society's awareness of privacy rights increased when the tragic events of 9/11 occurred. Surveys conducted right after the attacks showed that citizens were willing to trust and accept government surveillance.⁴⁴ As of December, 2013, 21 States have enacted some sort of law or bill that pertains directly to RFID technology.⁴⁵ One piece of legislation is the REAL ID Act of 2005. This act established minimum requirements for information on driver's licenses and identification cards.⁴⁶ RFID became known once this act was passed, and since then, the government has introduced RFID chips into passports.⁴⁷ It is worth noting that not all states responded positively toward this legislation,

38. *Id.* at 3 (RFID zones would be set prior to implementation as a way to decrease the integration of adverse inmates);

39. *Id.* at 2 (prison systems would be more efficient by allowing the technology to track individuals and allowing staff to know the exact count and location of each inmate).

40. *Id.* at 15 (the staff would wear devices that monitor their location and alert the system if they fall because they were struck by an inmate or because of health issues).

41. McKay, *supra* note 8.

42. *Id.*

43. *Id.* (this particular system constantly sends a signal that is processed through a computer system. At two-second intervals, the signal is determined).

44. Sommer, *supra* note 20 at 72.

45. NATIONAL CONFERENCE OF STATE LEGISLATURES, *State Statutes Relating to Radio Frequency Identification and Privacy*, (last updated on Dec. 20, 2013), available at <http://www.ncsl.org/research/telecommunications-and-information-technology/radio-frequency-identification-rfid-privacy-laws.aspx> (pieces of legislation that directly relates to RFID shows that States are willing to accept RFID technology. Regulating RFID is a positive aspect of emerging technology because awareness will only increase society's knowledge of RFID technology).

46. Sommer, *supra* note 20 at 60.

47. *Id.*

but the fact that legislation has been adopted by some states suggest the future of RFID is bright.⁴⁸ One of the most important acts is the Privacy Act of 1974 (“Privacy Act”).⁴⁹ The Privacy Act is concerned with the private information that is collected by the government and an individual’s right to review the collected information.⁵⁰ Another act pertaining to RFID and privacy is the Electronic Communications Privacy Act (ECPA).⁵¹ The relevant parts of the statute read, “any person who intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any...electronic communication...shall be punished.”⁵² Initially, this act was passed to balance the privacy interests of individuals and legitimate governmental interests.⁵³ The ECPA assists in regulating RFID technology because it makes it a crime for an individual to intentionally solicit personal data from another individual. This type of legislation raises awareness for emerging technology and may potentially assist society in weighing the pros and cons of RFID tracking. Another law directly relating to RFID technology is the Identity Theft and Assumption Deterrence Act (ITADA).⁵⁴ This act expressly prohibits the misuse of private information, anywhere from identity theft to possessing false identification.⁵⁵ All of these Acts affect RFID by both raising awareness and acting as a deterrent.

These laws are not the only means of regulating RFID technology; federal agencies, such as the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC), can use their power to regulate. The FCC plays a part in regulating RFID usage by prohibiting the secret collection of private information using RFID systems.⁵⁶ The FTC has taken the role of communicator by raising the awareness of RFID. The agency released a report that discussed most aspects of RFID, including privacy implications.⁵⁷ The report mostly addressed privacy concerns with respect to consumers but this can be compared to

48. *Id.* at 60-61.

49. *Id.* at 65.

50. *Id.* at 66 (explaining that, similar to the Fourth Amendment, the Privacy Act does not concern private entities).

51. Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2522 (2006).

52. Electronic Communications Privacy Act, 18 U.S.C. § 2511(1)(a) (making it a crime punishable by imprisonment).

53. EPIC, <http://epic.org/privacy/ecpa/> (last visited Nov. 28, 2014) (balancing interests of citizens and the government occurs frequently when discussing RFID technology; for example, an individual’s right to protect his information versus governmental need of the information for public safety).

54. Identity Theft and Assumption Deterrence Act, 18 U.S.C. §1028.

55. Jake Stroup, *The Identity Theft and Deterrence Act of 1998*, ABOUT MONEY, (last visited on Oct. 18, 2014), available at <http://idtheft.about.com/od/glossary/a/ITADA.htm> (regulating identity theft by connecting with a Federal Agency (FTC) to deal with claims of identity theft).

56. Sommer, *supra* note 20 at 69 (regulating occurs by requiring the companies that seek RFID type information, to notify another agency).

57. *Radio Frequency Identification: Applications and Implications for Consumers*, 22 FEDERAL TRADE COMMISSION (March 2005), available at <http://www.ftc.gov/sites/default/files/documents/reports/rfid-radio-frequency-identification-applications-and-implications-consumers-workshop-report-staff/050308rfdprt.pdf> (hereafter “*Radio Frequency Identification Applications*”).

prison implementation.⁵⁸ For example, the report noted that it is essential to provide clear and concise notice to consumers.⁵⁹ In the prison context, prisoners would be notified that the bracelets contain RFID chips that are capable of tracking. When this information is disclosed, inmates are notified and hopefully deterred from violent conduct. Similarly, with regards to parolees, their release will be conditioned on wearing the bracelets. Therefore, laws and regulatory agencies are essential to educate society on the positive and negative aspects of RFID technology as well as control, to a certain extent, the technology with respect to its means and limits.

ANALYSIS

The following sections will provide an in depth analysis of testing RFID technology in prisons and individuals on parole. First, prison statistics present an overwhelming increase of recidivism. Thus, in an effort to mitigate the rate of recidivism, implementation of RFID technology should be tested in prisons. However, testing should continue once the individual is out of prison. For this reason, RFID should be tested in individuals who are on parole. The reason for testing with parolees is that the rate by which recidivism increases once the individual is released back into society. In order for criminal activity to decrease, RFID will attempt to deter illegal activity inside of prisons as well as outside of prisons; a two-step process that will likely decrease repeat offenses. And lastly, the next section will provide a history of the individuals' right to privacy and what steps are needed to make RFID testing successful. Constitutional rights may create a barrier to testing this technology with free-citizens; however, prisoners and parolees are in drastic situations. Therefore, the implementation of RFID in prisons and parolees is sure to provide an avenue of success when it comes to decreasing criminal activity inside and outside of prisons.

