The Next Step in DNA Databank Expansion - The Constitutionality of DNA Sampling of Former Arrestees

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INTRODUCTION

Every state requires that persons convicted of certain offenses submit a DNA sample for inclusion in both the state’s, and a national, databank.1 In recent years, the scope of individuals included in these databanks has greatly expanded.2 Although all states compel DNA sampling from felony sex offenders,3 and most include DNA samples from violent felony offenders,4 many now require samples from adults convicted of any felony, those convicted of certain misdemeanors, and those on probation or parole.5 Additionally, as of November 2004, four states mandate DNA collection upon arrest.6

* J.D., University of California, Hastings College of the Law, 2006; B.A., Stanford University. The author would like to thank Tatiana Gaur, Audrey Jing, and the editors of the Hastings Law Journal for their hard work and thoughtful comments during the revision of this Note. She would also like to thank the Lew and Lee families for their love, encouragement, and support over the years.

1. 


4. Id.; see also Taylor, supra note 1, at 514.

5. State DNA Database Laws Qualifying Offenses, supra note 3.

Not surprisingly, these expansions have met with a variety of constitutional challenges, most frequently based on the Fourth Amendment’s prohibition on unreasonable searches and seizures. However, the vast majority of attempts to challenge state DNA database laws have failed. Still, as the scope of DNA databanks around the country continues to expand, courts may become more willing to impose limits on the government’s ability to forcibly extract DNA from certain statutorily designated classes of individuals. In particular, recent controversy surrounding the passage of California’s Proposition 69 may provide some clue as to the direction of forthcoming DNA databank expansions, as well as to the ability of these expansions to pass constitutional muster.

To date, those forced to submit to suspicionless DNA extraction under state and federal law—and, consequently, those who have brought legal challenges to DNA databank statutes—have been under some form of custody or supervision by the state, either as prison inmates, probationers, or jailed arrestees. Indeed, courts often have relied on a plaintiff’s status as a supervisee or ward of the state to uphold the constitutionality of DNA databank statutes. However, the passage of California’s Proposition 69 in November 2004 has raised new questions regarding the constitutionality of extracting DNA from individuals.

7. Stevens, supra note 2, at 937 (“As of June 2000, state DNA database laws [have] been challenged in sixteen jurisdictions on a variety of constitutional claims.”).
8. United States v. Kincade, 379 F.3d 813, 831 n.25 (9th Cir. 2004) (noting that DNA collection statutes have been invalidated only three times); see also United States v. Kincade, 345 F.3d 1095 (9th Cir. 2003), vacated and reh’g en banc granted, 354 F.3d 1000 (9th Cir. 2004); United States v. Miles, 228 F. Supp. 2d 1130, 1135-40 (E.D. Cal. 2002); Maryland v. Raines, 857 A.2d 19 (Md. 2004).
9. Stevens, supra note 2, at 942.
10. See, e.g., Green v. Berge, 354 F.3d 675 (7th Cir. 2004) (upholding a Wisconsin statute that permits the collection of DNA from incarcerated felons); Velasquez v. Woods, 329 F.3d 420 (5th Cir. 2003) (dismissing as frivolous a complaint by incarcerated felons that DNA sampling violated their Fourth Amendment rights); Jones v. Murray, 962 F.2d 302 (4th Cir. 1992) (addressing the constitutionality of Virginia’s statute requiring DNA extraction from incarcerated felons).
11. See, e.g., Kincade, 379 F.3d at 839 (upholding the constitutionality of DNA collection from conditionally-released offenders).
12. To date, no court has addressed the constitutionality of requiring DNA sampling from arrestees upon arrest.
13. Specifically, courts frequently point to the “substantially diminished expectations of privacy” held by conditional releasees and inmates. Kincade, 379 F.3d at 839. For example, in upholding a federal law authorizing the collection of DNA from individuals on supervised release, the Ninth Circuit recently noted that “conditional releasees enjoy severely constricted expectations of privacy relative to the general citizenry.” Id. at 834; see also Groceman v. United States, 354 F.3d 411, 413 (5th Cir. 2004); Velasquez, 329 F.3d at 421; Shaffer v. Saffle, 148 F.3d 1180, 1181 (10th Cir. 1998); Jones, 962 F.2d at 306-07. Additionally, courts have cited supervision of parolees and inmates as presenting a special need that justifies forgiving traditional Fourth Amendment protections—namely, the need to deter convicted felons, shown to have higher rates of recidivism, from committing future crimes. See Kincade, 379 F.3d at 839; Jones, 962 F.2d at 304.
14. Prop. 69 Results, supra note 6.
neither under government supervision, nor, in fact, ever convicted of a crime—a class of individuals to which traditional legal justifications appear no longer to apply.

Specifically, the recently filed class action complaint in *Weber v. Lockyer*\(^{15}\) alleges that Proposition 69 goes beyond authorizing DNA testing of individuals who are currently in custody or under government supervision.\(^6\) In addition to requiring DNA samples from individuals upon arrest for specified crimes, Proposition 69 appears to require DNA extraction from all persons with past arrests for these crimes, regardless of whether or not the arrest resulted in a conviction, or even charges being brought.\(^7\) Thus, Proposition 69 arguably has made California the first state to authorize suspicionless DNA collection from individuals no longer under any government supervision.\(^8\) Further, in the case of erroneously arrested individuals, Proposition 69 permits DNA extraction from individuals who never should have been under government supervision in the first place.\(^9\)

The current controversy in California regarding the reach of Proposition 69's DNA databanking provisions, as well as current developments in state DNA databanking laws,\(^{20}\) provide a lens through which we might predict the next step in DNA databank expansion—the collection of DNA from former arrestees, who neither have been convicted of a felony nor remain in government custody.\(^{21}\) It is the

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16. Id. at 6-7.
17. Id. at 17.
18. Id.
19. In response to the *Weber* challenge to Proposition 69, California Attorney General Bill Lockyer filed a motion to dismiss, asserting that the class action plaintiffs have misinterpreted Proposition 69's scope. Notice of Motion and Motion of Defendants Lockyer, Steinberger, and Gima to Dismiss the Complaint at 5-6, Weber, 365 F. Supp. 2d 1119 (No. 04-5161) (on file with the Author) [hereinafter Lockyer Motion to Dismiss]. Specifically, the Attorney General announced the State's position that the expanded arrestee provisions of Proposition 69 do not authorize DNA sample collection for arrests for felony sex offenses occurring before November 3, 2004, and, relatedly, do not apply retroactively to felony arrests that occur before January 1, 2009. Id. In the alternative, however, the Attorney General argued that even if the plaintiffs have correctly interpreted Proposition 69 as retroactively applicable to them, their claims were not ripe for judicial decision and do not present a justiciable case. Id. at 10-11. In April 2005, the United States District Court for the Northern District of California dismissed the *Weber* complaint as constitutionally unripe, thereby delaying resolution of the constitutional questions raised by the complaint until such time as the court "will be better able to evaluate whether plaintiffs have a reasonable fear of DNA testing under Proposition 69." Weber, 365 F. Supp. 2d at 1125. For further discussion of the district court's decision, see infra Part III.C.
20. See infra Part III.A.
purpose of this Note to examine the constitutionality of this impending step in DNA databank expansion, and to determine whether the continued expansion of DNA databanks has come to its constitutional end.\textsuperscript{22}

This Note begins with a brief discussion of the science and history of DNA databanks in the United States. Part I provides a description of DNA and DNA analysis, as well as an account of the expansion of DNA databank use from the federal level to the state and local levels. Part II then addresses Fourth Amendment challenges brought against various DNA databank statutes, and notes that individuals covered by these statutes traditionally have been under some sort of government supervision.

Part III explores the growing debate regarding DNA databank expansion in the area of DNA sampling upon arrest, the latest expansion in DNA databanks to date. To place \textit{Weber} in the context of this new area of controversy, Part III describes the three state DNA databank laws that currently authorize DNA sampling of felony arrestees upon detention. Part III then discusses the \textit{Weber} complaint's interpretation of California's new DNA databank provisions as expanding the scope of DNA databanks beyond any other currently in existence in the United States. Although California's Attorney General has rejected the \textit{Weber} interpretation of Proposition 69's scope,\textsuperscript{23} in light of California's leadership role in the state legislative arena\textsuperscript{24} and recent political sentiment in favor of expanding federal DNA databanks,\textsuperscript{25} this Part concludes that the emergence of DNA databanking laws that authorize DNA sampling of former arrestees no longer in custody is imminent.

Part IV directly addresses the constitutionality of forcible DNA extraction from former arrestees now exonerated and no longer in custody. Specifically, it argues that taking, analyzing, and storing DNA samples and data from former arrestees no longer under government supervision violates the Fourth Amendment's prohibition on unreasonable searches and seizures. The Part begins by describing the current state of Fourth Amendment constitutional law with regard to DNA databanks, and notes two distinct analytical approaches adopted by the split federal circuit courts as a result of the Supreme Court's

\textsuperscript{22} However, this Note will not address the separate question raised in the \textit{Weber} complaint regarding the constitutionality of forcible DNA extraction from former felons no longer under any type of governmental supervision. See Plaintiff's Class Action Complaint, \textit{supra} note 15, at 5.

\textsuperscript{23} Lockyer Motion to Dismiss, \textit{supra} note 19, at 8-10.

\textsuperscript{24} \textit{See infra} Part III.C (citing United States v. Kincade, 379 F.3d 813, 848-49 (9th Cir. 2003) (Reinhardt, J., dissenting) ("California's propositions frequently are emulated by other less imaginative jurisdictions.").

