NOTE

Arrested Development: Reforming the Federal All-Arrestee DNA Collection Statute to Comply with the Fourth Amendment

*Ashley Eiler**

INTRODUCTION

On March 21, 2009, Lily Haskell attended a peace rally at San Francisco's Civic Center.[1] When Haskell purportedly attempted to free a fellow protestor who had been taken into police custody, she was arrested.[2] According to Haskell, when she arrived at a city jail, two deputies with the San Francisco County Sheriff's Department informed her that she had to provide them with a DNA sample or she would be charged with an additional misdemeanor offense.[3] These deputies allegedly also told Haskell that if she waited to consult with an attorney before providing the DNA sample, she would not only be charged with the misdemeanor offense for not immediately complying

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1 Complaint at 5, Haskell v. Brown, 677 F. Supp. 2d 1187 (N.D. Cal. 2009) (No. C 09-04779 CRB).

2 *Id.*

3 *Id.* at 5–6.

with the required DNA collection, but would also be held in custody until she was formally arraigned.[4] No formal charges were ever brought against Haskell based on this arrest.[5]

The county deputies acted pursuant to a California state statute that requires individuals who are arrested on felony charges to provide a DNA sample for analysis and inclusion in a database.[6] Although Haskell's particular situation was governed by California law, there is an even broader federal regime that permits the warrantless collection of DNA from every arrestee.[7] Under this federal "all-arrestee" statute, an arrestee's DNA sample is eventually analyzed to produce a unique profile to be entered into the federal government's Combined DNA Index System ("CODIS").[8] In the CODIS database, an arrestee's DNA profile is subject to repeated and indefinite use by law enforcement officials across the nation, who perform searches to match unidentified biological evidence from crime scenes to an individual in the database in hopes of solving a crime.[9]

Under this federal statutory scheme, the fact that an arrestee is never formally charged or convicted of a crime has little impact on the analysis or continued use of her DNA profile; the federal government has no obligation to take affirmative steps to expunge a DNA profile from CODIS if an arrestee is not ultimately convicted.[10] Instead, arrestees like Haskell have to apply for expungement—a requirement designed to shift the burden from the government to the arrestee in order to strengthen CODIS's crime-solving power.[11]

On its face, DNA collection from arrestees appears problematic in light of an individual's right to be free from unreasonable searches and seizures under the Fourth Amendment.[12] The Supreme Court, however, has yet to consider a challenge to any statutory scheme, state or federal, authorizing DNA collection. Lower federal and state courts have largely upheld less expansive versions of DNA collection

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4 *Id.*

5 *Id.* at 6.

6 CAL. PENAL CODE § 296(a)(2)(C) (West 2008).

7 42 U.S.C. § 14135a(a)(1)(A) (2006).

8 *Id.* § 14135a(b).

9 *CODIS and NDIS Fact Sheet*, FBI, http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet (last visited Mar. 10, 2011).

10 *See* 42 U.S.C. § 14132(d) (explaining the affirmative steps that an individual arrestee who is not ultimately convicted must take to apply for expungement of her DNA sample).

11 *See* 151 CONG. REC. 28,857 (2005) (statement of Sen. Kyl) (arguing that expungement procedures that place a burden on the government are "an unwieldy requirement" and "effectively preclude[ ] the creation of a genuine national all-arrestee database").

12 *See infra* Part II.A.

statutes targeting certain classes of convicted offenders by using two different Fourth Amendment doctrines: the "totality of the circumstances" test and the "special needs" exception.[13] Courts have split, however, on more recent challenges to all-arrestee statutes.[14]

Despite the lack of a definitive Supreme Court ruling, current caselaw indicates that the federal all-arrestee DNA-collection regime violates the Fourth Amendment because it fails to pass muster under either of the doctrinal tests used by lower courts. The initial search involved in collecting a DNA sample from an arrestee involves only minimal bodily intrusion and thus can be justified under the Fourth Amendment. By contrast, the analysis of the sample to produce an individualized DNA profile, and the subsequent inclusion of the profile in CODIS for ongoing, recurrent searches by law enforcement officials are unconstitutional because the nature of the information obtained renders the searches unreasonable. For these reasons, Congress should reform the statute to comport with the Fourth Amendment.

Under the legislation proposed in this Note, an arrestee's DNA sample would not be analyzed immediately upon collection for entry into CODIS. Instead, investigators would place the sample, unanalyzed, into a separate DNA databank where it would be stored until either (1) the arrestee is convicted, or (2) the arrestee consents to have her DNA included in CODIS. This legislative reform is preferable to the Supreme Court simply striking down the current statutory regime because it protects an arrestee's Fourth Amendment rights while still allowing the federal government to pursue its compelling interest in improving the efficacy of CODIS.

Part I explores how DNA is used in law enforcement operations and summarizes the development and rapid expansion of DNA databases. Part I also provides an overview of the current statutory schemes in place for DNA collection at both the federal and state levels, focusing particularly on the DNA Fingerprint Act of 2005[15] and the accompanying U.S. Department of Justice ("DOJ") regulations,[16] which, together, authorize DNA collection from arrestees. Part II explains how DNA databasing procedures implicate Fourth Amendment scrutiny and summarizes lower courts' analyses of the constitutionality

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13 *See infra* Part II.B.1.

14 *See infra* Part II.B.2.

15 DNA Fingerprint Act of 2005, Pub. L. No. 109-162, §§ 1001–1005, 119 Stat. 2960, 3084–86 (2006) (codified in scattered sections of 18 and 42 U.S.C.).

16 28 C.F.R. § 28.12 (2010).

of DNA databasing statutes using two doctrinal approaches. Part II then concludes that the current federal all-arrestee statute does not comport with the Fourth Amendment under either of the doctrinal approaches used by the lower courts. Part III presents a legislative solution that cures the federal all-arrestee statute's constitutional defects by protecting individual arrestees' Fourth Amendment rights while also recognizing the federal government's legitimate interest in expanding the CODIS database.

I. BACKGROUND OF DNA COLLECTION STATUTES

A. The Evolving Role of DNA and DNA Databases in Law Enforcement

Over the past several decades, scientists have made significant discoveries about the structure of the human genome that allow for the use of DNA as a means of individualized identification.[17] An individual's genetic composition is unique because of small, yet significant, variations in the sequence of subunits that make up her DNA molecules.[18] Other than identical twins, no two individuals share the same DNA sequence,[19] which allows DNA to serve as an individual's personalized barcode.[20]

Once DNA's usefulness as a unique identifier became more apparent, law enforcement officials began successfully integrating DNA technology with traditional police tactics to solve crimes.[21] DNA's ability to link a suspect to a particular victim or crime scene allows police to solve crimes even without other physical evidence or eyewitness testimony.[22] In some cases, DNA technology allows police officers to connect an individual to a particular crime scene "from as little as the saliva on a cigarette butt, skin cells on a steering wheel or pet hairs on clothing."[23]

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17 *See, e.g.*, LAWRENCE KOBILINSKY ET AL., DNA: FORENSIC AND LEGAL APPLICATIONS 51 (2005) (describing the effect of the discovery of "restriction fragment length polymorphism analysis," also known as "DNA Fingerprinting," on the criminal justice system).

18 *Id.* at 5–6.

19 HENRY C. LEE & FRANK TIRNADY, BLOOD EVIDENCE: HOW DNA IS REVOLUTIONIZING THE WAY WE SOLVE CRIMES 4 (2003).

20 KOBLINSKY ET AL., *supra* note 17, at 5–6.

21 *See id.* at 5–6.

22 *See* LEE & TIRNADY, *supra* note 19, at 36 (explaining that the problematic nature of eyewitness testimony is part of the reason why scientific evidence, such as DNA, is "so compelling"); *see also id.* at 291 (noting that DNA "has solved cases that had virtually no chance of being solved without it").

23 Mark A. Jobling & Peter Gill, *Encoded Evidence: DNA in Forensic Analysis*, 5 NATURE REVIEWS: GENETICS 739, 739 (2004).