PRISON STATISTICS SHOW AN INCREASE OF RECIDIVISM

There are plenty of studies producing valuable research and information regarding criminal conduct. These studies are conducted to be knowledgeable and aware of safety hazards. Specifically, some criminals who are in prison are eventually released back into society. As a result, studies are conducted in order to know the rate of recidivism. One study in particular, released in 2014 from the Bureau of Justice Statistics, observed criminal offenders five years after they were released.⁶⁰ The most staggering and important statistic, relevant to the issue at hand, is that 76.6% of prisoners who were released from prison

58. *Id.*

59. *Id.*

60. Cooper et al., *supra* note 27 at 1 (observing prisoners who were released from 2005 to 2010 in 30 states).

were arrested within five years.⁶¹ This means that a little more than two-thirds of the prisoners who were released from prison subsequently committed another offense. However, on the brighter side of criminal statistics, the longer the person stayed out of trouble, the less likely the person was to be arrested again.⁶² To put the brighter note in perspective, only 13.3% of released prisoners were arrested again if the prisoner was not arrested after four years of being released.⁶³ This study shows that prisons are clearly failing at deterring repeat offenses. If the traditional system is not working, a new system should be implemented. These statistics are a reality that society must be aware of in order to enhance the safety of communities.⁶⁴ Proof that prisoner recidivism is likely to remain the same if other programs are not implemented is something society should be aware of.⁶⁵ Therefore, it would only be logical for society to want or to advocate for a new system that ensures safety in their communities.

Society's awareness should not end with prisoners' recidivism statistics; violence also occurs inside prisons. One form of violence that is common inside prison walls is sexual victimization. In 2014, the Bureau of Justice Statistics collected data of sexual victimization in prison.⁶⁶ In 2011, prison administrators reported 8,763 allegations of sexual victimization in correctional facilities.⁶⁷ These reports are based on only one violent crime; sexual victimization. Nevertheless, there has been a consistent increase of reported sexual victimization each year.⁶⁸ A self-report survey found that 16% of inmates reported injuries from fighting and over 50 thousand violations for assaulting prisoners or staff were issued.⁶⁹ Prisons are filled with violent criminals and the statistics exist to prove it. In order to attempt to keep everyone safe (including prisoners, staff, and society), a new system must be implemented. RFID technology is the system that should be implemented and tested to achieve the goal of providing safety in and outside of prison walls.

61. *Id.*

62. *Id.* at 7.

63. *Id.* (providing statistics to show how much recidivism is occurring is a necessity in order to raise the awareness level of criminal behavior).

64. Kevin Johnson, *Study: Prisons Failing to Deter Repeat Criminals in 41 States*, USA TODAY, (Apr. 13, 2011, 12:24AM), available at <http://usatoday30.usatoday.com/news/nation/2011-04-12-Prison-recidivism-rates-hold-steady.htm>.

65. *Id.* (releasing prisoners back into society without awareness of prisoner recidivism statistics is counter-intuitive to increasing the safety in our communities).

66. Allen Beck et al., *Sexual Victimization Reported by Adult Correctional Authorities 2009-11*, U.S. DEPT OF JUSTICE, 1 (Jan. 2014), available at <http://www.bjs.gov/content/pub/pdf/svraca0911.pdf>.

67. *Id.*

68. *Id.* at 3.

69. Josh Voorhees, *A City of Convicts*, SLATE (June 30, 2014, 9:07AM) available at http://www.slate.com/articles/news_and_politics/politics/2014/06/prison_crime_rate_the_us_violent_crime_rate_is_falling_partly_because_the.html.

RFID TECHNOLOGY SHOULD BE IMPLEMENTED INSIDE PRISON WALLS

Implementing RFID systems in prisons has the potential to mitigate violence inside prisons and criminal conduct outside of prisons. This will not only decrease the violence but also increase safety and awareness for society. Expectations of RFID technology are vast and exciting. Safety of individuals is the number one concern. If RFID technology can increase safety and minimize the risks of violent acts, then these systems must be tested in order to ensure its quality and implemented as soon as possible. The way RFID technology hopes to minimize the risk of danger is with emergencies, headcounts of inmates, and cost efficiency.⁷⁰ For example, inmates in need of emergency assistance will be notified promptly and accurately; headcounts of inmates will also be tracked and recorded with complete accuracy; in terms of cost efficiency, fewer officers would have to work overtime shifts.⁷¹

1. The Monitoring of Inmates Inside of Prison Walls

In order for RFID technology to be accepted and utilized, one must test and experiment with it. That possibility turned into a reality when one correctional facility implemented RFID in its prison in Cleveland, Ohio.⁷² The Northeast Pre-Release Center (NEPRC) experimented with a RFID system and observed its effects.⁷³ Even though there were many problems with the system, they were eventually fixed and the system was maintained.⁷⁴ The RFID system now allows prison administrators to have knowledge of where every individual is at any given time.⁷⁵ This could prove to be very beneficial in times of emergencies. Correctional facilities in a number of states, including Illinois, have used RFID technology to assist in tracking inmates.⁷⁶

Another institution that attempted to implement RFID technology was Washington Department of Corrections (DOC). A report was conducted to provide the pros and cons of implementing such a system.⁷⁷ In the report, the DOC announced the reasons for adopting such a system: “increase inmate management and accountability, to improve productivity and efficiency, to reduce jail operational costs, and to significantly enhance the safety of correctional officers and staff.”⁷⁸ There

70. Mikel Chavers, *Jail Uses RFID Technology*, CAPITOL IDEAS (last visited on Oct. 17, 2014, 4:23PM), available at http://www.csg.org/pubs/capitolideas/enews/issue35_3.aspx.

71. *Id.*

72. Claire Swedberg, *Prison RFID Study Finds Planning is Critical*, RFID JOURNAL (Sept. 13, 2010), available at <http://www.rfidjournal.com/articles/pdf?7862>.