\textsuperscript{25} \textit{See infra} Part III.C.
decision in *United States v. Knights.* After concluding that traditional "special needs" analysis continues to apply to suspicionless searches of individuals free from government supervision, Part IV applies the special needs approach to analyze the constitutionality of forcible DNA extraction from former arrestees.

Using this analytical framework, Part IV argues that suspicionless DNA sampling from former arrestees serves solely a normal law enforcement purpose—namely, to solve crimes—in violation of the Fourth Amendment’s prohibition of unreasonable searches and seizures. Part IV concludes that even if a court should find that the suspicionless searches entailed by DNA sampling of former arrestees present a special need beyond the normal need for law enforcement, the private interest citizens have in their bodies and genetic information outweighs the public interest in these suspicionless searches—thereby rendering these searches constitutionally invalid.

I. DNA Databanks in the United States: Science and History

A. The Science of DNA Analysis

Deoxyribonucleic acid (DNA) is a complex molecule that carries a person's genetic information and is found in the nuclei of human cells. The molecule is comprised of a particular sequence of four different chemical building blocks called nucleotides and determines an individual's unique genetic code. Generally, when DNA is analyzed, it reveals a variety of information about its carrier, including his or her ethnicity, physical characteristics, genetic defects, propensity to certain diseases, and relationship to other individuals. In recent years, scientists have suggested that DNA may carry information that can be used to predict personality traits, propensity to antisocial behavior, and sexual orientation.

Currently, the primary method of analyzing DNA samples for inclusion in state and federal databases is the Short Tandem Repeats (STR) method. Traditionally, DNA was analyzed using Restriction Fragment Length Polymorphism (RFLP) technology, which used large fragments of DNA separated by size to create a profile. However,
because RFLP analysis required larger, non-degraded samples, such as sterile blood samples that were often unavailable at crime scenes. STR analysis has become more popular. Using Polymerase Chain Reaction (PCR) to amplify certain repeating stretches of DNA called “short tandem repeats,” STR technology may analyze even small or degraded samples for inclusion in a DNA databank. Thus far, STR technology has been used to extract and analyze DNA from blood, skin tissue, hair follicles, semen, tooth pulp, and bone marrow, as well as DNA left behind on “gum, envelopes, weapons, rocks, and food products.”

The stretches of DNA that are analyzed in the STR process are considered “junk DNA”—genetically non-informative DNA not presently recognized as containing useful genetic programming material. According to the legislative history of the federal DNA databanking statute, these non-genic stretches of DNA were “purposely selected because they are not associated with any known physical or medical characteristics.” Although use of these so-called “junk sites” limits the type of information that can be gleaned from DNA analysis, DNA profiles generated by the STR process are still highly individuated and carrier-specific. These profiles subsequently allow scientists to compare the DNA from two biological samples—for example, from samples left at a crime scene and from samples taken from a suspect—to determine whether the samples came from the same individual. As a result, DNA profiles generated by STR technology have been described as “DNA fingerprints.”

33. Id.
34. Stevens, supra note 2, at 934–35 n.95.
35. FBI’S INITIATIVES, supra note 31.
36. Id.
37. Id. DNA analysis may now be done on “all kinds of human material, ‘from dandruff to old and damaged samples of blood and sperm,’” as well as on “old fragments of DNA damaged by bacteria or fungi (such as from a badly decomposed body).” Stevens, supra note 2, at 935 n.96.
40. Id.
41. LABORATORY CORP. OF AM., STR DNA Analysis (2003), http://www.labcorp.com/fid/str dna.html (last visited Feb. 7, 2005) (describing the types of evidence from which DNA may be extracted and analyzed by the Laboratory Corporation of America, a lab that performs DNA analysis for the FBI’s national DNA database).
42. Kincade v. United States, 370 F.3d 813, 818 (9th Cir. 2004).
45. Id.
47. Lawson, supra note 21, at 647.
48. Id. at 657; see also Plaintiff’s Class Action Complaint, supra note 15, at 19.
Although some suggest that DNA profiling is "analogous to the analysis of a dermatoglyphic fingerprint" because a DNA profile only individuates, rather than codes for genetic traits, others argue that "DNA fingerprint" is a "misnomer" for two reasons. First, while fingerprinting only "involves the creation of an image or impression of the external physical conformation of the fingertips," DNA is not displayed on the surface of the body and its extraction requires some measure of bodily intrusion. Second, while fingerprints reveal no other information about a person except for his identity, DNA "can reveal a vast array of highly private information about that person." Indeed, despite assertions that "junk DNA" is entirely non-genic and uninformative, many scientists still dispute that characterization. In addition to containing "instructions essential for the growth and survival of people and other organisms," junk DNA may reveal personal information about its carrier, including his or her relationship to other people and the likelihood that the carrier is of a particular race or sex. In fact, some studies have suggested that regions of DNA previously thought to be junk DNA may in fact be genic. Additionally, whether or not the type of personal information contained in junk sites is limited, DNA samples themselves contain the carrier's complete genetic and medical information. Because government laboratories usually store the actual DNA samples instead of destroying them after analysis of the junk sites, future testing remains a possibility. This option is not available in the case of fingerprints, which only provide information about an individual's identity.

B. THE RISE OF DNA DATABANKS IN THE UNITED STATES

In 1989, Virginia became the first state in the nation to develop a
forensic DNA databank.61 Other states have since followed Virginia's lead, and by June 1998, all fifty states had passed statutes authorizing the creation of state DNA databanks.62 The national DNA databank system known as the Combined DNA Index System (CODIS) began as an extension of these state databanks.63 A year after Virginia established the nation's first DNA databank, the FBI launched a pilot project serving fourteen state and local laboratories—a project that later developed into CODIS.64 The DNA Identification Act of 1994 officially authorized the FBI to establish a national DNA index for law enforcement purposes65 containing information from four sources: "persons convicted of crimes," "samples recovered from crime scenes," "samples recovered from unidentified human remains," and "samples voluntarily contributed from relatives of missing persons."66

The CODIS system established by the DNA Identification Act uses two different indexes to generate investigative leads in crimes where biological evidence is discovered at a crime scene: the Forensic and Offender indexes.67 The Forensic Index consists of DNA profiles recovered from crime scene evidence and is used primarily to identify serial offenders by linking crimes to an unknown individual.68 The Offender Index contains DNA profiles of convicted felons, which are compared to the profiles in the Forensic Index.69 As of July 2005, of the 2,485,857 total profiles stored in the CODIS system, 114,102 are Forensic profiles and 2,599,959 are Convicted Offender profiles.70

CODIS is comprised of DNA databanking information shared among three hierarchical levels—local, state, and national.71 All DNA profiles originate at the local level in law enforcement crime laboratories, which use the Local DNA Index System (LDIS) to analyze and develop these profiles.72 The DNA profiles then flow to the State DNA Index System (SDIS), which allows local laboratories within the state to exchange profiles.73 At the national level, the FBI maintains the National DNA Index System (NDIS), which permits state and local laboratories

61. Stevens, supra note 2, at 925.
62. Id.
63. Id. at 926–27.
67. THE FBI’S COMBINED DNA INDEX SYSTEM PROGRAM: CODIS, supra note 64; Stevens, supra note 2, at 927.
68. Stevens, supra note 2, at 927.
69. Id.
70. COMBINED DNA INDEX SYSTEM (CODIS), supra note 1.
71. THE FBI’S COMBINED DNA INDEX SYSTEM PROGRAM: CODIS, supra note 64.
72. Id.; Stevens, supra note 2, at 927.
73. Stevens, supra note 2, at 927–28.
participating in the CODIS system to exchange, compare, and search DNA profiles from across the nation. State and local agencies participating in CODIS have discretion in deciding what information contained in their DNA profiles will be relayed to the national level based on their specific legislative or legal requirements. All fifty states have become participants of CODIS. California alone has compiled 271,700 total profiles, more than any other state.

C. A SUMMARY OF FOURTH AMENDMENT CHALLENGES TO COMPULSORY DNA EXTRACTION

A spate of legal challenges to DNA databanking followed shortly after Virginia launched the nation’s first DNA database. Most of these challenges have alleged violations of the Fourth Amendment’s prohibition of unreasonable searches and seizures, and most have been unsuccessful. In upholding the Fourth Amendment constitutionality of these DNA databanking statutes, federal circuit courts have taken two distinct approaches: traditional Fourth Amendment balancing test analysis and the “special needs” doctrine. In both instances, a major factor in the courts’ analyses has been the plaintiff’s reduced expectation of privacy as a supervisee or ward of the state.

74. State and local law enforcement labs participating in CODIS receive CODIS software, installation, and user support free of charge. Id. at 928.
75. Id. at 927–28.
76. Id. at 928–29.
77. Taylor, supra note 1, at 513–14.
78. COMBINED DNA INDEX SYSTEM (CODIS), supra note 1. The impact of Proposition 69 on the expansion of California’s DNA database will be revealed quarterly:
On or before April 1 in the year following adoption of the act that added this paragraph, and quarterly thereafter, the Department of Justice DNA Laboratory shall submit a quarterly report to be published electronically on a Department of Justice website and made available for public review. The quarterly report shall state the total number of samples received, the number of samples received from the Department of Corrections, the number of samples fully analyzed for inclusion in the CODIS database, and the number of profiles uploaded into the CODIS database for the reporting period.