Recognizing the useful role that DNA can play in solving crimes,[24] policymakers and law enforcement officials saw the utility of creating databases that contain searchable collections of DNA profiles for law enforcement purposes.[25] Law enforcement agencies create DNA databases by collecting DNA samples (typically in the form of saliva or blood), analyzing a portion of the sample to yield a genotype that functions as a near-unique identifier, and storing this identifying data in a searchable database that can produce matches based on trace evidence linked to a particular crime or victim.[26] Officials store unanalyzed portions of the original DNA sample in databanks where police can access them for more in-depth DNA testing if the circumstances of a particular case warrant it.[27]

Today, most analyzed DNA samples are ultimately entered into CODIS, a centralized federal database that is widely accessible to law enforcement agencies.[28] Originally created in 1990 as a pilot program, CODIS has expanded to include DNA samples submitted from all fifty states as well as federal agencies.[29] For the purposes of inclusion in the CODIS database, the Federal Bureau of Investigation ("FBI") has limited the analysis of collected DNA samples to thirteen locations, or *loci*, which results in an "average match probability [of] one in 180 trillion."[30] In addition to CODIS, every state maintains its own

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24 In addition to its crime-solving utility, DNA has also been successfully used to exonerate the wrongly convicted. *See Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/351.php (last visited Mar. 27, 2011) (noting that DNA has been used to secure 267 postconviction exonerations, including 17 exonerations involving individuals serving time on death row).

25 *See, e.g.*, Robert Berlet, *A Step Too Far: Due Process and DNA Collection in California After Proposition 69*, 40 U.C. DAVIS L. REV. 1481, 1486–87 (2007) ("Every state has developed a criminal DNA database."); D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORNELL J.L. & PUB. POL'Y 455, 456 (2001) ("Law enforcement authorities promote offender DNA databanking on the theory that it will clear previously unsolved crimes and identify offenders who commit additional crimes while on probation or parole, or after they have finished serving their sentences.").

26 Kaye, *supra* note 25, at 461–62.

27 *Id.* at 462.

28 *CODIS Brochure*, FBI, http://www.fbi.gov/about-us/lab/codis/codis_brochure (last visited Mar. 10, 2011).

29 *Id.* After CODIS's initial creation, the DNA Identification Act of 1994 formalized the FBI's authority to establish a National DNA Index System ("NDIS") for law enforcement purposes. *See* DNA Identification Act of 1994, Pub. L. No. 103-322, §§ 210301–210306, 108 Stat. 1796, 2065–71.

30 James Crow, Comm'r, Nat'l Comm'n on the Future of DNA Evidence, Proceedings (Meeting V) in Santa Fe, New Mexico: Research and Development Working Group Report and Discussion (May 7, 1999), http://www.ojp.usdoj.gov/nij/topics/forensics/events/dnamtgtrans5/trans-h.html.

DNA database containing entries that can be compared to DNA profiles garnered from biological evidence.[31]

B. The Expansion of DNA Collection Statutes and Databases

All-arrestee DNA collection statutes are the latest product of the trend to expand DNA databases to improve their crime-solving potential.[32] As law enforcement officials recognized that DNA databases could help solve crimes, particularly in cold cases,[33] they realized that increasing the number of available DNA profiles would increase the chances of generating a hit that might lead to a conviction.[34] As a result, states that originally authorized only limited DNA collection—typically from those individuals convicted of certain statutorily designated violent crimes—widely expanded the applicability of their DNA database statutes.[35] Eligibility for federal funding to reduce the backlog in state and local crime laboratories created an additional incentive for states to broaden the applicability of their DNA database statutes.[36] States' DNA collection statutes now vary widely, with law

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31 *See* SETH AXELRAD, AM. SOC'Y OF LAW, MED. & ETHICS, SURVEY OF STATE DNA DATABASE STATUTES 1–2 (2005), *available at* http://www.aslme.org/dna_04/grid/guide.pdf.

32 This trend has not been without its critics. In addition to the constitutional concerns discussed *infra*, some commentators have argued that the continued expansion of DNA databases is flawed as a matter of public policy. *See, e.g.*, Paul E. Tracy & Vincent Morgan, *Big Brother and His Science Kit: DNA Databases for 21st Century Crime Control?*, 90 J. CRIM. L. & CRIMINOLOGY 635, 663–64 (2000) (questioning whether allocating the necessary funds to expand DNA databases is economically sound); Michael T. Risher, *Racial Disparities in Databanking of DNA Profiles*, 22 GENEWATCH, July–Aug. 2009, at 22, 22, *available at* http://issuu.com/genewatchmagazine/docs/genewatch22_3-4_final?mode=embed&layout=http%3A%2F%2Fskin.issuu.com%2Fv%2Flight%2Flayout.xml&showFlipBtn=true (finding that the expansion of DNA databasing laws will magnify "the current racial disparities in our criminal justice system as more and more people of color's DNA profiles are included in databases that make them potential suspects whenever DNA is recovered from a crime scene").

33 *See, e.g.*, Carey Goldberg, *DNA Databanks Giving Police a Powerful Weapon, and Critics*, N.Y. TIMES, Feb. 19, 1998, at A1 (describing how quickly the newly enhanced CODIS database was able to link a convicted sex offender in Illinois to a 1989 rape and attempted murder in Wisconsin); Colin Moynihan, *DNA Evidence Leads to Arrest in a 1993 Rape*, N.Y. TIMES, Sept. 21, 2010, at A28 (detailing the use of CODIS to link a man convicted on drug charges in 2010 to a rape committed in 1993).

34 Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 34 J.L. MED. & ETHICS 165, 166 (2006).

35 *See, e.g.*, Berlet, *supra* note 25, at 1494–95 (describing the expansion of California's DNA database statute, which originally authorized sampling only from individuals convicted of nine specified felonies, then expanded to include individuals convicted of a larger subset of crimes, and later, with the passage of Proposition 69, expanded to provide for sampling of any individual arrested for a felony by 2009).

36 *See* 42 U.S.C. § 14135 (2006) (establishing federal grants to fund state and local DNA analysis programs).

enforcement officials in at least twenty-one states collecting DNA samples from some or all arrestees.[37]

Over time, the federal government similarly responded to the powerful crime-fighting results produced by DNA databases by expanding the classes of individuals targeted for DNA collection, ultimately to include even individuals who have merely been arrested.[38] In 2000, Congress passed a statute authorizing federal agencies to collect DNA samples from persons convicted of certain federal, military, and District of Columbia offenses.[39] Congress then expanded the categories of qualifying federal offenses, first by adding three new violent felonies,[40] and then by including all felonies—creating a regime in which the federal government could collect DNA samples from all convicted federal felons.[41] Most recently, Congress passed the DNA Fingerprint Act of 2005, which authorized the Attorney General to "collect DNA samples from individuals who are arrested or from non-United States persons who are detained under the authority of the United States."[42]

Pursuant to this legislation, the DOJ implemented the statutory scheme and began collecting DNA samples from all arrestees and all

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37 *See State DNA Database Laws: Qualifying Offenses*, DNARESOURCE.COM, http://www.dnaresource.com/documents/statequalifyingoffenses2009.pdf (June 2009) (indicating that twenty-one states now have DNA collection statutes that include some or all arrestees: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, New Mexico, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Vermont, and Virginia).

38 *See* 42 U.S.C. § 14135a(a)(1)(A) ("The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested . . . ."). In one public appearance announcing an expansion of CODIS, former Attorney General John Ashcroft remarked that "DNA technology has proven itself to be the truth machine of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent." News Conference, John Ashcroft, U.S. Att'y Gen., DNA Initiative (Mar. 4, 2002), *available at* http://www.justice.gov/archive/ag/speeches/2002/030402newsconferncednainitiative.htm.

39 DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106–546, § 3, 114 Stat. 2726, 2728–30 (codified as amended at 42 U.S.C. § 14135a).

40 USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 503, 115 Stat. 272, 364 (codified as amended at 42 U.S.C. § 13135a).

41 Debbie Smith Act of 2004, Pub. L. No. 108-405, § 203(b), 118 Stat. 2260, 2270 (codified as amended at 42 U.S.C. § 14135a).

42 DNA Fingerprint Act of 2005, Pub. L. No. 109-162, § 1004(a)(1)(A), 119 Stat. 2960, 3085 (2006) (codified as amended at 42 U.S.C. § 14135(a)). 42 U.S.C was further amended by section 155 of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, 611 (codified at 42 U.S.C. § 14135a). This most recent amendment altered the language to clarify that it applies to individuals who are "arrested, facing charges, or convicted," and not only to those who are arrested. *Id.*

noncitizen detainees in January 2009.[43] Importantly, the statute provides for a fairly rigorous procedure through which arrestees who are ultimately not convicted of a crime can request expungement of their DNA samples from CODIS.[44] This process places the burden for seeking expungement entirely on the individual because Congress intended to relieve the government of the "unwieldy requirement" of having to "track the progress of individual criminal cases."[45]

In comparison to its already expansive statutory predecessors, the all-arrestee federal statute ultimately achieves only three, arguably limited, objectives for CODIS: (1) it speeds up the analysis, entry, and searchability of DNA samples from those arrestees who are ultimately convicted of a crime; (2) it permanently adds DNA samples from those arrestees who, for one reason or another, are not ultimately convicted of a crime *and* who do not pursue expungement; and (3) it temporarily adds analyzed DNA samples from those arrestees not ultimately convicted who do take affirmative steps to remove their DNA samples from the database.[46]

II. The Federal All-Arrestee DNA Collection Statute and the Fourth Amendment

As amended, the federal all-arrestee DNA collection statute raises constitutional concerns. This Part first explains that DNA collection procedures involve multiple searches that implicate the Fourth Amendment. Next, it analyzes how lower courts—in the absence of a Supreme Court decision on point—have struggled to determine whether DNA database laws conform with the Fourth Amendment, taking divergent approaches. Finally, it concludes that the federal all-arrestee statute fails under either of the two doctrinal tests used by lower courts.