73. *Id.*

74. *Id.* (it should be noted that early problems occurred but were fixed. Sometimes, with new technology, problems do arise especially with something so revolutionary and young).

75. *Id.*

76. McKay, *supra* note 8.

77. HICKMAN ET AL., *supra* note 37 at 1.

78. *Id.* at 16.

are practical situations in which this RFID system would assist prison administrators. For example, as stated by DOC staff, closely tracking inmates assists the officers in closely monitor the inmates' location.⁷⁹ This real time tracking helps with improving security and safety for everyone involved. Imagine an inmate attempting to escape. Once the inmate removes himself from the proximity of the readers, an alarm would signal the administration and staff would promptly respond.

Another scenario in which RFID technology is beneficial is in preventing inmate violence. As noted above, the rate of inmate violence is not decreasing.⁸⁰ One way RFID technology can combat violence is by restricting chips from being close to each other. Once an inmate moves in proximity of the inmate or specific location, the system promptly notifies the staff and, again, they can respond accordingly.⁸¹ Moreover, the major benefit of RFID tracking systems is its deterrent capabilities. When inmates know they can be tracked at any given moment, they are less likely to partake in prohibited activities – mainly violence. This helps with deterring gang violence in prisons. Suspected gang members would be strapped with a RFID chip bracelet and once they are in range of another rival gang member, the signal will notify prison staff. Using the RFID technology in prisons is essential to minimizing the risk of violence and increasing safety for the institutions.

Society recognizes that institutional interests outweigh prisoner rights to privacy. Due to society's broad recognition of legitimate institutional interests, especially when those interests deal with safety and security, RFID implementation would pass the two-prong standard established in *Katz*.⁸² An RFID system in prison would be cognizable to society relative to the penological interests. If prisons were to implement RFID technology for reasons stemming anywhere from safety interests to economic efficiency, society would most likely be prepared to recognize the implementation. The President of an RFID manufacturing company explained that once the chips are incorporated in the system, the institution will be able to identify them by name and location.⁸³ Moreover, a law professor stated that real time tracking is no more an invasion of privacy than handcuffs are.⁸⁴ Essentially, the chips would be a more comfortable and less restrictive handcuff. Handcuffs are chained together so that individuals' arm movements are severely limited. RFID bracelets would not be chained together allowing the prisoners to move

79. *Id.*

80. Cooper et al., supra note 27 at 1.

HICKMAN ET AL., supra note 37 at 15.

82. *Katz v. United States*, 389 U.S. at 361 (Harlan J., concurring) (noting the importance of the standard: (1) a prisoner' reasonable expectation of privacy, and (2) society's willingness to recognize inmates' right to privacy).

83. Daniel Casciato, *RFID Tracking Allows Prisons to More Closely Monitor Inmates*, DATAMATION (July 14, 2008), available at <http://www.datamation.com/mowi/article.php/3758681/RFID-Tracking-Allows-Prisons-to-More-Closely-Monitor-Inmates.htm> (illustrating the various methods of tracking that are beneficial to correctional facilities, including location tracking in bathrooms without invading the prisoner's privacy).

84. *Id.*

freely without worrying about any chains to restrict them. This is also another reason why society would recognize RFID implementation; the notion that tracking inmates for safety while also not treating them in a cruel and unjust manner would only help the argument for RFID use. These examples are intended to show that implementing RFID systems in prison would pass the standard set forth by Courts.

Using this technology does not come without a price however; prisoners and prisoner activists will most likely object to RFID due to its potential unreliability and inefficiency. A major issue that has been undermining the use of RFID in prisons is the technological malfunctions.⁸⁵ One example includes an Australian institution that attempted to utilize an RFID system to combat criminal activity and increase tracking capabilities.⁸⁶ The costly operation was abandoned and removed due to the system's inability to work properly.⁸⁷ Technological issues, among others, were explored and foreseen in the unpublished report by the U.S. Department of Justice.⁸⁸ Specifically, the inaccuracy of the location tracking was a major hurdle.⁸⁹ The issue would arise when inmates on the second floor were sitting on the ground; the reader from the first floor would catch the inmate's tag and lead to the wrong location reading.⁹⁰ From every point of view, this could lead to major problems and safety hazards. If the tracked location is not accurate, an altercation between two or more prisoners will not be handled fast enough. Moreover, if an altercation occurs between prisoners and staff, other staff will not be able to assist promptly. Another major issue that stems from inaccurate readings is the lack staff confidence.⁹¹ These two situations are the very situations that RFID technology should combat, not facilitate. If the RFID system does not function properly, prison staff or institutions generally will not trust the system to protect them. The end result is the system will not facilitate safety and eventually lead to inefficiency.

However, the only way to ensure a safe and fool-proof system is to implement and test it.⁹² This is the very reason RFID systems are tested and experimented with; to ensure problems do not arise, and if they do, they are handled accordingly. When the system is installed, data

85. Noel Towell, *Prisoner Tagging System Dropped*, THE CANBERRA TIMES (June 20, 2012), available at <http://www.canberratimes.com.au/act-news/prisoner-tagging-system-dropped-20120619-20mgy.html> (addressing the failed attempt of implementing RFID because of technical problems).

86. *Id.* (citing issues mainly with battery life).

87. *Id.*

88. HICKMAN ET AL., *supra* note 37 at 19.

89. *Id.* at 20.

90. *Id.* (addressing the issue of inaccurate location readings is essential to creating an efficient system; the issues will lead to improvements in location tracking).

91. *Id.* at 23 (citing issues of RFID inaccuracy will lower staff's reliability toward the system; prison staff must be sure that the system will accurately locate inmates to protect themselves and the institution from harm).