79. See Jones v. Murray, 962 F.2d 302, 306 (4th Cir. 1992) (representing the first federal appellate case to address the constitutionality of DNA databanking for convicted offenders). As indicated above, “[a]s of June 2000, state DNA database laws had been challenged in sixteen jurisdictions.” Stevens, supra note 2, at 937.
80. Stevens, supra note 2, at 937.
81. United States v. Kincade, 379 F.3d 813, 831 n.25 (9th Cir. 2004). Indeed, DNA collection statutes have been invalidated only three times, only to be upheld on appeal or overturned by later circuit court decisions. See United States v. Kincade, 345 F.3d 1095, 1113 (9th Cir. 2003), vacated and reh’g en banc granted, 354 F.3d 1000 (9th Cir. 2004); United States v. Miles, 228 F. Supp. 2d 1130, 1140 (E.D. Cal 2002); Maryland v. Raines, No. 98303 (Montgomery County Cir. Ct. Crim., Jan. 27, 2004), vacated, 857 A.2d 19 (Md. 2004).
82. See infra Part III.A.
83. Kincade, 379 F.3d at 834, 839; Groceman v. United States, 354 F.3d 411, 413 (5th Cir. 2004); Velasquez v. Woods, 329 F.3d 420, 421 (5th Cir. 2003); Shaffer v. Saffle, 148 F.3d 1180, 1181 (10th Cir. 1998); Jones, 962 F.2d at 306–7.
In one category of cases, a number of federal courts have upheld the constitutionality of compelled DNA extraction from prison inmates, citing the inmates’ substantially diminished expectation of privacy as the main justification. In *Jones v. Murray*, the Fourth Circuit became the first federal appellate court to address the constitutionality of DNA databanking as applied to convicted offenders. In reaction to Virginia’s recently enacted statutory requirement that incarcerated felons provide the state with a blood sample for DNA analysis, six inmates refused to submit to DNA sampling, claiming that Virginia’s statute violated the Fourth Amendment’s prohibition on unreasonable searches and seizures. Although the Fourth Circuit recognized that the Fourth Amendment applies to prison inmates, it held that prison inmates are not entitled to the usual Constitutional requirement that probable cause or even individualized suspicion support a bodily search. Instead, the court held that persons under state supervision, whether detained following arrest or conviction, or on probation, lose “some, if not all, rights to personal privacy otherwise protected by the Fourth Amendment.” The court justified this reasoning by asserting that “probable cause had already supplied the basis for bringing the person within the criminal justice system.” Ultimately, the Fourth Circuit found the plaintiffs’ status as wards of the state so central to its analysis as to distinguish “prison inmates . . . [as] compr[is]ing a separate category of cases to which the usual per se requirement of probable cause does not apply.”

In light of these considerations, the Fourth Circuit proceeded to balance the state interest in establishing the DNA database against the intrusion upon the inmates’ privacy interest and found that the state’s interest in identification outweighed the inmates’ nearly negligible privacy interests.

The Fifth, Seventh, and Tenth Circuits have applied similar reasoning to uphold the constitutionality of compulsory DNA sampling of prison inmates. In validating Wisconsin’s DNA databank statute, which requires DNA sampling of incarcerated felons, the Seventh Circuit in *Green v. Berge* contrasted the “limited privacy interests that prisoners retain” with that of persons “free of state custody.” Similarly, in

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84. *Jones*, 962 F.2d at 303.
85. *Id.* at 304-05.
86. *Id.* at 307 n.2.
87. *Id.* at 306.
88. *Id.*
89. *Id.* at 307 n.2.
90. *Id.* at 307.
93. Shaffer v. Saffle, 148 F.3d 1180, 1181 (10th Cir. 1998).
94. *Green*, 354 F.3d at 677.
Shaffer v. Saffle, the Tenth Circuit cited "an inmate's diminished privacy rights" as one of three reasons for upholding Oklahoma's DNA databank statute. And in Velasquez v. Woods, the Fifth Circuit dismissed as frivolous a complaint by incarcerated felons that DNA sampling violated their Fourth Amendment rights, citing the Tenth Circuit's language in Shaffer describing inmates' diminished privacy rights.

In a second category of cases upholding the federal DNA database statute, the Ninth Circuit has extended the reduced expectation of privacy rationale to "parolees and other conditional releasees." In United States v. Kincade, the Ninth Circuit recently reconsidered the constitutionality of compulsory DNA sampling of conditionally released offenders in the absence of individualized suspicion. As a critical part of its Fourth Amendment balancing test analysis, the Ninth Circuit noted that "conditional releasees enjoy severely constricted expectations of privacy relative to the general citizenry"—first, because their freedom has been conditioned on compliance with certain requirements that necessarily infringe on their privacy interests, and second, because individuals who have been in custody "leave prison with substantially reduced sensitivities" to bodily intrusions. Ultimately, the court upheld the federal DNA databank statute, finding that the government's "compelling" interest in identification and deterrence of crime outweighed the minimal privacy interests conditional releasees possess as a result of their status as state wards.

Thus far, the federal circuits' almost unanimous endorsement of DNA databank statutes has rested upon the conclusion that the plaintiffs are entitled to a drastically reduced modicum of privacy as a direct result of their detention or supervision by the state. As illustrated below, the courts must significantly alter their analysis when plaintiffs who are no longer under government supervision bring Fourth Amendment challenges to DNA databank statutes.

II. DNA SAMPLING UPON ARREST: AN EMERGING AREA OF EXPANSION

To date, no court has addressed the constitutionality of requiring

95. Id. at 679.
96. Shaffer, 148 F.3d at 1181.
98. United States v. Kincade, 379 F.3d 813, 833 (9th Cir. 2004).
99. Id. at 816.
100. Id. at 834.
101. Id.
102. Id. at 837.
103. Id. at 836-39.
DNA sampling upon arrest, much less the constitutionality of requiring DNA sampling from former arrestees. In fact, only four states, including Louisiana,\textsuperscript{104} Texas,\textsuperscript{105} Virginia,\textsuperscript{106} and most recently, California,\textsuperscript{107} currently mandate DNA collection upon arrest. However, a debate is emerging among legal scholars regarding whether this trend towards expanding DNA databases to include more classes of individuals comports with constitutional requirements.\textsuperscript{108} Although some suggest that expanding the scope of DNA databases to include arrestees exceeds constitutional limits,\textsuperscript{109} others conclude that DNA sampling of arrestees may be justified by the same reasons that have supported the federal circuits' approval of less expansive DNA databank statutes.\textsuperscript{110}

This Part will place 

\textit{Weber v. Lockyer} in the context of this relatively new area of DNA databank expansion, first by describing the three state DNA databank statutes that currently authorize DNA sampling upon felony arrest, and then by discussing how California's Proposition 69 appears to expand DNA databanks even further to include former arrestees. In light of the nationwide political trend towards DNA expansion, this Part projects that DNA databank statutes soon may expand to include former arrestees.

A. Laying the Groundwork: State Statutes Authorizing Compulsory DNA Extraction Upon Arrest

In 1997, Louisiana became one of the first states\textsuperscript{111} to mandate DNA sampling and analysis upon arrest for a felony or other specified offense, including battery and sex-related crimes.\textsuperscript{112} At the time, Louisiana's

\begin{footnotesize}
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\item VA. CODE ANN. §§ 19.2-310.2–310.7 (2004).
\item CAL. PENAL CODE §§ 295–299.7 (2005).
\item See generally Kaye, supra note 21 (examining the constitutionality of sampling and analyzing DNA from arrested individuals and concluding that such sampling and analysis may be constitutional in limited circumstances).
\item See Taylor, supra note 1, at 511 ("This Comment asserts that state DNA databases that index the genetic profiles of non-convicted persons—including both arrestees and cleared suspects—are unconstitutional under the Fourth and Fourteenth Amendments.")
\item Lawson, supra note 21, at 657, 667 (arguing that arrestees possess a diminished expectation of privacy similar to that of prisoners or pretrial detainees and urging states to "collect DNA samples from arrestees and include DNA fingerprints analyzed from those samples in their DNA databases"); see supra Part I.C.
\item In 1994, South Dakota passed a law permitting DNA sampling from people who had been arrested for any crime, but the law was changed in 1997 to authorize DNA sampling from convicted offenders. Stevens, supra note 2, at 948.
\item A person who is arrested for a felony or other specified offense, including an attempt, conspiracy, or criminal solicitation, or accessory after the fact of such offenses on or after September 1, 1999, shall have a DNA sample drawn or taken at the same time he is fingerprinted pursuant to the booking procedure.
\end{enumerate}
\end{footnotesize}
databank represented the most expansive DNA database in the nation.\textsuperscript{113} Texas followed with a more narrowly drawn statute in 2001, amending its DNA databank law to compel DNA collection from defendants who have been arrested for specified felonies, including family violence, sexual assault, or child abuse, but only after having been convicted of or placed on deferred adjudication for such an offense.\textsuperscript{114} Like the Louisiana statute, Texas' statute called for the DNA sampling to occur at the time of fingerprinting and booking.\textsuperscript{115} Finally, in 2002, Virginia authorized DNA sampling and analysis of individuals arrested for a "violent felony" prior to their release from custody.\textsuperscript{116} Virginia is unique in requiring that a magistrate or grand jury find probable cause for the arrest prior to the DNA sampling.\textsuperscript{117}

Louisiana, Texas, and Virginia represent the nation's newest trend towards expanding DNA databases to include profiles from individuals arrested for a range of crimes beyond sexual offenses.\textsuperscript{118} As of June 2004, four additional states, including Delaware, Illinois, New Jersey, and New York, were considering expanding the scope of their DNA databanks to include individuals arrested for felonies, violent felonies, or "crime[s] for which fingerprints are required."\textsuperscript{119} Aside from the specific underlying crimes that trigger DNA extraction upon arrest, databank laws in Louisiana, Texas, and Virginia differ only in the process available for expunging a DNA profile from the state's database. Although the Texas statute provides for mandatory expunction of DNA profiles upon acquittal of the defendant or dismissal of the case,\textsuperscript{120} both Louisiana and Virginia provide for expunction of their profiles and samples only upon