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43 DNA-Sampling Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74,932 (Dec. 10, 2008) (codified at 28 C.F.R. Pt 28).

44 42 U.S.C. § 14132(d).

45 151 Cong. Rec. 28,857 (2005) (statement of Sen. Kyl).

46 *Cf.* John D. Biancamano, Note, *Arresting DNA: The Evolving Nature of DNA Collection Statutes and Their Fourth Amendment Justifications*, 70 Ohio St. L.J. 619, 654 (2009) ("[A]rrestee statutes really only target individuals who are not ultimately found guilty of the crime for which they've been arrested . . . .").

A. *DNA Collection Procedures Constitute Multiple Searches Under the Fourth Amendment*

The Fourth Amendment provides protection for individuals against government action that constitutes a search or a seizure.[47] The modern two-prong test for determining what constitutes a search turns on reasonableness, requiring that (1) an individual manifest an actual, subjective privacy interest and (2) the individual's privacy interest is objectively legitimate in the eyes of the public.[48]

Applying this framework, DNA databasing consists of three distinct phases that constitute searches under the Fourth Amendment because each involves government intrusion into an objectively legitimate privacy interest. First, the initial collection of a DNA sample requires a bodily intrusion that encroaches upon an individual's unarguably objective privacy interest. Second, the analysis of the sample to yield a DNA profile containing personal information about the individual constitutes an additional search because of the nature of information it produces. Finally, the inclusion of the profile in CODIS ultimately results in multiple, recurrent searches each time a law enforcement official accesses the database to conduct a search of the DNA profiles it contains.

Both courts and academics widely agree that compelled collection of DNA constitutes a search because it involves a bodily intrusion and therefore violates an individual's reasonable expectation of privacy.[49] DNA samples are typically extracted from an individual either by drawing blood or by taking a buccal cheek swab[50]—procedures that are closely analogous to other bodily intrusions deemed to be searches by the Supreme Court because they constitute "severe, though brief,

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47 U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, 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.").

48 Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

49 *See, e.g.*, United States v. Kincade, 379 F.3d 813, 821 n.15 (9th Cir. 2004) (en banc) ("The compulsory extraction of blood for DNA profiling unquestionably implicates the right to personal security embodied in the Fourth Amendment, and thus constitutes a 'search' within the meaning of the Constitution."); Kaye, *supra* note 25, at 476 ("An inspection or extraction that penetrates the body or enters its cavities usually is regarded as infringing a reasonable expectation of privacy and hence falling within the zone of the Fourth Amendment.").

50 Kaye, *supra* note 25, at 467. A buccal cheek swab is a common method of collecting DNA that involves "rubbing a foam-tipped swab . . . against the inside of the cheek for approximately 30 seconds" to obtain a sample of buccal epithelial cells. Christina L. Aquilante, *Methodologies in Pharmacogenomics*, *in* CONCEPTS IN PHARMACOGENOMICS 55, 58 (Martin M. Zdanowicz ed., 2010).

intrusion[s] upon cherished personal security."[51] In 1966, the Supreme Court held that a forcible blood draw from a drunk driving suspect is among those procedures that "plainly constitute searches of persons."[52] Although a forcible blood draw is arguably more intrusive than the buccal swabs commonly used to collect DNA samples,[53] the Supreme Court expanded the types of bodily intrusion subject to Fourth Amendment scrutiny in 1989 by holding that mandatory taking of breath samples for drug testing is a search.[54] This holding strongly indicates that taking a buccal swab, which could be considered more intrusive than administering a breathalyzer test, would also be deemed a search by the Court.

In addition to the widely recognized search upon collection, the subsequent analysis of the DNA sample to produce a profile for inclusion in databases like CODIS also constitutes a search because individuals have an objectively reasonable privacy interest in the nature of information that is obtained.[55] DNA samples contain a wealth of information about an individual's "immutable, lifelong characteristics," far more than the moment-in-time information captured by the drug and alcohol tests considered by the Supreme Court.[56] An individual's genome reveals information about diseases and behavioral characteristics that might not otherwise be obvious.[57] This considerable intrusion distinguishes DNA sampling from fingerprinting, which the Supreme Court has observed "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search."[58] Moreover, the results produced by analyzing a particular DNA sample are not limited in scope to the donor, but can actually reveal private information about the donor's blood-related family members.[59]

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51 Cupp v. Murphy, 412 U.S. 291, 295 (1973) (citing Terry v. Ohio, 392 U.S. 1, 24–25 (1968)) (holding that the taking of blood is subject to constitutional scrutiny).

52 Schmerber v. California, 384 U.S. 757, 767 (1966).

53 Kaye, *supra* note 25, at 467.

54 Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 606 (1989).

55 Kaye, *supra* note 25, at 481–82; Maclin, *supra* note 34, at 169–70; *see also* United States v. Kincade, 379 F.3d 813, 859, 865–66 (9th Cir. 2004) (en banc) (Reinhardt, J., dissenting) (criticizing the majority opinion for focusing its analysis on the initial extraction of DNA via a blood sample and disregarding "what is done with that information once it is taken," which, the dissent argues, is highly relevant for Fourth Amendment purposes because of "the obvious privacy intrusions suffered by those whose data are included in a permanent governmental database").

56 Robert Craig Scherer, *Mandatory Genetic Dogtags and the Fourth Amendment: The Need for a New Post-*Skinner *Test*, 85 GEO. L.J. 2007, 2021 (1997).

57 Kaye, *supra* note 25, at 482.

58 Davis v. Mississippi, 394 U.S. 721, 727 (1969).

59 Scherer, *supra* note 56, at 2021; *see also* Henry T. Greely et al., *Family Ties: The Use of*

Under this reasoning, each time the analyzed DNA profile is subject to a query within CODIS, that query results in a Fourth Amendment search because of the nature of information available to the law enforcement official accessing the database.[60] Admittedly, Congress specifically intended to restrict the personal and medical information obtainable through CODIS by limiting the DNA profiles to consist of so-called junk DNA, which it hoped would "uniquely identify an individual, but . . . not provide a basis for determining or inferring anything else about the person."[61] Even using today's technology, however, junk DNA samples can yield probabilistic evidence of an individual's race or sex.[62] Moreover, as technology inevitably advances, scientists have predicted that even junk DNA will allow access to the wealth of information that an individual's DNA contains.[63] In particular, junk DNA is increasingly considered to contain predictive medical and behavioral information[64]—information that goes far beyond its function as a unique identifier.[65] For example, although the

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DNA Offender Databases to Catch Offenders' Kin, 34 J.L. MED. & ETHICS 248, 251 (2006) (explaining that DNA "runs in families" such that two persons who are closely related have a higher probability of having similar DNA than two people who are not related).

60 The First Circuit recently rejected this view in a case brought by a probationer who had completed the term of his probation and challenged the government's continued retention and use of his DNA profile and sample. *See* Boroian v. Mueller, 616 F.3d 60, 64 (1st Cir. 2010). Specifically, the court reasoned that because "the government's retention and matching of [the probationer's] profile against other profiles in CODIS for the purpose of identification does not invade an expectation of privacy that society is prepared to recognize as reasonable," the practice does not constitute a separate search under the Fourth Amendment. *Id.* at 71.

61 H.R. REP. NO. 106-900, pt. 1, at 27 (2000).

62 *See* NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, NAT'L INST. OF JUSTICE, THE FUTURE OF FORENSIC DNA TESTING: PREDICTIONS OF THE RESEARCH AND DEVELOPMENT WORKING GROUP 35 (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/183697.pdf (noting that because the frequencies of the markers are different for different population groups, "a particular profile . . . may be more probable in one group than in another," and explaining that "[t]his can be used as a likelihood ratio . . . to provide evidence for the group origin of the DNA sample").