92. *Id.* 29 (June 2010), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/230781.pdf>.

will be compiled and analyzed.⁹³ With the collection of data, prisons are able to determine any increases or decreases in violence and identify the locations where violence occurs. Even if objections impose an almost impossible hurdle to mass implementation, testing in some facilities will provide valuable information and eventually gain support from certain adversaries. In other words, testing RFID technology in only prisons will provide agencies and institutions with beneficial data to curb violence and maximize safety. This, in turn, will gain the support needed to satisfy the reasonable expectation test set forth in *Katz*. Thus, prisoners will not have a reasonable expectation of privacy within prison walls. Additionally, society will not be prepared to recognize any prisoners' expectation of privacy for the important reason that safety for individuals and staff outweigh any prisoners' subjective expectations. The safety interest of prisoners and staff is the main reason RFID technology should be implemented and will pass the opposition.

2. RFID Outside of Prison Walls

The statistics mentioned in part II (A) is crucial to why RFID chips should be implemented. Along with RFID systems in prisons, RFID chips should be implemented outside of prisons. The latter is much less likely since that would likely infringe on individuals' Fourth Amendment (and possible Eighth Amendment) rights. There are advocates of implanting prisoners with RFID chips under the skin. It should be noted that in 2004, the U.S. Food and Drug Administration approved the implanting of RFID chips.⁹⁴ The approval was aimed at easing the process of identifying individuals for medical purposes; i.e. people with Alzheimer's disease could be implanted and doctors would have their personal information readily available.⁹⁵ Nevertheless, once prisoners are set free, they should be monitored to ensure the safety of our communities.

In order to combat recidivism of released prisoners, RFID chips should be implemented when prisoners are set free from the institution. To fully deter these individuals, RFID bracelets should be kept on their person for at least five years. Since there have been studies that conclude that criminals who are released from jail are more than $\frac{3}{4}$ more likely to commit another criminal offense within five years, bracelets containing RFID chips are logical.⁹⁶ In other words, it is logical to assume that prisoners who are released from prison and tracked with

93. Philip Bulman, *Using Technology to Make Prisons and Jails Safer*, 262 NAT'L INST. OF JUSTICE 38, 40 (March 27, 2009).

94. *FDA Approves Computer Chip for Humans*, THE ASSOCIATED PRESS (Oct. 13, 2004, 6:38PM), available at http://www.nbcnews.com/id/6237364/ns/health-health_care/t/fda-approves-computer-chip-humans/#.VEGV0fldXtI (so, even though implanting chips in the human body would most likely be in violation of a constitutional right, it was nevertheless approved).

95. Kenneth Foster & Jan Jaeger, *Ethical Implications of Implantable Radiofrequency Identification (RFID) Tags in Humans*, AM. J. BIOETHICS, 8(8): 44-48, (2008).

96. Cooper et al., *supra* note 27 at 7.

RFID bracelets for no less than five years would be much less inclined to engage in criminal conduct. The basis for implementing RFID chips is mainly to ensure the safety of communities. Even though it has many more benefits, such as cost efficiency in the retail end, safety is the primary reason of implementation. Once prisoners are released into society, RFID chips can help deter criminal conduct. As stated previously, the statistics reveal that criminals who are released into society are highly likely to get arrested within five years. Proposing RFID technology to be placed with parolees is compelling. For example, if parolees are given the RFID bracelets, administrators would be able to track them in a limited fashion.⁹⁷

History of Courts' Decisions Disfavor Parolees' Rights

Occasionally, when an inmate is released from prison, the individual is placed on parole. Placing a prisoner on parole serves many purposes – mainly rehabilitation and safety.⁹⁸ For that reason, courts have held that keeping an eye on parolees is necessary and would not be unconstitutional.⁹⁹ A prominent case that analyzed this issue was *United States v. Knight*. The Court indicated that reasonableness is essential under the Fourth Amendment, and in order to determine the reasonableness of a search, one must balance how much the search encroaches an individual's privacy rights with the legitimate governmental interest in conducting the search.¹⁰⁰ Further, the Court expressed that probation is a form of incarceration in that it is inherent that individuals on probation “do not enjoy the absolute liberty to which every citizen is entitled.”¹⁰¹ As a result, the condition imposed in probation rendered defendant's reasonable expectation of privacy invalid.¹⁰² As for the legitimate governmental interest, criminals are highly likely to repeat their criminal conduct.¹⁰³ For this reason, the government has an interest in keeping the crime rate at a minimum as well as an interest in keeping the public safe.

Knight illustrates the need for the government to prioritize its interests.¹⁰⁴ When it comes to privacy interests, the government must limit prisoner's privacy interests in order to keep the public safe and secure from further criminal conduct. One way to keep the public safe is to monitor prisoners. Not only should the government monitor inmates in

97. Chips implanted into humans will not be discussed because implanting humans subjects our discussion to Eighth Amendment implications that are not relevant to this comment. Thus, only the issue of requiring bracelets with RFID chips will be analyzed.

98. *United States v. Freeman*, 479 F.3d 743, 746 (2007).

99. *Id.*

100. *United States v. Knights*, 534 U.S. 112, 118-119 (2001) (citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

101. *Id.* at 119 (citing *Morrissey v. Brewer*, 408 U.S. 471, 480, (1972)).

102. *Id.* at 119-20.

103. *Id.* at 120 (reporting that “the recidivism rate of probationers is significantly higher than the general crime rate” (See U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Recidivism of Felons on Probation*, 1986-89, (Feb. 1992))).

104. *Id.* at 118-119.

prison, it should also monitor individuals released from prison (parolees and probationers). RFID chips would be a very efficient means to achieve the safety of the public from criminals. Strapping the bracelet around the wrist, strategically placing RFID readers around various locations, and monitoring the parolee would be a less invasive means of monitoring than would be video recording or GPS satellite based tracking because it does not monitor every single move the individual makes. The individual would be tracked only when he or she moves into the range of a reader. An even more reasonable way to achieve success with monitoring parolees is to place RFID readers in certain prearranged points in which the chip is always active. For example, at least one reader can be placed in the parolee's home. Then, the reader would constantly monitor the parolee and in the event of the parolee moving outside of the reader's range, the police would be notified. For these reasons, monitoring inmates out of prison with RFID technology should be implemented on a large scale.