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\item \textsuperscript{113} Stevens, \textit{supra} note 2, at 948.
\item \textsuperscript{114} TEX. GOV'T CODE ANN. § 411.1471(a)(2) (2005).
\item \textsuperscript{115} Id. § 411.1471(b).
\item \textsuperscript{116} VA. CODE. ANN. § 19.2-310.2:1 (2004).
\item \textsuperscript{117} Id.
\item \textsuperscript{118} Aside from Louisiana, Texas, and Virginia, Mississippi and Kentucky require DNA samples from individuals who are arrested for sexual felonies. MISS. CODE. ANN. § 45-33-37(2) (2004) ("From and after January 1, 1996, every individual... in the custody of the Mississippi Department of Corrections for a sex offense... shall submit a biological sample for purposes of DNA identification analysis before release from or transfer to a state correctional facility or county jail or other detention facility."); KY. REV. STAT. ANN. § 17.170(1) (2004) (providing that any person in the custody of the Kentucky Department of Corrections after July 14, 1992, for specified felony sex offenses "may, have a sample of blood, an oral swab, or sample obtained... for DNA... law enforcement identification purposes and inclusion in law enforcement identification databases").
\item \textsuperscript{120} TEX. GOV'T CODE ANN. § 411.1471(e) ("On acquittal of a defendant... or dismissal of the case against the defendant, the court shall order the law enforcement agency taking the specimen to immediately destroy the record of the collection of the specimen and require the department to destroy the specimen and the record of its receipt.").
\end{itemize}
request of the contributor following acquittal, reversal, or dismissal.\textsuperscript{121}

B. \textbf{PROPOSITION 69: A LOOK TOWARDS THE NEWEST EXPANSION IN THE SCOPE OF DNA DATABASES}

In November 2004, over 7 million Californians voted to pass Proposition 69,\textsuperscript{122} an initiative statute that promised to “help[] solve crime, free those wrongfully accused, and stop serial killers”\textsuperscript{123} by expanding the state’s DNA database to include adults arrested for or charged with a serious felony offense.\textsuperscript{124} By 2009, Proposition 69 requires the collection of DNA from adults arrested for or charged with any felony offense.\textsuperscript{125} At first glance, Proposition 69 appears no more expansive than other statutes that require DNA sampling upon arrest. However, since Proposition 69’s passage, California has been criticized as having “the most draconian DNA database system in the country because of Proposition 69.”\textsuperscript{126}

Specifically, as the class action complaint in \textit{Weber v. Lockyer} alleges, Proposition 69 appears to require DNA samples not only from individuals arrested for or charged with murder, voluntary manslaughter, or a felony sexual offense upon arrest, but also from all persons who have ever been arrested for those offenses—and by 2009, DNA from all persons who have ever been arrested for, or charged with, \textit{any} felony offense.\textsuperscript{127} This provision would apply regardless of whether or not the arrest resulted in a conviction or even charges being brought.\textsuperscript{128}

According to the plaintiffs, California’s Proposition 69 thus presents the newest expansion in DNA databases by authorizing DNA testing of individuals who are not currently in custody or under government supervision. Indeed, Proposition 69 mandates collection of DNA from individuals who perhaps never should have been under government supervision.\textsuperscript{129}

\textsuperscript{121} LA. REV. STAT. ANN. § 15:614 (2005); VA. CODE ANN. § 19.29-510.7.
\textsuperscript{122} Prop. 69 Results, \textit{supra} note 6. Proposition 69 passed with a majority vote of 62\%\textsuperscript{,} comprised of 7,183,917 voters. \textit{Id.}
\textsuperscript{124} CAL. PENAL CODE § 296(a)(2) (2005). Such offenses include the commission, or attempted commission, of murder, voluntary manslaughter, and felony sex offenses. \textit{Id.}
\textsuperscript{125} \textit{Id.} § 296(a)(2)(C).
\textsuperscript{127} Plaintiff’s Class Action Complaint, \textit{supra} note 15, at 17. Prior to the enactment of Proposition 69, California law only required DNA sampling of persons convicted of certain serious felony offenses. \textit{Id.} at 14.
\textsuperscript{128} \textit{Id.} at 3.
\textsuperscript{129} \textit{Id.} at 2.
As a result of Proposition 69's passage, section 296 of the California Penal Code now provides that any adult person who is arrested for or charged with specified felony offenses—and commencing on January 1, 2009, any adult person who is arrested for any felony offense—"shall provide buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required pursuant to this chapter for law enforcement identification analysis." The language critical to the Weber plaintiffs' interpretation of Proposition 69 is located at section 296.1(b), which provides for "[r]etroactive application of paragraphs (1), (2), (3), (4), (5), and (6) of subdivision (a)." Section 296.1(b) thus provides for retroactive application of the extraction-upon-arrest provision in section 296(a) of the Penal Code. According to the plaintiffs, section 296.1(b) can only be interpreted as subjecting to DNA extraction and analysis "all persons who have ever been arrested for or charged with" the specified felonies prior to 2009, and any felony starting January 1, 2009.

The Weber plaintiffs find further support for their interpretation of Proposition 69's expansive scope in section 296.1(a)(1)(B) of the Penal Code, which declares that:

If the person subject to this chapter did not have specimens, samples, and print impressions taken immediately following arrest or during booking or intake procedures or is released on bail or pending trial or is not confined or incarcerated at the time of sentencing or otherwise bypasses a prison inmate reception center maintained by the Department of Corrections, the court shall order the person to report within five calendar days to a county jail facility or to a city, state, local, private, or other designated facility to provide the required specimens, samples, and print impressions ....

Thus, the plaintiffs argue, Proposition 69 requires anyone who has ever been arrested and who, at that time, had not submitted to DNA sampling to submit a DNA sample within five days of a court order after the passage of Proposition 69.

The Weber plaintiffs' class includes "all persons who are, or will be, compelled to submit to the involuntary collection of their DNA under sections 295 et seq. of the California Penal Code solely by reason of the fact that they have been arrested for, or charged with, a felony offense." Some of the named plaintiffs include: a victim of identity...
theft who was mistakenly arrested in April 2004; a woman who was arrested for, charged with, and later acquitted of murder when she shot her husband in self-defense; a man who was erroneously arrested for possession of medical marijuana; and a San Francisco resident who participated in an anti-war demonstration in November 2004 and was a member of the crowd of participants arrested for felony assault with a deadly weapon when a bottle was thrown by an unknown person in the crowd.135

As the Weber plaintiffs indicate, Proposition 69's broad mandate also covers:

[P]ersons who are [or have been] arrested for a felony but against whom charges are quickly dropped in the recognition that they are innocent and that no probable cause existed for the arrest in the first place; persons against whom arrest warrants are [or have been] issued as a result of mistaken identity, including victims of identity theft; persons, such as victims of domestic violence, who are [or have been] arrested for violence committed in self-defense and who either have the charges against them dropped or are subsequently acquitted; participants in political demonstration and other activities who have committed no crime but are [or have been] nonetheless arrested in connection with broad sweeps of participants by the police; persons who are [or have been] wrongly arrested due to police misconduct; persons who are [or have been] arrested for felony possession of marijuana but against whom charges are dropped or dismissed upon a showing that they were in lawful possession of the marijuana for medical purposes; persons who are [or have been] subject to overcharging upon their initial arrest for minor offenses and are hence charged with felonies but are ultimately convicted of nothing more than misdemeanors . . . 136

Because Proposition 69 does not require probable cause or even individualized suspicion to justify the compulsory DNA sampling and analysis of arrestees, the plaintiffs argue that Proposition 69 violates the Fourth Amendment's protections against unreasonable searches and seizures and the Fourteenth Amendment's right to privacy and due process.137

The plaintiffs further criticize California's newly modified

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DNA under Sections 295 et seq. of the California Penal Code. ("Formerly Convicted Persons Class").

Id. at 6-8.

135. Id. at 3-4.

136. Id. at 20-22. The lack of individualized suspicion underlying compulsory DNA extraction in California becomes especially evident when one considers the types of offenses for which arrestees will qualify for DNA testing by 2009—namely, offenses that do not require biological evidence to solve, including "the use of unauthorized signatures in a campaign advertisement, writing checks with insufficient funds, accepting a bribe to throw a sporting event, racing a horse under a fictitious name, or counterfeiting railroad tickets." Id. at 3; see CAL. PENAL CODE §§ 115.1, 337c, 337f, 476(a), 481.
expunction provisions as inadequate and burdensome, citing that expunction will only take place upon request, in the absence of an objection from the prosecuting attorney or the Department of Justice, and only after a 180-day waiting period has expired. Additionally, the plaintiffs note the troubling fact that “[t]he court has the discretion to grant or deny the request for expungement,” and that a “denial of a request for expungement is a nonappealable order and shall not be reviewed by petition for writ.” California’s new expunction process thus represents the most cumbersome of the four statutes that provide for DNA sampling upon arrest. When this provision is considered in combination with what seems to be Proposition 69’s radically broad inclusion of former arrestees in the state’s DNA databank, California justifiably appears to represent the forefront of DNA databank expansion. Accordingly, plaintiffs have requested from the court declaratory and injunctive relief from the implementation of Proposition 69’s provisions.

C. UNANSWERED QUESTIONS: THE IMPACT OF THE WEBER DISMISSAL

Since the filing of the Weber complaint in December 2004, the United States District Court for the Northern District of California has dismissed the complaint as “constitutionally unripe.” As a result, the court never had the opportunity to determine the expansiveness of Proposition 69’s scope or to resolve the constitutional questions raised in the complaint. Whether Proposition 69’s provisions apply to former arrestees thus remains an open question.