63 *See* W. Wayt Gibbs, *The Unseen Genome: Gems Among the Junk*, 289 SCI. AM. 46, 49 (2003) (questioning the notion that junk DNA does not contain any useful genetic programming information).

64 *See* Simon A. Cole, *Is the "Junk" DNA Designation Bunk?*, 102 NW. U. L. REV. COLLOQUY 54, 56–59 (2007), *available at* http://www.law.northwestern.edu/lawreview/colloquy/2007/29/lrcoll2007n29cole.pdf (arguing that certain portions of junk DNA could serve as a screening test for some diseases or medical conditions); *see also* TANIA SIMONCELLI & SHELDON KRIMSKY, AM. CONSTITUTION SOC'Y, A NEW ERA OF DNA COLLECTIONS: AT WHAT COST TO CIVIL LIBERTIES? 12–13 (2007), *available at* http://www.acslaw.org/node/5338 (discussing the potential for abuse of DNA databases to profile suspects on the basis of characteristics such as "intelligence, addictive behavior and aggression").

65 Other scholars, although conceding that DNA *could* be used to predict medical conditions and behavioral tendencies, insist that it is "highly unlikely" that such practices will actually

information contained in junk DNA is not currently thought to cause any particular disease, it does correlate with genes that do; accordingly, the junk DNA contained in CODIS profiles can potentially be used to determine whether a particular individual possesses certain disease-causing genes.[66]

B. Lower Courts' Approaches to Determining Whether DNA Databasing Laws Are Reasonable Under Current Fourth Amendment Jurisprudence

Although there is widespread agreement that DNA databasing laws implicate the Fourth Amendment, it does not necessarily follow that they are constitutionally prohibited; the Constitution requires only that the government's searches be reasonable.[67] Notwithstanding some well-established categorical exceptions, a search is presumed to be unreasonable under the Fourth Amendment unless it is conducted pursuant to a warrant based on a showing of probable cause.[68]

Prior to DNA databasing laws, the standard way to collect an individual's DNA for crime-solving purposes was by obtaining a warrant based on probable cause.[69] Essentially, to sample and analyze an individual's DNA, law enforcement officers had to demonstrate to a magistrate that criminal activity was afoot by linking a particular individual to a crime scene. The text of the Fourth Amendment ultimately prohibits only *unreasonable* searches, so the warrantless or even suspicionless collection of DNA samples pursuant to statute is not necessarily unconstitutional under Supreme Court precedent on the legality of government searches.[70]

Lower courts have diverged in analyzing how DNA collection statutes fit within the Fourth Amendment doctrines established by the Supreme Court. Some courts have analyzed the legality of such statutes under the special needs exception while others have adopted the totality of the circumstances test.

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occur and that arguments to the contrary constitute a "red herring." Derek Regensburger, *DNA Databases and the Fourth Amendment: The Time Has Come to Reexamine the Special Needs Exception to the Warrant Requirement and the Primary Purpose Test*, 19 ALB. L.J. SCI. & TECH. 319, 330–31 (2009).

66 Cole, *supra* note 64, at 58–59 (2007).

67 Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 619 (1989).

68 *Id.*

69 Biancamano, *supra* note 46, at 620.

70 *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652–53 (1995) ("[A] warrant is not required to establish the reasonableness of *all* government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either.").

1. *Emergence of a Split in Lower Courts' Consideration of Early DNA Statutes Targeting Parolees and Convicts*

The federal courts of appeals that considered challenges to earlier iterations of DNA collection statutes split in their use of two different Fourth Amendment theories of reasonableness, but ultimately agreed in their decisions to uphold the statutes.[71] These DNA collection statutes allowed law enforcement officials to collect, analyze, and perform unlimited database queries on a qualifying offender's DNA sample without a warrant or any showing of individualized suspicion that the offender had committed additional crimes.[72] Importantly, these decisions were not about statutes that permit suspicionless DNA collection from arrestees, but were limited to individuals who had been convicted of qualifying offenses.

a. Decisions Using the Totality of the Circumstances Test

A majority of federal circuits adopted the Supreme Court's totality of the circumstances test[73] that balances the state's interest in pursuing a search with the individual's expectation of privacy.[74] A minority of circuits opted to use the Supreme Court's special needs exception to the warrant requirement,[75] which allows a search to be

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71 Although Part II.A, *supra*, identifies three distinct types of searches involved in DNA databasing that implicate the Fourth Amendment, courts that considered earlier iterations of laws that targeted only qualifying offenders analyzed the constitutionality of the regime as a whole, rather than each distinct search separately.

72 *See, e.g.*, DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106–546, § 3, 114 Stat. 2726, 2728–30 (codified as amended at 42 U.S.C. § 14135a) (allowing DNA collection from federal convicts and providing for the entry of that information into CODIS).

73 *See* Samson v. California, 547 U.S. 843, 848 (2006) (finding that a stop and subsequent search of a parolee by a police officer who was aware of the parolee's prior history—but who did not have any individualized suspicion of a new crime—was reasonable under the totality of the circumstances approach based on the balancing of the "degree to which [a search] intrudes upon an individual's privacy and . . . the degree to which [the search] is needed for the promotion of legitimate governmental interests"); United States v. Knights, 534 U.S. 112, 118–22 (2001) (upholding a warrantless search of the home of a probationer convicted of drug offenses conducted by a law enforcement official who suspected probationer's involvement with non–drug related crimes, such as arson, because under the totality of the circumstances test, the state's interest in searching the probationer's home without a warrant outweighed his diminished privacy interest).

74 *See, e.g.*, United States v. Weikert, 504 F.3d 1, 9–11 (1st Cir. 2007); Banks v. United States, 490 F. 3d 1178, 1184 (10th Cir. 2007); United States v. Kraklio, 451 F.3d 922, 924–25 (8th Cir. 2006); United States v. Kincade, 379 F.3d 813, 832 (9th Cir. 2004) (en banc).

75 *See* New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985) (upholding a high school assistant principal's search of a student's purse based on a mere suspicion that the student had been smoking in violation of school rules because the school's interest in maintaining discipline and safety constituted a special need); *see also id.* at 351–52 (Blackmun, J., concurring) (agreeing that maintaining school discipline and safety is a "special need" beyond the normal needs of law enforcement that rendered the "warrant and probable cause requirement impracticable"). In

conducted without probable cause when the primary purpose of the search is not related to law enforcement.[76]

Circuits that employed the majority totality of the circumstances approach balanced the government's interest in maintaining databases like CODIS against the individual's privacy interest in her DNA, and ultimately found that DNA collection statutes targeting certain qualifying offenders are reasonable under the Fourth Amendment.[77] In considering the privacy rights of the individual, these courts built upon Supreme Court precedent[78] to find that individuals subject to state control—either by incarceration or supervised release—have a diminished expectation of privacy; therefore, the courts reasoned that such individuals can be subject to DNA collection even in the absence of individualized suspicion that they have committed additional crimes.[79] For example, an en banc panel of the Ninth Circuit upheld mandatory DNA testing of violent felons on supervised release pursuant to federal law[80] by focusing on the "well-established principle that parolees and other conditional releasees are not entitled to the full panoply of rights and protections possessed by the general public."[81]

On the opposite side of the balancing test, the courts followed Supreme Court precedent[82] by considering the government's interest in including samples from these classes of individuals in DNA databases, and ultimately concluded that this interest justified the stat-

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certain types of cases, primarily those involving border searches, the Court has invoked the special needs doctrine to uphold a search where the government has not even established a reasonable suspicion of wrongdoing. *See, e.g.*, United States v. Ramsey, 431 U.S. 606, 616 (1977) ("[S]earches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border . . . .").

76 *See, e.g.*, United States v. Amerson, 483 F.3d 73, 78 (2d Cir. 2007); United States v. Hook, 471 F.3d 766, 771–72 (7th Cir. 2006); United States v. Conley, 453 F.3d 674, 679 (6th Cir. 2006); Nicholas v. Goord, 430 F.3d 652, 667 (2d Cir. 2005).

77 *See, e.g.*, *Kincade*, 379 F.3d at 839 (holding that compulsory DNA profiling of qualified federal offenders is reasonable under the totality of the circumstances test).

78 *Samson*, 547 U.S. at 848–49 (discussing the "continuum" of liberty interests associated with various punishments that affords probationers more freedom than parolees).

79 *See Weikert*, 504 F.3d at 10–11, 14; *Banks*, 490 F.3d at 1185–86, 1193; *Kraklio*, 451 F.3d at 924–25; *Kincade*, 379 F.3d at 833–34, 839.