B. Adversaries Fail to Dissuade RFID Advocates

There are, however, adversaries of RFID technology who are against the monitoring of released prisoners.¹⁰⁵ An alarming number of individuals, namely the principal inventor of GPS technology, expressed their displeasure with government collection of location data.¹⁰⁶ Since GPS monitoring is viewed as having similar capabilities as RFID, privacy activists contend that location monitoring via cell phone data is as unconstitutional as warrantless GPS tracking.¹⁰⁷ Not only does location tracking show where you are at any given moment, it also shows personal activities such as the church an individual attends or doctor's office.¹⁰⁸ Affirming this view, a recent decision from the New Jersey Supreme Court found that GPS monitoring of a man 23 years after the commission of the offense was unconstitutional.¹⁰⁹ Even more intriguing, studies have shown that parolees under constant watch do not

105. Chris Zappone, *Backlash Against RFID is Growing*, CNN, (May 21, 2007, 1:25PM), available at <http://money.cnn.com/2007/05/21/technology/rfid/>.

106. *GPS Inventor Joins EFF in Fight Against Warrantless GPS Tracking*, ELECTRONIC FRONTIER FOUNDATION (Oct. 3, 2011), available at <https://www.eff.org/press/archives/2011/10/03-0> (citing that along with the principal inventor, Roger Easton who is considered the father of GPS, expressed his displeasure as well).

107. *Government Faces New Warrantless Surveillance Battle After Losing Landmark GPS Tracking Case*, ELECTRONIC FRONTIER FOUNDATION (Aug. 14, 2012), available at <https://www.eff.org/press/releases/government-faces-new-warrantless-surveillance-battle-after-losing-landmark-gps>.

108. *Id.*

109. Mary Pat Gallagher, *Court Finds Post-Sentence GPS Tracking Unconstitutional*, NEW JERSEY L.J., (Sept. 24, 2014), available at <http://www.njlawjournal.com/id=1202670980774/Court-Finds-PostSentence-GPS-Tracking-Unconstitutional?slreturn=20141026133809>.

demonstrate lower recidivism rates.¹¹⁰ Instead of constant monitoring, family support has been a major benefactor of successful transitions into society.¹¹¹

A more frightening scenario is the testing RFID in school children. A school district in Texas has started a project in which all of their students would wear badges imbedded with RFID chips.¹¹² However, parents, not approving of this type of action, responded by taking their children out of school and protesting the board's actions.¹¹³ To illustrate the parents' frustration, one parent said that the school board was "creating prisoners, not model citizens."¹¹⁴ Issues regarding location tracking will always be raised, especially in the context of school children.

Nevertheless, arguments for RFID surmount the oppositional arguments. Even if GPS tracking of the public and RFID implementation in school children would be deemed unconstitutional, prisoners and parolees are in vastly different situations. Courts have been unwilling to reverse laws granting parole officers the right to conduct a suspiciousness search of a parolee.¹¹⁵ The Supreme Court left it to the States to create a system that releases criminal offenders into society but maintains maximum safety in the communities.¹¹⁶ As previously mentioned, the approach that has been most successful is the system of parole. To emphasize the success of this approach, the court in *Samson v. California* decided that the Fourth Amendment allows an officer to search a parolee without any suspicion.¹¹⁷ In *Samson*, an inmate was on parole in California subsequent to his conviction for possessing a firearm.¹¹⁸ While on parole, an officer saw the parolee walking down the street with a woman and a child.¹¹⁹ Because of prior meetings, the officer knew the parolee and thought he had an outstanding warrant.¹²⁰ The officer approached the individual and, even after being told by parolee that he was in good standing with his parole officer and there was no outstanding warrant, searched parolee and found methamphetamine on his person.¹²¹ The trial court found that the California statute authorized the search. Furthermore, on appeal, the Appellate Court affirmed

110. Sharon Brett, *No Contact Parole Restrictions: Unconstitutional and Counterproductive*, 18 MICH. J. GENDER & L. 485, 503 (2012), available at <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1019&context=mjgl>.

111. *Id.* at 503-504.

112. Mark Anderson, *Students Rise Up Against Forced Chipping*, AMERICAN FREE PRESS NEWSPAPER, (Nov. 20, 2012) available at <http://americanfreepress.net/?p=7385>.

113. *Id.*

114. *Id.*

115. *Samson v. California*, 547 U.S. 843 (2006).

116. Devallis Rutledge, *Parole and Probation Searches*, POLICE MAG. (Sept. 1, 2006), available at <http://www.policemag.com/channel/patrol/articles/2006/09/point-of-law.aspx>.

117. *Samson v. California*, 547 U.S. 843, 857 (2006).

118. *Id.* at 846.

119. *Id.*

120. *Id.*

121. *Id.* at 846-847.

finding that parolees can be searched without an officer's suspicion.¹²²

There are several reasons for this decision: the California statute, the precedent found in *Knights*, and the states' legitimate interest.¹²³ The statute requires: any prisoner, who is eligible for parole, receive notice of the maximum length of time they can be subjected to supervision; any parolee may be incarcerated for violating any condition of his release; and that any parolee is subjected to searches absent a search warrant or cause.¹²⁴ California's system gives prisoners the option to serve a portion of their sentence outside of prison.¹²⁵ However, the price of choosing this option is that parolees must sign and abide to all of the terms and conditions, including drug tests, mandatory meetings, and searches absent suspicion.¹²⁶ As a result of these terms and conditions, parolees have "severely diminished expectations of privacy by virtue of their status alone."¹²⁷ Next, *Knight* set a precedent by deciding that under California law, a parole officer or other peace officer can search a parolee without suspicion because it was clearly expressed in the conditions that parolee signed.¹²⁸ Because the conditions were clearly expressed, the parolee was said to not have an expectation that society was willing to recognize.¹²⁹ Finally, the State's interest is critical in protecting society from criminal recidivism.¹³⁰ The Court, by providing recidivism statistics, expressed how imperative it is for the State to protect its citizens by sacrificing privacy interests that would normally be protected under the Fourth Amendment.¹³¹ The three reasons previously mentioned strengthen the need for RFID technology in parolees. Prisoners, by opting to complete their remaining sentence outside of prison, do not have a reasonable expectation of privacy that free citizens are afforded in the Constitution. Further, it would be entirely illogical for society to willingly allow parolees protection from officers to search whenever they choose. As mentioned in previous sections, criminals' rate of recidivism is too high a rate to give convicted criminals any protection from the law. The last thing any innocent citizen wants is to be on the street next to a convicted criminal who has a higher than 70%

122. *Id.* at 847 (expressing their view, the Supreme Court ultimately affirmed both lower courts).