In February 2005, California Attorney General Bill Lockyer filed a motion to dismiss, asserting that the Weber plaintiffs construed Proposition 69’s scope too broadly. Specifically, the Attorney General took the position that the expanded arrestee provisions of Proposition 69 neither authorize DNA sampling for arrests for felony sex offenses occurring before November 3, 2004, nor authorize retroactive DNA sampling from individuals arrested for felonies before January 1, 2009. In support of the State’s position, the Attorney General cited an unofficial, unpublished “Information Bulletin” entitled “Proposition 69—DNA Fingerprint, Unsolved Crime and Innocence Protection Act,

138. CAL. PENAL CODE § 299(a)-(c).
139. Id. § 299(c)(1).
140. Prior to the passage of Proposition 69, California’s DNA databank statute provided for the “automatic expungement of data and samples taken from persons whose convictions are overturned.” Plaintiff’s Class Action Complaint, supra note 15, at 18.
141. See supra Part II.B.
144. Lockyer Motion to Dismiss, supra note 19, at 10.
145. Id. at 8–9.
Effective November 23, 2004,” which was alleged to have been distributed to California law enforcement authorities, and which purports to make clear that the arrestee provisions of Proposition 69 do not apply retroactively to arrests taking place prior to November 3, 2004, or to felony arrests taking place prior to January 1, 2009. In the alternative, the Attorney General argued that even if plaintiffs correctly interpreted Proposition 69 as retroactively applicable to them, their claims were not ripe for judicial decision and did not present a justiciable case.

In their opposition papers, the plaintiffs suggested that the Attorney General’s interpretation of Proposition 69’s scope was not binding and thus could not provide certainty that state law enforcement agencies would not apply Proposition 69’s arrestee provisions retroactively. Additionally, in pointing to the facts that the Attorney General issued the draft Information Bulletin conveying his position on Proposition 69’s scope more than a month after the filing of the plaintiff’s complaint and that the bulletin had yet to be finalized, the plaintiffs argued that the Attorney General’s assurances were of “questionable reliability.” Not only were his assurances non-binding, but also the current or future Attorney General could reverse the state’s position on Proposition 69’s scope “without warning.” For these reasons, the plaintiffs insisted that the court rely on the text of Proposition 69 to support an interpretation of the statute as authorizing DNA sampling of former arrestees.

In considering the Attorney General’s motion to dismiss, the Northern District court focused exclusively on the issues of standing and ripeness. The court applied the Ninth Circuit’s three-pronged framework for analyzing whether a constitutional challenge to a state statute before its enforcement was ripe for review: “(1) whether the plaintiffs have articulated a ‘concrete plan’ to violate the law in question,

146. Id.
147. Id. at 18-19.
149. Plaintiff’s Opposition, supra note 148, at 5.
150. Id. at 1.
151. Id. at 4 (“The Attorney General gave this assurance in the form of a draft Law Enforcement Information Bulletin issued on January 11, 2005, more than a month after the Complaint in this case was filed, and that is still not finalized.”).
152. Id. at 10.
153. Id.
154. Id. at 1, 11.
155. Id. at 5–6.
(2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and (3) the history of past prosecution or enforcement under the challenged statute.” Ultimately, the court found that dismissal was warranted by a failure to meet the latter two prongs of the Ninth Circuit test.5

First, the fact that Proposition 69 had been recently enacted and thus lacked a history of past enforcement against the plaintiffs or other similarly situated persons weighed in favor of finding the case constitutionally unripe.6 Second, the court noted the absence of a specific warning or threat that Proposition 69 would be enforced in the manner feared by the plaintiffs; instead, the court pointed out that the Attorney General's Bulletin strongly suggested that Proposition 69 would not be enforced against the plaintiffs or other similarly situated persons.7 As a result, the complaint only posed hypothetical or abstract, rather than definite and concrete injuries necessary to establish a constitutional “case or controversy” for standing and ripeness purposes.8

Having found that the plaintiffs could not establish the ripeness of their claims, the court refused to determine “whether plaintiffs have a reasonable fear of DNA testing under Proposition 69.” Instead, the court noted that “the state's interpretation and enforcement of Proposition 69 [would] become much clearer as January 2009 nears.” The court suggested that only then would it be in a position to make an informed decision whether or not the plaintiffs had accurately interpreted Proposition 69's provisions as applying to former arrestees. Because the court never addressed the merits of the complaint, Weber's dismissal did not end the inquiry into the expansiveness and constitutionality of Proposition 69's scope.

D. THE FUTURE OF DNA DATABANKS: COMPULSORY DNA SAMPLING AND ANALYSIS OF FORMER ARRESTEES

Thus, regardless of the Attorney General's own interpretation of Proposition 69's scope, the fact that Proposition 69's arrestee provisions

157. Id. at 1124 (citing Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1139 (9th Cir. 2000)).
158. Id. at 1124-26.
159. Id. at 1126.
160. Id. at 1125. However, the court acknowledged the possibility that the enforcement policy of the state could change or that local officials might disregard the Attorney General's Bulletin. Id. at 1126. Under these circumstances, the court recognized that “the ripeness inquiry might lead to a different answer.” Id.
161. Id. at 1124, 1126.
162. Id. at 1125.
163. Id.
164. Id.
plausibly have been interpreted as mandating DNA sampling of all former arrestees provides a lens through which we might predict the next step in DNA databank expansion. First, California's status as a role model in the state legislative arena suggests that the possibly revolutionary scope of Proposition 69 may be adopted in other jurisdictions. In fact, the Ninth Circuit's Judge Stephen Reinhardt has specifically referenced California's Proposition 69 in pronouncing that "California's propositions frequently are emulated by other less imaginative jurisdictions," and in predicting drastic expansion to state and federal databases. Because no California court has either affirmed or disaffirmed the Weber plaintiffs' interpretation of Proposition 69's scope, the ambiguity of Proposition 69's reach may influence other states to expand the scope of their own DNA databank statutes.

Second, recent political sentiment in favor of significantly expanding the scope of federal and state DNA databanks further suggests that DNA databank laws authorizing DNA sampling of former arrestees no longer in custody is not an idle prospect. To begin with, both state and federal legislatures are considering plans to expand their DNA databases to include arrestees. In 1999, the seventeen hundred members of the International Association of Chiefs of Police unanimously voted to urge Congress to pass a federal law authorizing DNA sampling upon arrest. Mandatory DNA testing of arrestees has also received support from former U.S. Attorney General Janet Reno and from more than fifty-four percent of the public. Additionally, a study conducted in July 1999 by a committee of the National Commission on the Future of DNA Evidence concluded that DNA sampling of arrestees probably would be constitutional. In fact, one of the principal reasons the FBI has yet to implement DNA testing of arrestees is a lack of funds. Furthermore, the nationwide appeal of expanding DNA databases has not been limited to DNA sampling upon arrest. Rather, some have suggested that expanding the national DNA database to cover all Americans might comport with Constitutional requirements. For example, former mayor of New York Rudolph Giuliani in 1999 called for comprehensive DNA sampling and analysis from all individuals at birth.

166. See supra Part III.A; Stevens, supra note 2, at 949-51.
167. Stevens, supra note 2, at 949.
168. Id. at 949-50.
170. Stevens, supra note 2, at 951.
171. Id. at 955.
172. Id. at 955-56 ("Rudolph Giuliani, Mayor of New York, stated in 1999 that he would have no
When considered alongside California's influence over state legislation, such robust political sentiment for expanding the scope of national and state DNA databases suggests that the next series of DNA databanking laws will be modeled on the Weber plaintiffs' interpretation of California's Proposition 69. It is likely then that the next step in DNA databank expansion will be laws that authorize DNA sampling of former arrestees. At the same time, however, DNA sampling of former arrestees may mark the constitutional end of DNA databank expansion; for like any other suspicionless bodily search and seizure, DNA sampling of former arrestees must present a special need beyond an ordinary law enforcement purpose.173

III. THE CONSTITUTIONALITY OF DNA SAMPLING POST-ARREST UNDER THE SPECIAL NEEDS APPROACH

The passage of California's Proposition 69 and the arguments set forth in the Weber complaint have raised new questions regarding the constitutionality of extracting DNA from former arrestees. In the past, the federal circuits' essentially undivided approval of state and national DNA databank statutes has rested on the premise that a plaintiff enjoys a reduced expectation of privacy as a supervisee or ward of the state. However, traditional legal justifications do not apply to former arrestees no longer under government supervision and never convicted of a crime.

This Part directly addresses the constitutionality of forcible DNA extraction from former arrestees who have been exonerated and released from custody. It begins by describing the current Fourth Amendment framework for analyzing the constitutionality of DNA sampling by the government, and notes two distinct analytical approaches adopted by the federal circuit courts as a result of the Supreme Court's decision in United States v. Knights.174 Upon concluding that the Court's holding in Knights does not require in this case a departure from the traditional "special needs" analysis that applies to suspicionless searches, the Part applies the special needs approach to analyze the constitutionality of compulsory DNA sampling of former arrestees. Ultimately, this Part finds that suspicionless DNA sampling of former arrestees primarily serves the ordinary law enforcement purpose of solving crimes, and thereby violates the Fourth Amendment.