80 42 U.S.C. § 14135a(a)(2) (2006).

81 *Kincade*, 379 F.3d at 833.

82 *See Samson*, 547 U.S. at 853 (finding that the state's combined interest in the supervision of its parolees, the reduction of recidivism, and the effective reintegration of parolees into society justified the suspicionless search at issue); United States v. Knights, 534 U.S. 112, 120–21 (2001) (holding that the state had dual interests in reintegrating the probationer into the community and in preventing recidivism).

utes under the totality of the circumstances.[83] The First Circuit recognized that the government has "important interests in monitoring and rehabilitating supervised releasees, solving crimes, and exonerating innocent individuals" through the use of CODIS.[84] Similarly, the Ninth Circuit noted that "the interests furthered by the federal DNA Act are undeniably compelling."[85]

b. Decisions Using the Special Needs Doctrine

The minority approach adopted by federal circuit courts examines whether the DNA collection statute being considered presents a "special need" beyond normal law enforcement needs that renders the "warrant and probable-cause requirement impracticable."[86] Applying the special needs doctrine, the Second Circuit upheld a federal law[87] requiring DNA sample collection from any individual convicted of a felony—even nonviolent felons who are sentenced only to probation.[88] The Second Circuit rejected the argument that recent Supreme Court decisions mandated consideration of the statute under the totality of the circumstances;[89] instead, it held that some law enforcement purposes—including the government's interest in creating a federal DNA database—still qualify as a "special need" and fall under the associated exception to the Fourth Amendment's warrant requirement.[90] In a previous case, the Second Circuit similarly upheld New York's DNA indexing statute targeting convicted felons[91] under the special needs test, reasoning that the privacy intrusion of DNA collection is comparable to the intrusion involved in fingerprinting.[92] To justify this finding, the Second Circuit downplayed both the nature of information contained in DNA samples and the inherent crime-solving purpose of the statute, finding that the primary purpose of the statute goes beyond normal law enforcement needs:

> Although the DNA samples may eventually help law enforcement identify the perpetrator of a crime, at the time of collection, the samples in fact provide no evidence in and of

83 *Weikert*, 504 F.3d at 1.

84 *Id.* at 14.

85 *Kincade*, 379 F.3d at 838.

86 New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

87 42 U.S.C. § 14135a(d)(1) (2006).

88 United States v. Amerson, 483 F.3d 73, 89 (2d Cir. 2007).

89 *See id.* at 78–80 (distinguishing United States v. Knights, 534 U.S. 112, 122 (2001) and Samson v. California, 547 U.S. 843, 854–55 (2006)).

90 *Id.*

91 N.Y. EXEC. LAW §§ 995 to 995-f (McKinney Supp. 2011).

92 Nicholas v. Goord, 430 F.3d 652, 671 (2d Cir. 2005).

> themselves of criminal wrongdoing, and are not sought for the investigation of a specific crime. Because the state's purpose in conducting DNA indexing is distinct from the ordinary crime detection activities associated with normal law-enforcement concerns, it meets the special-needs threshold.[93]

2. Early Considerations of All-Arrestee DNA Statutes

Based on a handful of decisions on the constitutionality of all-arrestee DNA statutes that have been issued to date, it is clear that the rationales used by lower courts to uphold earlier, less expansive iterations of DNA databasing statutes do not lend themselves as easily to all-arrestee statutes. As noted previously, the Supreme Court has not yet granted certiorari to a challenge of *any* state or federal DNA collection statute, including the latest federal all-arrestee law.

To date, only a handful of state courts have considered the state and federal constitutionality of all-arrestee DNA statutes, splitting both on the doctrinal approach used and the end result reached.[94] The Supreme Court of Virginia did not expressly rely on either the majority or minority approaches, but instead upheld a state all-arrestee statute based on a comparison of DNA sampling and fingerprinting as part of a routine booking process.[95] The Supreme Court of Virginia reasoned that DNA collection, like fingerprinting, is justified by an arrest based on probable cause given that the arrestee's "identification becomes a matter of legitimate state interest and he can hardly claim privacy in it."[96]

By contrast, the Minnesota Court of Appeals (the intermediate appellate court in Minnesota) struck down the state's all-arrestee statute using the totality of the circumstances test, opting to focus its anal-

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93 *Id.* at 669 (internal quotation marks and citation omitted).

94 In addition to the Virginia and Minnesota decisions discussed *infra*, Lily Haskell, whose story is recounted in the Introduction, filed a suit challenging the constitutionality of California's all-arrestee DNA collection statute. *See* Complaint, *supra* note 1, at 1. The federal district court hearing the case has dismissed the plaintiffs' motion for a preliminary injunction, *see* Haskell v. Brown, 677 F. Supp. 2d 1187, 1201–03 (N.D. Cal. 2009), and the parties now await the Ninth Circuit's ruling on the matter, Haskell v. Brown, No. 10-1512 (9th Cir. argued July 13, 2010).

95 Anderson v. Commonwealth, 650 S.E.2d 702, 705 (Va. 2007). Although the Supreme Court of Virginia did not expressly cite the totality of the circumstances test, its analysis did engage in balancing the government's and the arrestee's respective interests. *See id.* at 705–06. By contrast, the *Anderson* court explicitly rejected the defendant's reliance on the special needs doctrine. *See id.* at 706.

96 *Id.* at 705 (quoting Jones v. Murray, 962 F.2d 302, 306 (4th Cir. 1992)) (internal quotation marks omitted). The *Anderson* court went on to note that, like fingerprinting, the "'Fourth Amendment does not require an additional finding of individualized suspicion' before a DNA sample can be taken." *Id.* (quoting *Jones*, 962 F.2d at 306–07).

ysis on the statute's failure to require probable cause sufficient for a search warrant in order to extract a biological specimen.[97] The Minnesota appellate court ultimately rejected the state's arguments that the totality of the circumstances test produces the same results for arrestees as it does for convicted felons, recognizing that the two classes of individuals have very different expectations of privacy.[98]

On the federal level, there has been a relatively short period of time for challenges to the federal all-arrestee statute because the DOJ did not issue regulations providing for widespread DNA collection from federal arrestees until January 2009.[99] In *United States v. Pool*,[100] the District Court for the Eastern District of California adopted the majority totality of the circumstances approach and ultimately upheld the statute as applied to the defendant.[101] The opinion explicitly left open the question of whether compelled DNA collection from other arrestees would be constitutional under the Fourth Amendment.[102] Authorities arrested the defendant on child pornography charges after an indictment by a grand jury. At the defendant's arraignment, the district court ordered DNA testing as a condition to his pretrial release, prompting him to challenge both the all-arrestee statute and provisions of the Bail Reform Act.[103] In upholding the constitutionality of both statutes, the court noticeably took pains to limit its holding to those situations where there has been a judicial or grand jury finding of probable cause, holding that under the totality of circumstances test, it is only after this event that a "defendant's liberty may be greatly restricted."[104] Accordingly, the court found that imposing the DNA collection requirement on pretrial detainees is "clearly warranted if not compelling" because the state has a legitimate interest in an arrestee's identity,[105] paralleling the reasoning used by the Second

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97 *In re* Welfare of C.T.L., 722 N.W.2d 484, 490–91 (Minn. Ct. App. 2006).

98 *Id.* at 491–92.

99 *See* DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74,932 (Dec. 10, 2008) (codified at 28 C.F.R. pt. 28) (authorizing DNA collection pursuant to any arrest by federal authorities—even those made without warrants and, in cases of police misconduct, without probable cause).

100 United States v. Pool, 645 F. Supp. 2d 903 (E.D. Cal. 2009), *aff'd*, 621 F.3d 1213 (9th Cir. 2010).

101 *Id.* at 913.

102 *Id.*

103 Bail Reform Act of 1984, 18 U.S.C. §§ 3141–3150 (2006); *Pool*, 645 F. Supp. 2d at 905.

104 *Pool*, 645 F. Supp. 2d at 909.

105 *Id.* at 910.

Circuit[106] and the Supreme Court of Virginia[107] that analogizes DNA collection to fingerprinting.