123. *Samson v. California*, 547 U.S. 843, 850-854 (2006) (citing more reasons only makes the ruling more persuasive).

124. CAL. PENAL CODE § 3067 (a) & (b) (citing section (b)(3) is the most important and the most relevant to the subject matter of this comment; the fact that the prisoners are subjected to this condition is the cornerstone of the advocating for RFID technology).

125. *Samson v. California*, 547 U.S. at 851.

126. *Id.*

127. *Id.* at 852 (showing that parolees do not have a reasonable expectation of privacy clearly satisfies Justice Harlan's first prong of the reasonableness standard set forth in *Katz* (*Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan J., concurring))).

128. *Samson v. California*, 547 U.S. at 852 (citing *United States v. Knights*, 534 U.S. 112, 119 (2001)).

129. *Id.* (noting the importance of society's willingness to recognize an expectation of privacy, and not only the individual's expectation of privacy).

130. *Id.* at 853.

131. *Id.* (providing statistics of recidivism strengthens the argument that states' safety interests substantially outweigh prisoners' right to privacy).

chance of offending again. Therefore, society is unwilling to recognize an expectation of privacy as reasonable.

Do Prisoners Have A Right to Privacy?

1. THE RIGHT TO PRIVACY AND HOW IT EVOLVED

Since the uses of modern RFID are relatively new, some critics of RFID are concerned with the privacy implications. The Fourth Amendment states, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.”¹³² It must not be forgotten that the purpose of the Fourth Amendment was to prevent the government from unreasonably searching an individual’s home, person, vehicle, etc.¹³³ It was Louis Brandeis and Samuel Warren who, in their notable work *The Right to Privacy*, realized that due to social and political (and now technological) advancements, the law must adapt and expand to meet the demands of society.¹³⁴ In the early days of American jurisprudence, the law afforded remedies to individuals only for issues that dealt with the individual’s life and property.¹³⁵ Sooner after, however, society recognized these so-called social and political changes and facilitated the evolution of the law; “the right to life has come to mean the right to enjoy life, - the right to be let alone.”¹³⁶ The right to be let alone became the cornerstone of the right to privacy; “it is the unwarranted invasion of privacy that must be prevented at all costs.”¹³⁷ For these views, courts have interpreted the Fourth Amendment to protect individuals from unreasonable intrusions upon individuals’ privacy, especially with respect to technological advancements.

Early case law, determined in *Olmstead v. United States*, found that the Fourth Amendment did not extend beyond the home or office and stated, “the government did not physically enter onto defendant’s land, therefore no search was ensued.”¹³⁸ Further, Justice Brandeis, in his judicial opinion, proclaimed that the purpose of the Fourth Amendment “was to prevent the use of governmental force to search a man’s house, his person, his papers, and his effects, and to prevent their sei-

132. U.S. CONST. amend. IV.

133. Warner, *supra* note 16 at 859.

134. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) available at <http://www.jstor.org/stable/pdf/1321160.pdf?acceptTC=true>.

135. *Id.*

136. *Id.*

137. Jennifer E. Smith, *YOU CAN RUN, BUT YOU CAN’T HIDE; PROTECTING PRIVACY FROM RADIO FREQUENCY IDENTIFICATION TECHNOLOGY*, 8 N.C. J. L. & TECH. 249, 251 (2007) (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890)).

138. Warner, *supra* note 16 at 859 (citing *Olmstead v. United States*, 277 U.S. 438, 463 (1928)).

zure against his will.”¹³⁹ Brandeis’s envisioned a trend towards more personal autonomy which was echoed in future opinions; years later in *Katz v. United States*, the government listened in on conversations from a device that was attached to a telephone booth.¹⁴⁰ The court decided that an individual is entitled to know that he will be free from unreasonable searches and seizures, absent reasonable justification.¹⁴¹ The concurrence in *Katz* is of utmost importance; Justice Harlan stated that a rule has emerged from prior decisions which indicated a two-prong requirement that is used to determine whether a search is conducted: (1) a person has a subjective expectation of privacy, and (2) whether society is prepared to recognize that expectation as reasonable.¹⁴² Along with the search and an individual’s reasonable expectation of privacy, the reasonableness of a search must be defined.¹⁴³ A probable cause standard is still in place regarding reasonableness.¹⁴⁴ Probable cause is satisfied when certain circumstances lead the individual to believe, as would an objectively reasonable individual, that prohibited conduct has occurred or is occurring.¹⁴⁵ Specifically, in *Couden v. Duffy*, the court stated generally that probable cause is required in order to conduct a warrantless search.¹⁴⁶ These cases briefly evidence the courts’ interpretation of the right to privacy and have determined how the Fourth Amendment applies in the context of daily life and what protections citizens have against violations of the right to privacy.

2. PRISONERS’ PRIVACY RIGHTS (OR LACK THEREOF)

The Fourth Amendment right to privacy that individuals have in society becomes severely limited once they are detained and placed in a correctional facility. That does not mean that prisoners have no rights, but it does mean that they have “some.” The Fourth Amendment states, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon reasonable cause...and the persons or things to be seized.”¹⁴⁷ The development of individuals’ privacy issues has been that prisoners are not afforded the broad constitutional rights as free citizens. Specifically regarding Fourth Amendment rights to privacy, the court appropriately decided in *Lanza v. New York* that a public jail does not offer the same protections as does a per-

139. *Olmstead v. United States*, 277 U.S. 438, 463 (1928).

140. *Katz v. United States*, 389 U.S. 347, 348 (1967).

141. *Id.* at 355-356 .

142. *Id.* at 361 (Harlan J., concurring).