A. THE FOURTH AMENDMENT FRAMEWORK FOR ANALYZING THE CONSTITUTIONALITY OF DNA DATABANKS

The Fourth Amendment guarantees "[t]he right of the people to be

173. See infra Part III.A.
secure in their persons... against unreasonable searches and seizures.\footnote{U.S. Const. amend. IV.} To determine the existence of a Fourth Amendment privacy interest, the Supreme Court has set forth two requirements: "first that a person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'\footnote{Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).}

Additionally, whether a search is reasonable under the Fourth Amendment depends on the nature of the search and the surrounding circumstances.\footnote{Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989).} Generally, a search is reasonable only when it is accomplished pursuant to a judicial warrant issued upon probable cause.\footnote{Id.} Even when the Court has held that probable cause is unnecessary,\footnote{Id. at 822.} it usually requires "'some quantum of individualized suspicion.'\footnote{Id.} Under Supreme Court doctrine, searches conducted with a complete lack of suspicion are reasonable only when they present "'special needs, beyond the normal need for law enforcement' that make individualized suspicion "'impracticable.'\footnote{Id. at 823; see Skinner, 489 U.S. 602.} Thus, conducting a suspicionless search for a pure law enforcement purpose would seem to violate the Fourth Amendment.\footnote{Id. at 823.} Otherwise, a degree of individualized suspicion less than probable cause is warranted only "'when the balance of governmental and private interests makes such a standard reasonable.'\footnote{Id. at 824 (citation omitted); see also Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).}

In its 1989 \textit{Skinner v. Railway Labor Executives Ass'n} decision, the Supreme Court considered whether suspicionless blood and urine testing of railroad employees following major accidents qualified as a special

\begin{itemize}
  \item \textit{Edmond}, 531 U.S. at 37 (citation omitted).
  \item \textit{Skinner}, 489 U.S. at 619 (citations omitted).
  \item \textit{Id.}
\end{itemize}
need. In light of "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety," the Court held that the search in Skinner presented special needs "'beyond normal law enforcement.'" 86

Similarly, in Michigan Department of State Police v. Sitz, the Court considered whether state-authorized highway sobriety checkpoints presented a special need beyond normal law enforcement. 87 Noting the "magnitude of the drunken driving problem," as well as the State's "'grave and legitimate'" interest in curbing drunken driving, the Court held that highway sobriety checkpoints did present a special need beyond normal law enforcement. 88

In both Sitz and Skinner, the Supreme Court limited application of the special needs doctrine to situations involving searches intended to protect public safety from imminent harm. However, as the Court has stressed, where the primary purpose of a government program is "ultimately indistinguishable from the general interest in crime control," the program does not qualify as a special need. 189 Suspicionless searches under such a program thus violate the Fourth Amendment.

In 2000, the Supreme Court considered in City of Indianapolis v. Edmond the constitutionality of a highway checkpoint program that used suspicionless searches to discover and intercept illegal drugs. 190 The Court distinguished the checkpoint program in Edmond from that in Sitz by noting the different purposes of each program. The Court emphasized that the checkpoint program in Sitz was "clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways." 191 By contrast, the primary purpose of the Edmond program was to "detect evidence of ordinary criminal wrongdoing," a goal "indistinguishable from the general interest in crime control." 192 The Court further stated that only exigent circumstances, such as the flight of a dangerous criminal, could justify checkpoints with the primary purpose of crime control. 193 Noting the lack of such circumstances, the Court held that the checkpoint program in Edmond did not qualify as a special

185. Id. at 608.
186. Id. at 620 (citation omitted).
188. Id. at 447, 449, 451 (citation omitted).
190. Id. at 34.
191. Id. at 39.
192. Id. at 38, 44, 48.
193. Id. at 44.
need. ¹⁹⁴

The following year, in Ferguson v. City of Charleston, the Supreme Court examined the constitutionality of a hospital program that tested pregnant women for drug use and then turned over the results to law enforcement officials if a woman tested positive twice. ¹⁹⁵ The government hoped to protect the health of mothers and unborn children through the threat of criminal punishment under the program. ¹⁹⁶ The Court held that the program did not qualify as a special need because "the immediate objective of the searches was to generate evidence for law enforcement purposes." ¹⁹⁷ The Court noted that although a major goal of the program was to aid women with substance abuse problems, the program's primary law enforcement purpose disqualified the program as a special need. ¹⁹⁸

The Court further remarked that the "extensive involvement of law enforcement officials at every stage of the policy" was significant in determining that the program did not fall under the special needs exception. ¹⁹⁹ In Ferguson and Edmond, law enforcement officials used drug test results to investigate and prosecute criminal activity. ²⁰⁰ By contrast, drug and alcohol test results in Skinner were not intended to "assist in the prosecution of employees." ²⁰¹ Thus, in both Ferguson and Edmond, the Supreme Court affirmed that where "law enforcement authorities pursue primarily general crime control purposes," searches "can only be justified by some quantum of individualized suspicion." ²⁰²

B. CIRCUIT SPLIT IN THE APPROACHES TO ASSESSING THE FOURTH AMENDMENT CONSTITUTIONALITY OF DNA DATABANK STATUTES: THE EFFECT OF KNIGHTS

Currently, the federal circuit is split as to the effect that the Supreme Court's 2001 decision in United States v. Knights ²⁰³ has on the applicability of the special needs approach to bodily intrusions occasioned by DNA databank laws. In Knights, the Supreme Court considered whether the warrantless search of a probationer's home, supported by reasonable suspicion, was constitutional under the Fourth Amendment. ²⁰⁴ Applying the traditional Fourth Amendment totality of the circumstances balancing test rather than special needs analysis, the

¹⁹⁴ Id. at 48.
¹⁹⁶ Id. at 81.
¹⁹⁷ Id. at 83.
¹⁹⁸ Id. at 83-84.
¹⁹⁹ Id. at 84.
²⁰² Edmond, 531 U.S. at 47; Ferguson, 532 U.S. at 67.
²⁰⁴ Id. at 114.
Court held that the search was reasonable because there was a "sufficiently high probability that criminal conduct [was] occurring." The Court ultimately found that the government's interest in public safety justified the reduced degree of suspicion required to intrude on Knights' privacy interests.

1. **Circuits in Favor of Using the Totality of the Circumstances Approach**

The Fourth, Fifth, and Ninth Circuits, one Seventh Circuit judge, and various federal district and state courts have interpreted the Supreme Court's decision in *Knights* as signaling a limitation on when the special needs doctrine will apply to suspicionless searches. These courts understand the special needs doctrine as being triggered by a degree of suspicion less than probable cause. The fact that the Supreme Court did not apply the special needs approach in *Knights*—where the search was effected without warrant or probable cause—seemed to indicate an exception to the general rule. Specifically, these courts view the Court's decision in *Knights* to apply the totality of the circumstances balancing test as suggesting that persons enjoying a significantly diminished expectation of privacy as government supervisees or detainees comprise a separate class of cases not subject to special needs analysis. These courts thus reject the notion that "any search conducted primarily for law enforcement purposes must be accompanied by at least some quantum of individualized suspicion," and instead have construed *Knights* as carving out a government-supervisee exception to the special needs doctrine.

As a result, these courts have chosen to apply the totality of the circumstances balancing test for reasonableness in considering whether compulsory DNA extraction and analysis comport with Fourth Amendment requirements. Because the only challenges to DNA sampling statutes have come from individuals under either government supervision or detention, these challenges have been considered in light

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205. Id. at 121.
206. Id.
207. United States v. Kincade, 379 F.3d 813, 831 (9th Cir. 2004); see also Groceman v. United States, 354 F.3d 411, 413-14 (5th Cir. 2004); Velasquez v. Woods, 329 F.3d 420, 421 (5th Cir. 2003); Jones v. Murray, 962 F.2d 302, 306-07 (4th Cir. 1992).
208. Kincade, 379 F.3d at 832 ("Knights, of course, affirmed the post-Edmond, post-Ferguson possibility that conditional releasees' diminished expectations of privacy may be sufficient to justify the judicial assessment of a parole or probation search's reasonableness outside the strictures of special needs analysis."); Jones, 962 F.2d at 307 n.2 ("Because we consider the cases which involve the Fourth Amendment rights of prison inmates to comprise a separate category of cases to which the usual per se requirement of probable cause does not apply, there is no cause to address whether the so-called 'special needs' exception . . . applies in this case.").
209. Kincade, 379 F.3d at 827; Groceman, 354 F.3d at 413; Velasquez, 329 F.3d at 421; Jones, 962 F.2d at 306-07.
210. Kincade, 379 F.3d at 831.
of these courts' government-supervisee exception to the special needs doctrine.

2. Circuits in Favor of Using the Special Needs Approach

By contrast, the Second, Seventh, and Tenth Circuits, as well as a Ninth Circuit judge and various federal district and state courts, have interpreted *Knights* as a non-special needs case, and have accordingly analyzed the constitutionality of DNA collection statutes under the Supreme Court's special needs doctrine.²¹¹ Specifically, these courts read the special needs doctrine as being prompted by a complete lack of individualized suspicion, rather than by a mere departure from probable cause requirements.²¹² Thus, these courts construe the Court's decision in *Knights* to apply the totality of the circumstances test as being based on the presence of individualized suspicion.²¹³

As a result of their interpretation of *Knights* as a non-special needs case, these courts have analyzed Supreme Court case law in *Ferguson* and *Edmond* as establishing a per se rule that searches must be supported by some quantum of individualized suspicion, or alternatively, must present a special need. Because DNA sampling of a class of individuals occurs without any modicum of individualized suspicion, these courts have applied the special needs approach and have upheld DNA sampling statutes under a number of different rationales.²¹⁴

3. The Inapplicability of *Knights* to Statutes Authorizing DNA Extraction from Former Arrestees

The federal circuits' split interpretation of the scope of cases covered by special needs analysis is limited to those cases involving plaintiffs who are under some form of government supervision or detention. Even the courts that have applied the totality of circumstances approach to DNA databank statutes have not suggested that *Knights* has completely eliminated the use of the special needs approach in suspicionless search cases. Rather, these courts have merely suggested that *Knights* provides a government-supervision exception to the special needs approach.