On appeal, the Ninth Circuit affirmed.[108] The court agreed with the lower court's characterization "that the 'judicial or grand jury finding of probable cause' was the 'watershed event' that distinguished [the defendant] from the general public" and warranted considering this particular instance of DNA collection under the totality of the circumstances test.[109] Although the court considered the defendant's arguments regarding the information potentially available through junk DNA and the possibility of familial identification, it nonetheless adhered to circuit precedent to hold that DNA collection is "minimally invasive both in terms of the bodily intrusion it occasions, and the information it lawfully produces."[110] On the opposite side of the balancing test, the court found that the government's interest in collecting DNA "after a probable cause determination"—an event that is notably different than an arrest—"remain[s] substantial" when done for the purpose of identification and "outweighs the intrusion into his privacy."[111]

Refuting the type of analysis conducted by the district and circuit courts in *Pool*, the District Court for the Western District of Pennsylvania in *United States v. Mitchell*[112] held that the collection of DNA from a pretrial detainee pursuant to federal law would be an unreasonable search.[113] First, the court found that the collection of DNA is not analogous to the types of searches upheld by the Supreme Court under the special needs doctrine.[114] Then, the court also rejected the government's totality of the circumstances argument, finding that "the Fourth Amendment does not stop at the jailhouse door"[115] and re-

106 Nicholas v. Goord, 430 F.3d 652, 671 (2d Cir. 2005).

107 Anderson v. Commonwealth, 650 S.E.2d 702, 705–06 (Va. 2007).

108 United States v. Pool, 621 F.3d 1213, 1214 (9th Cir. 2010).

109 *Id.* at 1219 (quoting *Pool*, 645 F. Supp. 2d at 909). Although the court noted that "the Supreme Court indicated that with a person's arrest the government may have grounds to limit the arrestee's rights," it nonetheless relied on the defendant's appearance before a magistrate, rather than his arrest, as the relevant event for its analysis under the totality of the circumstances test. *Id.*

110 *Id.* at 1222 (quoting United States v. Kincade, 379 F.3d 813, 838 (9th Cir. 2003) (en banc)) (internal quotation marks omitted).

111 *Id.* at 1223.

112 United States v. Mitchell, 681 F. Supp. 2d 597 (W.D. Pa. 2009).

113 *Id.* at 611. Because the Act's implementing regulations did not go into effect until January 2009, officials did not collect the detainee's DNA upon his initial arrest, but instead sought to collect it at his pretrial appearance. *Id.* at 600.

114 *Id.* at 603–04.

115 *Id.* at 607.

jecting the analogy of DNA collection to fingerprinting as "pure folly."[116]

C. *The Federal All-Arrestee DNA Statute Violates the Fourth Amendment Under Both the Majority and Minority Approaches*

When considered as a whole, the federal statutory scheme authorizing DNA sample collection from all arrestees violates the Fourth Amendment, regardless of the doctrinal approach used. Although the initial search to obtain a DNA sample can be justified because it involves only a minimal bodily intrusion, the subsequent analysis of that DNA sample and its inclusion in the CODIS database for repeated querying are not constitutional under either the special needs or the totality of the circumstances tests.[117]

1. *On Its Own, the Initial Collection of a DNA Sample from Arrestees Comports with the Fourth Amendment*

A comprehensive consideration of the federal all-arrestee DNA collection regime reveals constitutional flaws. It is important, however, to consider whether the individual components of the statute on their own violate the Fourth Amendment. In separating the regime into three distinct searches, it becomes clear that the initial extraction of an arrestee's DNA is constitutional when isolated from the sample's subsequent analysis and inclusion in CODIS.

The initial collection of DNA involves a bodily intrusion,[118] but without additional analysis of the sample or inclusion in a searchable database, the intrusive nature of the search ends with the removal of the syringe drawing blood or the swab scraping the inside of the cheek. The Supreme Court has upheld searches of arrestees involving physical intrusions as being reasonable even when conducted without

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116 *Id.* at 608.

117 The following analysis is premised on viewing federal DNA databasing of arrestees as a compelled practice. By contrast, DNA databasing is always constitutional, even in the context of arrests, if the individual arrestee knowingly and voluntarily consents to each of the distinct searches involved. *See generally* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (establishing a totality of the circumstances test for evaluating whether an individual has consented to a search). Even when an exception to the warrant requirement is not applicable—which, as discussed *infra*, is the case here—officials may nonetheless make a constitutional warrantless search with the consent of the party, even in the absence of any articulable suspicion. *See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: INVESTIGATIVE CASES AND COMMENTARY 457 (Thomson West 8th ed. 2007).

118 *See supra* Part II.

a warrant.[119] For example, in the context of forcible blood draws from arrestees, the Supreme Court has found that such "tests are a commonplace in these days of periodic physical examinations and . . . for most people the procedure involves virtually no risk, trauma, or pain."[120] Furthermore, the Supreme Court has upheld far more intrusive bodily searches of detained individuals prior to conviction.[121]

Scholars generally agree that it is the nature of the information obtained by analyzing DNA samples for inclusion in CODIS rather than the bodily intrusion of the initial collection that is problematic under the Fourth Amendment.[122] It is only when the government goes beyond the physical extraction of DNA that an individual's expectation of privacy in her personal information is invaded. As such, the next two subsections will consider the federal all-arrestee DNA statute as a whole to determine whether the regime violates the Fourth Amendment.

2. *The Special Needs Doctrine Does Not Encompass the Federal All-Arrestee DNA Collection Statute*

Notwithstanding the amorphous bounds and inconsistencies of the special needs exception,[123] the DNA Fingerprinting Act—when considered as a whole—cannot be upheld under the doctrine. First, the federal all-arrestee statute fails the primary purpose test because Congress enacted it to solve more crimes, a purpose that does not go beyond the ordinary needs of law enforcement. Second, there are no alternative, non–law enforcement purposes for the statute that adequately justify the use of the special needs exception.

The special needs exception's primary purpose test presents an insurmountable obstacle for the federal all-arrestee law because the law enforcement rationale behind expanding CODIS is so obviously paramount. In recent decisions, the Supreme Court limited the special needs exception by making the determinative factor whether there is a non–law enforcement primary purpose behind a search.[124]

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119 *See, e.g.*, Schmerber v. California, 384 U.S. 757, 771 (1966).

120 *Id.*

121 *See* Bell v. Wolfish, 441 U.S. 520, 558 (1979) (finding that visual body cavity searches of pretrial detainees do not violate the Fourth Amendment).

122 *See, e.g.*, Kaye, *supra* note 25, at 482.

123 *See* Maclin, *supra* note 34, at 178 (noting that the Supreme Court's special needs decisions "do not neatly fit together as a coherent doctrine").

124 Ferguson v. City of Charleston, 532 U.S. 67, 84 (2001) (striking down a policy implemented at a Charleston public hospital that required health care providers, upon suspicion of drug use, to conduct urine tests of pregnant mothers and turn test results over to law enforcement because its primary purpose "was to use the threat of arrest and prosecution in order to

Most recently, the Supreme Court made it clear that the special needs exception does not encompass suspicionless efforts by law enforcement to obtain information about crimes a searched individual *may have* committed[125]—which is exactly what is at the heart of the rationale for collecting DNA from arrestees.[126] Congress expanded DNA collection to arrestees specifically for the purpose of increasing the size of CODIS and thus increasing the probability of generating matches to help solve other crimes in which the arrestee may be involved.[127]

Some scholars have explored other possible purposes behind DNA collection statutes that might justify application of the special needs test in this context,[128] but have nonetheless struggled to fit all-arrestee statutes within the doctrine. The more meritorious of the alternative justifications offered for DNA collection regimes limited to qualifying offenders are largely inapplicable to all-arrestee statutes. For example, the idea that a warrantless DNA-collection statute has the purpose of preventing recidivism[129] has no logical application for

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force women into treatment" and it relied on extensive involvement of law enforcement); City of Indianapolis v. Edmond, 531 U.S. 32, 38 (2000) (ruling that the special needs doctrine did not cover officers' use of drug-sniffing dogs at roadblocks because its "primary purpose was to detect evidence of ordinary criminal wrongdoing" rather than enforcing border security or ensuring safe roads). *See also* Maclin, *supra* note 34, at 179 (noting that the *Ferguson* Court made it clear that the primary purpose prong is "first among equals" in applying the special needs test as compared to other factors, including the availability of the search results to law enforcement and the role of law enforcement in conducting the search).

125 Illinois v. Lidster, 540 U.S. 419, 422–23 (2004) (upholding a police roadblock to investigate a traffic accident under the special needs test because the purpose of the stop was to ask vehicle occupants for help in providing information about a crime and not to determine whether the vehicle occupants themselves were committing a crime); *id.* at 423–24.

126 *See* 151 CONG. REC. 28,858 (2005) (statement of Sen. Kyl) (explaining that "the efficacy of the DNA identification system in solving serious crimes depends upon casting a broad DNA sample collection net to produce well-populated DNA databases").