143. Alexandra C. Hirsch, *Schools: Where Fewer Rights Are Reasonable? Why The Reasonable Standard is Inappropriate to Measure The Use of RFID Tracking Devices on Students*, 28 J. MARSHALL J. COMPUTER & INFO. L. 411, 426 (2011).

144. *Id.*

145. *Id.* at 426-427 (addressing the standard is based on the common sense notion that probable cause exists when any reasonable individual would believe a prohibited act is occurring).

146. *Id.* at 426, note 111.

147. U.S. CONST. AMEND. IV.

son's home, office, or dwelling.¹⁴⁸ The court's reasoning for that decision was that prisons require constant surveillance for the safety of the institution.¹⁴⁹ Years later, the Court in *Bell v. Wolfish* stated that a prisoner has no reasonable expectation of privacy in his cell and that the Fourth Amendment does not protect such individuals.¹⁵⁰ The significance of the *Bell* decision was the emphasis the Court placed on institutional safety; specifically, the court stated that prison administrators should be given great deference in executing the administration's policies in order to preserve the safety and security of the institution.¹⁵¹ No one is better suited to determine and execute prison policies than the administration because of their daily interactions with the prison inmates and process in general.

Subsequently, in *Hudson v. Palmer*, an officer searched an inmate's locker and cell and found a ripped pillowcase near the inmate's bed.¹⁵² Charges were brought against the inmate for destroying state property (the ripped pillowcase).¹⁵³ The Court found in favor of the State, and the inmate brought suit claiming that the officer conducted the search of his cell and filed charges to harass the inmate.¹⁵⁴ The Supreme Court granted certiorari and cited many landmark cases in deciding in favor of the State.¹⁵⁵ Most importantly, the Court cited Justice Harlan's concurring opinion in *Katz v. United States* emphasizing the second prong of his rule: "whether a prisoner's expectation of privacy in his prison cell is the kind of expectation that 'society is prepared to recognize as reasonable.'"¹⁵⁶ The Court held that society is not prepared to recognize a prisoner's subjective expectation of privacy.¹⁵⁷ By the very nature of being in prison, prisoners' Fourth Amendment rights are very limited. Due to prison-administrations' need for safety and protection of security interests, the right to privacy is not protected by the Constitution once incarcerated.¹⁵⁸

The decisions in *Katz* and *Hudson* suggest that RFID imbedded bracelets would not violate prisoners' Fourth Amendment right to privacy. To analyze this issue, Justice Harlan's two-prong test is necessary

148. *Lanza v. New York*, 370 U.S. 139, 143 (1962).

149. Darlene C. Goring, *Fourth Amendment—Prison Cells: Is there a Right to Privacy*, 75 J. CRIM. L. & CRIMINOLOGY 609, 611 (1984) available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6436&context=jclc> (citing *Lanza v. New York*, 370 U.S. 139 (1962)).

150. *Bell v. Wolfish*, 441 U.S. 520, 557 (1979).

151. *Id.* at 547-48.

152. *Hudson v. Palmer*, 468 U.S. 517, 519 (1982).

153. *Id.* at 520.

154. *Id.*

155. *Id.* at 525 (deciding the correct application of the Fourth Amendment).

156. *Id.*; *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan J., concurring).

157. *Hudson v. Palmer*, 468 U.S. at 526 (1982) (stating the administrator's legitimate interests simply outweigh prisoner's individual right to privacy).

158. *Doe v. Delie*, 257 F.3d 309, 316 (3d Cir. 2001) (citing *Hudson's* holding that a prisoner's right to privacy in their cells is not consistent with the Fourth Amendment. Prisons must take extra steps in ensuring the safety of the institution and giving prisoner's full Fourth Amendment rights would be foolish).

to determine whether a violation is present: whether a person has a subjective expectation of privacy and whether society is prepared to recognize that expectation as reasonable.¹⁵⁹ As to the first prong, a prisoner does not have a reasonable expectation of privacy once he or she is placed in prison.¹⁶⁰ Prisoners are stripped of their freedom when arrested rendering no conceivable reason to which a prisoner would have an expectation of privacy. Further, the second prong is most important; Hudson explains society's willingness, or lack thereof, of recognizing a prisoner's reasonable right to privacy.¹⁶¹ The court explained that society could not recognize privacy rights for prisoners when the institutions' legitimate interests are at stake.¹⁶² Moreover, it is crucial that unexpected searches are the institutions' greatest weapon against violence and in furtherance of safety.¹⁶³ Just the thoughts of unexpected searches deter prisoners from concealing their own weapons and other contraband in their cells. The institutions' interests are not the only interests that are at stake; communities and neighborhoods have a safety interest. While institutional interests are relevant with respect to inside the prisons, society also takes safety into account outside of prisons. Safety inside of prisons is a legitimate interest that is needed to keep the staff and other prisoners safe. However, for society to recognize the privacy rights of prisoners, society must feel safe in their own communities first. Moreover, increasing rates of recidivism from released felons does not help the expectations. No one can expect society to recognize these rights if crime continues to occur in their own neighborhoods. Therefore, the use of RFID technology would not violate the Fourth Amendment rights to privacy in this context.

Educating the Public and Raising Awareness for RFID Technology

In order for a new technology to be accepted and used in prisons, individuals must be educated and must understand the pros and cons of such a technology. For this reason, regulatory agencies are created. For example, the Federal Trade Commission (FTC) is one federal agency with a mission to, among other things, inform the public of various consumer practices and increase their understanding of said practices.¹⁶⁴ A report that was released by the FTC surveyed consumers in 2003 and found that 77% of people were not aware of RFID technology.¹⁶⁵ In a meeting to discuss RFID applications, the FTC chairman stated that efforts to increase awareness and public education are essential to policy

159. *Katz v. United States*, 389 U.S. at 361 (Harlan J., concurring).

160. *Lanza v. New York*, 370 U.S. 143 (1962) (implicit in the notion of imprisonment is the very notion that individuals' liberty or certain freedoms are taken away from them).

161. *Hudson v. Palmer*, 468 U.S. 517, 525-526 (1982).