Because the government-supervision exception to the special needs doctrine is premised on the plaintiff's enjoyment of a significantly diminished expectation of privacy as a government supervisee or detainee, former arrestees no longer under any government supervision and never convicted of a crime do not fall under any exception to the

²¹¹. *Id.* at 830, 840; see also Green v. Berge, 354 F.3d 675, 677 (7th Cir. 2004); United States v. Kimler, 335 F.3d 1132, 1146 (10th Cir. 2003); Roe v. Marcotte, 193 F.3d 72, 77 (2d Cir. 1999).
²¹². *Kincaide*, 379 F.3d at 862–63 (Reinhardt, J., dissenting); *Groceman*, 354 F.3d at 413; *Velasquez*, 329 F.3d at 421; *Jones*, 962 F.2d at 306–07.
²¹³. *Kincaide*, 379 F.3d at 827.
²¹⁴. For example, the special needs for supervision and deterrence of conditional releasees provided the basis of the Ninth Circuit's upholding of the federal DNA databanking act in *Kincaide*, 379 F.3d at 841 (Gould, J., concurring).
special needs approach. Former arrestees enjoy the same expectations of privacy that any ordinary free citizen enjoys. Thus, to analyze the constitutionality of statutes mandating suspicionless DNA sampling of former arrestees, a court must apply special needs analysis.

C. Assessing the Constitutionality of DNA Extraction from Former Arrestees Using the Special Needs Approach

1. Compulsory DNA Sampling and Analysis is a Search

Obtaining and examining physical evidence from a person in a way that “infringes an expectation of privacy that society is prepared to recognize as reasonable” is a Fourth Amendment search. Whether the expectation of privacy an individual holds in his biological material is reasonable may be determined by examining several factors, including the extent to which the material is displayed to the public, the extent of the bodily invasion occasioned by the sampling procedure, and the nature of the information that can be gleaned from the sample.

At present, DNA sampling statutes like Proposition 69 mandate compulsory DNA extraction through taking either blood samples or buccal swab samples. In Skinner, the Supreme Court established that blood extraction, as a “physical intrusion, penetrating beneath the skin,” infringes a reasonable expectation of privacy. The Court also stated that “chemical analysis of the sample to obtain physiological data”—for example, through urinalysis for blood-alcohol content—poses a further invasion of privacy. The Court thus concluded that blood tests constitute searches under the Fourth Amendment. Correspondingly, DNA sampling statutes that authorize a compelled intrusion into the body for blood, as well as DNA analysis, give rise to Fourth Amendment searches.

For similar reasons, buccal swab sampling for DNA analysis also constitutes a Fourth Amendment search. In Cupp v. Murphy, police suspected the defendant of strangling his wife and subsequently scraped his fingernails against his will and without a warrant to remove traces of skin and blood cells. In finding that searches of an individual’s body are “severe, though brief, intrusions upon cherished personal security” that

217. Kaye, supra note 21, at 473.
220. Id.
221. Id. at 617.
222. See Kaye, supra note 21, at 478; Sandra J. Carnahan, The Supreme Court’s Primary Purpose Test: A Roadblock to the National Law Enforcement DNA Database, 83 NEB. L. REV. 1, 8 (2004) (“[T]he use of buccal swabs to collect skin cells from the lining of the cheek . . . is a search as well.”).
[are] subject to constitutional scrutiny," the Supreme Court held that the fingernail scrapings constituted a Fourth Amendment search.\footnote{224}{Id. at 295 (citation omitted).}

If scraping a fingernail to remove dried blood or other physical evidence constitutes a Fourth Amendment search, so does scraping the inside of a cheek for DNA analysis. Not only are cheek cells less exposed to public view than fingernails,\footnote{225}{In \textit{Cupp}, the police decided to perform the fingernail scraping after viewing a dark spot on the defendant's finger. \textit{Id.} at 292.} but also their extraction occasions a greater bodily intrusion. Unlike fingernail scrapings, buccal swabs require police to penetrate a bodily orifice. Additionally, DNA analysis of buccal swab samples reveals just as much, and arguably more personal, information than a fingernail scraping can.

Furthermore, free persons enjoy such a high expectation of privacy that even fingerprinting implicates Fourth Amendment interests. Indeed, the "gathering of fingerprint evidence from 'free persons' constitutes a sufficiently significant interference with individual expectations of privacy that law enforcement officials are required to demonstrate that they have probable cause, or at least an articulable suspicion, to... establish or negate the person's connection to the offense."\footnote{226}{\textit{Former} arrestees who are no longer in custody and who have never been convicted of a crime enjoy the same expectation of privacy as "free persons," and thus are entitled to reasonable suspicion before being subjected to DNA extraction and analysis—a much more intrusive procedure than fingerprinting.}\footnote{227}{Under traditional Fourth Amendment doctrine then, compulsory DNA extraction and analysis constitute a search that must be supported by a warrant and probable cause, or at least individualized suspicion with respect to free persons.}

2. \textit{The Lack of Individualized Suspicion Requires the Presence of Special Needs, but DNA Sampling of Former Arrestees Serves Only a Normal Law Enforcement Purpose}

Statutes that mandate compulsory DNA sampling of former arrestees, released from custody and never convicted of a crime, authorize searches that are not supported by any individualized suspicion. Rather, such sampling is based on an individual's status and thus must present special needs to pass constitutional muster. However, because the primary purpose of DNA sampling of former arrestees is a normal law enforcement purpose—assisting law enforcement to solve crime—such sampling does not qualify for special needs exemption from the normal Fourth Amendment requirement of individualized suspicion.

To determine whether a search has as its primary purpose normal
law enforcement purposes, it is instructive to look to the language of the statute. For example, Proposition 69 advances as its main purpose "assist[ing] federal, state, and local criminal justice and law enforcement agencies within and outside California in the expeditious and accurate detection and prosecution of individuals responsible for sex offenses and other crimes." Proposition 69's "Findings and Declaration of Purpose" further describes the "critical and urgent need to provide law enforcement officers and agencies with the latest scientific technology available for accurately and expeditiously identifying, apprehending, arresting, and convicting criminal offenders ". In *Edmond*, the Supreme Court held that a government program with a primary purpose of investigating potential criminal activity did not qualify for special needs analysis. Similarly, as suggested in the text of Proposition 69, the government's primary purpose in conducting suspicionless, bodily searches is to investigate potential and past criminal activity, both of which constitute a normal crime control purpose.

Additionally, as the Supreme Court indicated in *Ferguson*, where law enforcement officials are deeply involved in implementing DNA sampling and analysis, as is customary in statutory DNA databanking procedures, a presumption of ordinary law enforcement purposes arises. In California, law enforcement officials are engaged at every step of the DNA databank procedure, from sample collection to analysis and processing of the samples. Thus, at least in California, law enforcement is even more heavily involved in the implementation of the bodily search than in *Ferguson*, where hospital personnel collected and analyzed the biological samples at issue before sending them to the police. The extensive involvement of law enforcement officials in executing DNA statutes demonstrates that the primary purpose of the searches involved is a law enforcement purpose. Ultimately then, because the primary purpose of DNA sampling of former arrestees would be to advance normal needs of law enforcement, such sampling requires at least individualized suspicion. However, because such statutes would operate in the absence of individualized suspicion, DNA sampling of former arrestees would violate the Fourth Amendment.

228. CAL. PENAL CODE § 295(c) (2005).
229. VOTER INFORMATION GUIDE, supra note 123, at 135.
232. CAL. PENAL CODE § 298(b)(3) ("Buccal swab samples may be procured by law enforcement or corrections personnel or other individuals trained to assist in buccal swab collection.").
233. Id. § 298.3.
234. Ferguson, 532 U.S. at 72.
3. DNA Sampling of Former Arrestees Does Not Present a Special Need

In the past, proponents of DNA databank statutes have argued that several other goals of DNA sampling advance special needs beyond normal law enforcement purposes, including deterrence, exoneration of the innocent, and identification of criminal offenders. However, none of these goals can withstand scrutiny under special needs analysis when considered in the context of DNA sampling of former arrestees.

First, pointing to the higher rates of recidivism associated with individuals on conditional release from prison, the Second Circuit in *Roe v. Marcotte* suggested that Connecticut's DNA databank statute's goal of deterrence presented special needs beyond the normal need for law enforcement. However, deterrence cannot justify DNA sampling from former arrestees no longer in custody and never convicted of a crime. Although the Supreme Court has recognized that those with prior convictions are more likely than ordinary citizens to violate the law, there is no evidence to suggest that individuals who once were arrested but never convicted are more likely to engage in crime. Additionally, even in the case of DNA sampling of conditional releasees, deterrence is not the primary purpose of DNA databank laws. Instead, deterrence is an incidental effect of the DNA databank statute's main purpose of solving past and future crimes.