127 *See id.* at 28,856 ("By removing current barriers to maintaining data from criminal arrestees, the Act will allow the creation of a comprehensive, robust database that will make it possible to catch serial rapists and murderers before they commit more crimes.").

128 *See, e.g.*, Sandra J. Carnahan, *The Supreme Court's Primary Purpose Test: A Roadblock to the National Law Enforcement DNA Database*, 83 NEB. L. REV. 1, 21–28 (2004) (exploring several purposes beyond normal law enforcement needs that might warrant inclusion of the federal law in the now-narrowed special needs exception, including the exoneration of innocent people, the prevention of recidivism, the solving of past or future—rather than present—crimes, and the need to fill in gaps at the state level). *But see* Charles J. Nerko, *Assessing Fourth Amendment Challenges to DNA Extraction Statutes After* Samson v. California, 77 FORDHAM L. REV. 917, 917 (2008) (arguing that the Supreme Court should use the less stringent totality of the circumstances test to assess the constitutionally of DNA databasing laws in order to maintain the integrity of the special needs test).

129 *See* Carnahan, *supra* note 128, at 24–25 (finding that the government does have an inter-

the federal all-arrestee statute. In contrast to more targeted statutes, all-arrestee statutes require DNA collection from many people who are not ultimately convicted of a crime at all, do not serve any (or at least any significant) jail time, and therefore are not implicated by the trend of prisoners who are more likely to be reincarcerated for committing another serious crime.[130]

An additional justification that could be offered is that the all-arrestee statute has the purpose of exonerating the innocent. Although a worthy goal, these ends can be accomplished through other means. Laws improving access to DNA testing postconviction present the best opportunity for improving exoneration rates based on DNA.[131] For those arrestees who want to argue in favor of their innocence *pre*conviction through the use of DNA evidence, that opportunity is available even if law enforcement does not automatically collect a DNA sample upon arrest; testing can be conducted independently by the defense or by court order. Accordingly, exoneration of the innocent is not a suitable justification that would allow the all-arrestee scheme to pass muster under the special needs exception.

3. The Federal All-Arrestee Statute Does Not Pass Constitutional Muster Under the Totality of the Circumstances Test

The current all-arrestee federal DNA databasing statute also does not pass muster under the more flexible totality of the circumstances test because the government's interest in expanding CODIS does not outweigh an arrestee's expectation of privacy in her DNA. Neither the reasoning employed in the seminal Supreme Court decisions establishing the doctrine, nor the federal circuit courts' considerations of earlier DNA databasing statutes stretch so far as to sustain the DNA Fingerprint Act of 2005's expansion of DNA collection from federal arrestees.[132]

State and federal courts have held that collecting DNA from arrestees complies with the Fourth Amendment under the totality of the

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est in reducing recidivism by convicted offenders who are statistically more likely than ordinary citizens to break the law).

130 *See, e.g.*, PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf (finding that over sixty-seven percent of former prisoners released from state prisons in 1994 committed at least one serious new crime within the next three years).

131 *See generally Access to Post-Conviction DNA*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php (last visited Mar. 28, 2011) (offering suggestions to improve access to postconviction DNA testing).

132 DNA Fingerprint Act of 2005, Pub. L. No. 109-162, §§ 1001–1105, 119 Stat. 2960, 3084–86 (2006) (codified in scattered sections of 18 and 42 U.S.C.).

circumstances because it is part of the "routine booking process" that is justified by the state's interest in identifying an arrestee.[133] To support this argument, courts compare DNA collection upon arrest to fingerprinting.[134] Although the Supreme Court has never conclusively ruled on the reasonableness of fingerprinting, lower courts have justified the practice as a minimal, but necessary, privacy intrusion that allows the state to accurately identify an individual in the event of an escape and to determine the proper sentence in the event of a second offense.[135]

As one scholar has pointed out, however, the analogy to fingerprinting works only if an individual's DNA could be obtained through a "procedure that made it virtually impossible to extract sensitive information" such that "information related to identification and nothing else could be obtained from it."[136] As noted previously, DNA contains a wealth of information far beyond identification, including medical conditions, behavioral characteristics, and even family relationships.[137] Congress has attempted to limit the accessibility of this information by including only junk DNA in CODIS,[138] but rapid DNA technology advances promise to undermine this goal by greatly expanding the types of information that can be gleaned from an individual's junk DNA profile.[139]

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133 Anderson v. Commonwealth, 650 S.E.2d 702, 706 (Va. 2007); *see also* Nicholas v. Goord, 430 F.3d 652, 668–69 (2d Cir. 2005); United States v. Pool, 645 F. Supp. 2d 903, 913 (E.D. Cal. 2009), *aff'd*, 621 F.3d 1213 (9th Cir. 2010).

134 *See, e.g.*, *Anderson*, 650 S.E.2d at 706 ("[W]e see the intrusion on privacy . . . as similar to the intrusion wrought by the maintenance of fingerprint records."); *see also* Regensburger, *supra* note 65, at 389 ("Given that DNA testing is only marginally more intrusive than fingerprinting, it is not unreasonable to think of DNA testing as but one more additional step in the booking procedure.").

135 United States v. Kelly, 55 F.2d 67, 68 (2d Cir. 1932).

136 Kaye, *supra* note 25, at 482; *cf.* Corey Preston, Note, *Faulty Foundations: How the False Analogy to Routine Fingerprinting Undermines the Argument for Arrestee DNA Sampling*, 19 WM. & MARY BILL RTS. J. 475, 476 (2010) (noting that the analogy between fingerprinting and DNA "certainly makes intuitive sense," but that "with a close analysis of the differences between DNA and fingerprint testing, both procedurally and substantively, the analogy falls apart").

137 *See* Greely et al., *supra* note 59, at 252; Kaye, *supra* note 25, at 482; Scherer, *supra* note 56, at 2021.

138 *See* H.R. REP. NO. 106-900, pt. 1, at 27 (2000) ("[T]he genetic markers used for forensic DNA tested were purposefully selected because they are not associated with any known physical or medical characteristics.").

139 *See* Gibbs, *supra* note 63, at 29 (questioning the notion that junk DNA does not contain any useful genetic programming information).

Recent studies have concluded that the long-held conception that junk DNA has no biological function is "badly flawed,"[140] and that the key to identifying genetic disorders (and curing them) lies within these regions of DNA.[141] These studies also give some credence to more speculative predictions that DNA profiles entered into CODIS will eventually provide a basis for determining a particular individual's propensity for certain types of criminal or socially disfavored behavior.[142] One Ninth Circuit judge recognized that CODIS profiles might be abused for nefarious purposes like identifying social deviance and diseases, predicting that the potential for misuse will only increase over time because "the permanent maintenance of this type of information about untold millions of Americans . . . affords the government monumental powers to intrude into the core of those intimate concerns which lie at the heart of the right to privacy."[143] Already, law enforcement officials in the United States have begun following the British practice of exploiting the familial-relationship information contained in junk DNA; in any given investigation, police can search DNA databases for "less than perfect matches" between a profile and evidence from crime scenes in the hopes that a family member's junk DNA will be a close enough match to lead them to a perpetrator.[144]

Furthermore, if the state's interest is purely in identification, then fingerprinting already serves this purpose and arguably does so in a superior fashion to DNA sampling.[145] As illustrated by the statute's

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140 Richard Ingham, *Landmark Study Prompts DNA Rethink*, DISCOVERY CHANNEL (June 14, 2007), http://dsc.discovery.com/news/2007/06/14/genetics_hea_print.html.

141 *See* Colin Nickerson, *DNA Study Challenges Basic Ideas in Genetics: Genome 'Junk' Appears Essential*, BOSTON GLOBE, June 14, 2007, at A1.

142 *See* Tania Simoncelli, *Dangerous Excursions: The Case Against Expanding Forensic DNA Databases to Innocent Persons*, 34 J.L. MED. & ETHICS 390, 392 (2006) (arguing against the expansion of DNA databases based in part on "[r]epeated claims that human behaviors such as aggression, substance addiction, criminal tendency, and sexual orientation can be explained by genetics").

143 United States v. Kincade, 379 F.3d 813, 850–51 (9th Cir. 2004) (en banc) (Reinhardt, J., dissenting).

144 *See* Greely et al., *supra* note 59, at 248–49 (describing a British case where police, without any other leads, went after the brother of an individual whose DNA profile was a close, but far from exact, match to the DNA collected at the scene of a murder, and noting that this method has been used in the United States "at least once").