162. *Id.* at 526.

163. *Id.* at 528 (explaining that the power of searching inmates' cells is the greatest weapon institutions have because of the essence of surprise and unexpectedness that is associated with searches).

164. Beth Bacheldor, *Federal Trade Commission Holds RFID Workshop*, RFID JOURNAL (Sept. 25, 2008).

165. *Radio Frequency Identification Applications* supra note 57 at 12.

making.¹⁶⁶ With that in mind, the FTC releases guidelines and reports that offer recommendations to maximize benefits associated with RFID technology.¹⁶⁷ The continuing efforts to increase awareness are essential for society to accept RFID technology. Especially in prisons, where inmates are not as informed as free citizens, increasing the awareness in prisons will assist inmates' reasonable expectations of privacy. Moreover, society would be less willing to recognize inmates' expectation of privacy by understanding how RFID technology would be implemented and what the benefits of implementation come with it. The benefits of the technology in prisons are to increase the safety of all individuals involved and increase institutional efficiency. As a result, society would be more willing to accept the fact that inmates' rights are being limited at the same time the rights are stripped away when incarcerated in the first place. Thus, the regulatory agencies, with educating society and increasing awareness of this technology, are essential to implementing RFID in prisons.

PROPOSAL

For RFID to be implemented with prisoners and parolees, the technology must be tested and experimented with. With that being said, the implementation should be in prisons because of the limited privacy rights inmates have once incarcerated. Imagine a society in which we monitor prisoners inside prisons and parolees outside of prisons. Once the inmate is arrested and enters the correctional facility, a bracelet containing an RFID chip would be locked onto the inmate's wrist or ankle. Thereafter, the technology would track the movement of the inmate and transmit the data to a system that monitors the data. If, for example, the inmate attempts to escape, attempts to open an unauthorized door, room, etc., he would be flagged and the institution would be notified immediately. Violence would also be mitigated; if the inmate is known for gang activity, the RFID chip can be programmed to alert the system once they are in range of each other.

In addition to prisoners, individuals on parole should be monitored with RFID chips. As previously mentioned, the statistics show that there is a very high likelihood of reoffending when inmates are released back into society.¹⁶⁸ To decrease the recidivism, RFID technology should be implemented in parolees so that they are monitored constantly. The most efficient avenue is to have readers placed in prearranged locations in which the parolee's chip is in range continuously. Any instance in which the parolee moves out of range, the institution would be notified and officials can respond accordingly.

Therefore, I propose that RFID technology be implemented in prisons and that parolees are to be monitored with RFID bracelets for a minimum of three to five years. This can be validated by the statistics

166. Bachelder, *supra* note 164.

167. *Radio Frequency Identification Applications* *supra* note 57 at 22.

168. Cooper et al., *supra* note 27 at 1.

previously mentioned; prisoners are highly likely to reoffend within three to five years of being released from prison. Thus, experimenting with parolees for three to five years will likely decrease recidivism. This would help deter criminal activity because the parolees know they are being watched 24 hours a day. Furthermore, prisoners and parolees do not have a reasonable expectation of privacy while in prisons and on parole; both are stripped of their liberties by the very nature of their situations. Lastly, society would be willing to accept RFID technology because it is essential to the decrease in criminal activity and increase in institutional and societal safety. Therefore, RFID technology should be implemented and enforced in prisoners and parolees.

CONCLUSION

Technology is the wave of our future and will continue to rapidly develop for years to come. There will be problems associated with it, but there will be success as well. For RFID technology, the benefits are endless. In order to make RFID use in everyday life possible, the system must be tested. Along with the retail and consumer industries, this comment proposes that RFID technology be tested in the prison context. The reasons are that Fourth Amendment implications are minimal since prisoners' rights are severely limited once they are incarcerated; the Fourth Amendment prohibits searches that are unreasonable.¹⁶⁹ Further, in order for the Fourth Amendment protection to apply, the person must reasonably expect privacy and society must be prepared to recognize said privacy protection.¹⁷⁰ However, in the prison context, the inmate does not have an expectation of privacy because his freedom is limited once he is incarcerated. More importantly, society is not prepared to give prisoners the right to privacy because institutional safety interests outweigh the prisoners'.¹⁷¹ Thus, testing RFID technology in prisons would not violate the Fourth Amendment; rather, the testing would show that RFIDs can be implemented on a mass scale.

On the other hand, RFID technology should also be tested with prisoners when they step out of the institutions. This would be possible because of the decisions of the Supreme Court and statutes enacted by state and federal legislatures; the Court explained that there are special necessities that law enforcement need in order to maintain criminals on parole and, because of this, the government would be allowed to search the parolee with a "reduced level of suspicion."¹⁷² This reasonably means that individuals on parole are watched suspiciously just because they are on parole, rendering RFID chips an acceptable form of monitoring. Similarly, in *Samson*, the court expressed the importance of state statutes and government interests in protecting society from re-

169. *Bell v. Wolfish*, 441 U.S. 520, 558 (1979).

170. *Hudson v. Palmer*, 468 U.S. 517, 525 (1982); *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Katz v. United States*, 389 U.S. 347, 348 (1967) (Harlan J., concurring).

171. *Hudson v. Palmer*, 468 U.S. at 526.

172. *Griffin v. Wisconsin*, 483 U.S. 868, 882 (1987).

peat offenders.¹⁷³ Monitoring parolees would be acceptable since being on parole is an alternative form of imprisonment in which inmates forego certain constitutional rights.¹⁷⁴ As a result, inmates have the option to finish their sentence on parole. By choosing parole, they subject themselves to monitoring under the conditions set forth in parole conditions. These two situations show that RFID technology is a means to create a safer society. Tracking prison inmates creates safer prison institutions while tracking probationers increases the safety in our communities. Therefore, society will be willing to accept the fact that RFID technology will create more efficient and safer communities.

173. *Samson v. California*, 547 U.S. 843, 853 (2006).

174. *Id.* at 850 (citing *Morrissey v. Brewer*, 408 U.S. 471, 477, (1972)).