Second, proponents of DNA databanks have suggested that increasing the accuracy of the criminal justice system by ensuring that innocents are not wrongfully accused or convicted qualifies as a compelling government interest that presents special needs beyond ordinary law enforcement purposes. Indeed, California's amended DNA databank statute presents as one of its purposes the exoneration of innocent persons and exclusion of innocent suspects from investigation. However, this goal does not qualify for consideration as a special need. First, ensuring the accuracy of criminal investigations by arresting and convicting the right person is, or should be, a normal need of law enforcement. Second, even if it were not, the Supreme Court has noted that a "benign" motive, such as that advanced in *Ferguson*, "cannot justify a departure from Fourth Amendment protections" if the search has a primary purpose of law enforcement. Third, compulsory DNA extraction is not necessary to further the government interest in exonerating innocent persons, since individuals who claim wrongful

237. *Id.* at 22–24.
238. CAL. PENAL CODE § 295(c) (2005).
conviction or even wrongful accusation may volunteer their DNA to exonerate themselves.\(^{241}\)

Finally, some courts have suggested that identification of criminal offenders serves as the requisite special need that can justify suspicionless DNA sampling of certain classes of individuals.\(^{242}\) In fact, Proposition 69 recently added the goal of “assist[ing] in the accurate identification of criminal offenders” to California’s DNA databank statute.\(^{243}\) However, just as the goal of deterrence cannot plausibly be considered the primary purpose of DNA sampling, neither can identification. Specifically, as one author suggests, “fingerprints already provide an unequivocal, and in some respects, a better record of personal identity than forensic DNA typing” for several reasons.\(^{244}\) First, DNA analysis cannot distinguish between monozygotic twins, whereas fingerprint analysis can.\(^{245}\) Second, fingerprints can be obtained more easily and more inexpensively than DNA profiles.\(^{246}\) It is simply implausible to argue that the lengthy and expensive process of extracting, sending out, analyzing, and comparing DNA samples and profiles will be used primarily for immediate identification purposes, when fingerprinting is far more time- and cost-effective. Instead, DNA analysis will only be used when the government has a compelling, albeit ordinary, interest in solving crimes where biological evidence is discovered. Even more importantly, former arrestees who have never been convicted of a crime are not criminal offenders, and thus there is no special need to identify former arrestees any more than there is a special need to identify any member of the general population.

Because the primary purpose of DNA sampling of former arrestees would be to solve crime—a normal law enforcement purpose—such sampling must occur with individualized suspicion. But since such DNA databanking statutes would be based purely on an individual’s status as a former arrestee, suspicionless DNA sampling of former arrestees would violate the Fourth Amendment.

4. Even If DNA Sampling of Former Arrestees Qualifies as a Special Need, Such Sampling Still Violates the Fourth Amendment Because Former Arrestees’ Privacy Interests Outweigh the Government’s Public Interest

When faced with special needs cases, the Supreme Court has “not hesitated to balance the governmental and privacy interests” involved to determine whether individualized suspicion is necessary to conduct a

\(^{241}\) Carnahan, supra note 222, at 24.
\(^{243}\) CAL. PENAL CODE § 295(d).
\(^{244}\) Kaye, supra note 21, at 488.
\(^{245}\) Id. at 488–89.
\(^{246}\) Id.
search.\footnote{247} The Court has held that, even in the absence of suspicion "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable . . . .\footnote{248}

Thus, finding that a government search qualifies as presenting a special need beyond the normal need for law enforcement does not automatically render the search reasonable. The special need must be "important enough to override the individual's acknowledged privacy interest" and to justify a departure from the Fourth Amendment's normal requirement of individualized suspicion.\footnote{249}

In \textit{Chandler v. Miller}, the Supreme Court considered whether a statute requiring candidates for state office to certify that they had passed a drug test presented a substantial enough special need.\footnote{250} The statute was not enacted in response to a suspicion of drug use by state officials, but only to uphold state officials' image of integrity and good judgment.\footnote{251} In assessing the private interests, the Court noted that the testing method was "relatively noninvasive" because a candidate could provide a urine sample for analysis at the office of his personal physician.\footnote{252} Still, the Court found that the statute did not present a substantial enough special need, since "public safety is not genuinely in jeopardy."\footnote{253} As the Court's decision in \textit{Chandler} indicates, even relatively noninvasive suspicionless searches must be justified by a deeply compelling government interest, usually marked by exigent circumstances.\footnote{254}

As discussed above,\footnote{255} DNA extraction and analysis, whether through blood sampling or buccal swab sampling, intrudes upon an expectation of privacy that society holds as reasonable. Even brief, minimal bodily intrusions, such as scraping fingernails\footnote{256} or taking fingerprints,\footnote{257} implicate "cherished personal security" . . . [and are] subject to constitutional scrutiny."\footnote{258} Unlike convicted felons currently in

\begin{footnotes}
\item[248] \textit{Id.} at 624.
\item[250] \textit{Id.} at 308.
\item[251] \textit{Id.} at 318–19.
\item[252] \textit{Id.} at 310, 318.
\item[253] \textit{Id.} at 323.
\item[254] See, e.g., Mich. Dept. of State Police v. Sitz, 496 U.S. 444, 447, 449, 451 (describing sobriety checkpoints as justified by special needs, since the pervasive drunken driving problem posed immediate danger on the roads).
\item[255] See supra Part III.C.1.
\item[257] United States v. Kincade, 379 F.3d 813, 836 n.31 (9th Cir. 2004).
\item[258] \textit{Cupp}, 412 U.S. at 295 (citation omitted).
\end{footnotes}
government custody, former arrestees no longer under government supervision and never convicted of a crime do not have a diminished expectation in their bodily privacy. Thus, even fingerprinting requires at least individualized suspicion when performed on a free person, such as a former arrestee. Because DNA sampling and analysis implicate a greater expectation of privacy, former arrestees are entitled to at least individualized suspicion, if not more, when the government desires to perform DNA sampling and analysis.

By contrast, the government's interest in gathering potential evidence for investigating past and future crimes cannot outweigh former arrestees' significant privacy interest in their bodies. In assessing the legality of extracting blood from a suspected drunk driver, the Supreme Court held that penetrative bodily intrusions cannot be justified "on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search." In taking DNA samples from former arrestees, the sampling occurs without any evidence to suggest that the sampled individuals are likely to commit a crime in the future, or have committed a crime in the past. Additionally, there are no exigent circumstances to justify such suspicionless searches. These facts suggest that requiring individualized suspicion will not jeopardize the government interest in crime control.

Additionally, the government's interest in deterring criminal conduct does not outweigh the privacy interests held by former arrestees. Because there is no evidence that former arrestees are more likely to commit crimes than the average free person, the significant interests former arrestees hold in their bodily integrity and genetic privacy outweigh the purely hypothetical deterrent effect that DNA sampling might occasion.

Furthermore, the government's interest in protecting the innocent from wrongful conviction cannot outweigh the privacy interests held by

259. Taylor, supra note 1, at 537. In fact, the Ninth Circuit has suggested that once a conditional release has completed the terms of his conditional release, he becomes a "normal citizen" entitled to full Fourth Amendment privacy interests and expectations. United States v. Crawford, 323 F.3d 700, 710 (9th Cir. 2003). Specifically, in considering whether a suspicionless search of a parolee's home violated the Fourth Amendment, the Ninth Circuit held that parolees are entitled to the amount of privacy that other citizens take for granted so that parolees might "negotiate the transition into the life of a normal citizen." Id. Thus, even a convicted felon who is no longer under any supervision by the government may enjoy the same Fourth Amendment rights as the general population.


261. See supra Part III.C.1.

262. Schmerber v. California, 384 U.S. 757, 770-72 (1966) (holding that forced blood extraction from a drunk driver who had just been involved in an accident was reasonable under Fourth Amendment standards).
former arrestees. As suggested above, individuals who are arrested or convicted voluntarily may submit their DNA to exonerate themselves. Thus, requiring individualized suspicion would not jeopardize the government's interest in exonerating and excluding the innocent from conviction and investigation, respectively.

Finally, requiring individualized suspicion to extract and analyze DNA samples from former arrestees would not jeopardize the government's interest in identifying criminal offenders. The government's interest in using DNA samples to identify former arrestees who have never been convicted of a crime is minimal at best. First, such former arrestees are not criminal offenders, and thus the need to identify former arrestees is no more special than the need to identify any member of the general population. Second, fingerprints provide an easier and cheaper method of identification. Ultimately then, even if DNA sampling and analysis of former arrestees presents a special need, the private interest of sampled individuals would overwhelmingly outweigh the government's interests in ordinary crime control, deterrence, exoneration of innocents, and identification.

CONCLUSION

Proposition 69 and the ensuing controversy embodied in the Weber v. Lockyer complaint have illuminated the next step in DNA databank expansion: DNA sampling from former arrestees no longer under any form of government supervision. To date, the courts' essentially unanimous endorsement of DNA databank statutes nationwide has rested upon the premise that the plaintiffs under detention or supervision by the state enjoy a drastically reduced expectation of privacy. However, as illustrated above, the courts must significantly alter their analysis of DNA databank statutes when plaintiffs who are no longer under government supervision bring Fourth Amendment challenges to DNA databank statutes.

First, because an individual's status as a former arrestee removes a DNA databank challenge from the federal circuit split on the effect of Knights on special needs analysis, courts considering the constitutionality DNA sampling of former arrestees will be compelled to apply special needs scrutiny. Second, an individual's status as a former arrestee completely eliminates several special needs arguments traditionally advanced by proponents of DNA databanks—namely, the arguments that deterrence and identification of criminal offenders present special needs. Third, should a court decide to balance private interests against the government's interests in performing a search in the absence of individualized suspicion an individual's status as a former arrestee

263. See supra Part III.C.3.
significantly increases his expectation of bodily integrity and genetic privacy.

Ultimately, because the primary purpose of suspicionless DNA sampling of former arrestees would be to solve crimes—an ordinary law enforcement purpose—such sampling would violate the Fourth Amendment's prohibition on unreasonable searches and seizures. Thus, despite the recent trend towards expanding DNA databases around the country, the DNA sampling of former arrestees reaches a bright line that represents the constitutional end of such expansion.