145 *See* Kaye, *supra* note 25, at 488 (pointing out that every individual fingerprint is unique, whereas identical twins can share the same DNA). *But see* Jones v. Murray, 962 F.2d 302, 307 (4th Cir. 1992) ("Traditional methods of identification by photographs, historical records, and fingerprints often prove inadequate. . . . DNA . . . cannot, within current scientific knowledge, be altered. . . . Even a suspect with altered physical features cannot escape the match that his DNA might make with a sample contained in a DNA bank, or left at the scene of a crime within samples of blood, skin, semen or hair follicles.").

legislative history, however, Congress intended to expand CODIS for the purpose of solving more crimes,[146] a goal that is inherently different than the rationale originally used to uphold fingerprinting as a constitutionally sound method of identifying an arrestee who later escapes.[147]

Given the imperfection of the analogy likening DNA sampling to fingerprinting, courts would have to find that the government's interest in the crime-fighting benefits of DNA databases outweigh an arrestee's expectation of privacy for the statutes to be constitutional under the totality of the circumstances test. The Supreme Court's past decisions upholding suspicionless searches of parolees and convicts have placed great weight on the individuals' diminished privacy expectations that result from being under the supervision of the government.[148] In *United States v. Knights*,[149] for example, the Court balanced the state's interest in searching the probationer's home without a warrant against the probationer's privacy interest, ultimately finding that the defendant's status as a probationer "informs both sides of th[e] balance."[150]

This diminished expectation of privacy, made paramount by Supreme Court precedent, justifies the inclusion of a convicted offender's DNA in CODIS for the purpose of solving past or future crimes in which the offender might be implicated. Accordingly, lower courts applying the totality of the circumstances test have upheld earlier iterations of DNA collection statutes by focusing on the diminished expectation of privacy that convicted offenders have by virtue of being under the supervision or detention of the government.[151] Some argue that even this reduced expectation of privacy should not be enough to tip the balance in favor of the government in this context.[152]

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146 *See* 151 CONG. REC. 28,855 (2005) (statement of Sen. Kyl) ("By removing current barriers to maintaining data from criminal arrestees, the Act will allow the creation of a comprehensive, robust database that will make it possible to catch serial rapists and murderers before they commit more crimes.").

147 *See* United States v. Kelly, 55 F.2d 67, 68 (2d Cir. 1932) (upholding fingerprinting for identification, rather than crime-solving, purposes).

148 *See* Samson v. California, 547 U.S. 843, 850 (2006); United States v. Knights, 534 U.S. 112, 119 (2001).

149 *Knights*, 534 U.S. at 112.

150 *Id.* at 119.

151 *See* United States v. Weikert, 504 F.3d 1, 10–11 (1st Cir. 2007); Banks v. United States, 490 F.3d 1178, 1185 (10th Cir. 2007); United States v. Kraklio, 451 F.3d 922, 924–25 (8th Cir. 2006); United States v. Kincade, 379 F.3d 813, 839 (9th Cir. 2004) (en banc).

152 One dissenting Ninth Circuit judge argued that the majority adopted a "malleable" totality of the circumstances test and abandoned a fundamental tenet of Fourth Amendment jurisprudence that requires individualized suspicion to conduct a search. *See Kincade*, 379 F.3d at

No such "diminished expectation of privacy" justification exists for analyzing an arrestee's DNA sample and subjecting the resulting profile to ongoing searches by law enforcement officials trying to solve cases. An arrestee, unlike a convict or parolee, has not been found guilty of a crime beyond a reasonable doubt.[153] At most, an arrest acknowledges that law enforcement officials have probable cause to believe she has committed a crime.[154] In cases of warrantless arrests, however, that determination of probable cause is not even subject to advance judicial approval,[155] which leaves the door open to both conscientious officer abuse and honest mistake[156]—as demonstrated by the Lily Haskell anecdote detailed in the Introduction. One commentator hypothesized that all-arrestee DNA regimes are an "invitation for misconduct" that will lead to an increase in improper investigative detentions: police officers who lack probable cause for a warrant to collect a suspect's DNA for use in a specific case will instead simply arrest the individual on improper grounds to obtain his DNA and confirm whether their investigative hunch is correct.[157]

Furthermore, the legislators enacting the federal all-arrestee statute acknowledged the fundamental differences between arrestees and convicted offenders. The very text of the statute recognizes that an arrestee is different from a convicted felon by providing only arrestees with a process through which their DNA samples can be expunged if they are not ultimately convicted[158]—a process that would not be necessary if an arrestee and a convicted offender shared the same spot on the "continuum of liberty interests" described by the Supreme

844 (Reinhardt, J., dissenting); s*ee also, e.g.*, Bina Ghanaat, *Technology and Privacy: The Need for an Appropriate Mode of Analysis in the Debate over the Federal DNA Act*, 42 U.C. DAVIS L. REV. 1315, 1341–43 (2009) (arguing that the lack of guidance from the Supreme Court regarding the totality of the circumstances test has improperly opened the door for courts to potentially uphold all-arrestee DNA statutes).

153 *See, e.g.*, *In re* Welfare of C.T.L., 722 N.W.2d 484, 491 (Minn. Ct. App. 2006) (finding that "the reduced expectation of privacy that was present in the cases [that considered statutes that targeted only qualifying offenders] is not present" in the case of a juvenile who had been arrested, but not yet convicted, on charges of assault and aiding and abetting).

154 *See, e.g.*, SALTZBURG & CAPRA, *supra* note, 117, at 167.

155 An individual who is arrested without a warrant is entitled to a "timely judicial determination of probable cause" *only if* law enforcement officials plan to continue to detain him. *See* Gerstein v. Pugh, 420 U.S. 103, 125–26 (1975). Waiting to hold a *Gerstein* hearing more than forty-eight hours after the individual's arrest is presumptively unreasonable. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

156 *See* SALTZBURG & CAPRA, *supra* note 117, at 167–68 (noting that the decision of whether to conduct an arrest is "totally within the police officer's discretion").

157 Berlet, *supra* note 25, at 1510–12.

158 *See* 42 U.S.C. § 14132(d) (2006).

Court.[159] No such expungement procedures exist for an arrestee's fingerprints—an arrestee who is ultimately not convicted has no way to affirmatively seek the destruction of her fingerprint records,[160] further demonstrating the fundamental difference between fingerprinting, which is constitutionally permissible upon arrest, and DNA sampling, which is not. One court noted that the mandatory expungement provision of a state all-arrestee statute—requiring destruction of DNA samples when an arrest does not result in a conviction—demonstrates that an individual's expectation of privacy is not diminished by arrest.[161]

In considering the totality of the circumstances approach, it is important to address the policy argument that an all-arrestee statute is sound because it ultimately results only in identifying individuals who are actually guilty; this rationale is based on the premise that law-abiding citizens who are erroneously arrested have nothing to fear by having their DNA profiles included in CODIS.[162] This idea is cited by legislators rather than courts, and for good reason: it is simply not constitutionally valid to argue that an illegal search is justified because it reveals only incriminating evidence and leaves the innocent unharmed. Indeed, the whole premise of the Fourth Amendment exclusionary rule, which prevents illegally gathered or analyzed evidence from being admissible in a criminal prosecution, is to discourage the police from pursuing unconstitutional searches and seizures.[163] A suspicionless search of a car invades an individual's legitimate privacy interest regardless of whether it reveals something as incriminating as illegal drugs or as benign as empty fast food containers. Similarly, analyzing a DNA sample and including it in a searchable database impermissibly invades an arrestee's privacy interest whether or not it

159 Samson v. California, 547 U.S. 843, 850 (2006).

160 *See, e.g.*, 151 CONG. REC. 28,857 (2005) (statement of Sen. Kyl) (noting that the DNA expungement procedures provided in the DNA Fingerprint Act of 2005 and amendments thereto are "more restrictive of law enforcement than the rule for fingerprints—there is no expungement of fingerprints from the national database, even if the arrestee is acquitted or charges are dismissed").

161 *In re* Welfare of C.T.L., 722 N.W.2d 484, 491 (Minn. Ct. App. 2006).

162 *See* 150 CONG. REC. 22,956 (2004) (statements of Sen. Cornyn) ("If the person whose DNA it is does not commit other crimes, then the information simply remains in a secure database and there is no adverse effect on his life. But if he commits a murder, rape, or other serious crime, and DNA matching can identify him as the perpetrator, then it is good that the information was retained.").

163 *See* SALTZBURG & CAPRA, *supra* note 117, at 35.

links her to a crime, because of the personal nature of the information contained within a DNA profile.[164]

III. Solving the Constitutional Defects of the Federal All-Arrestee DNA Collection Statute

As established in Part II, the federal statute authorizing DNA collection from all arrestees is constitutionally problematic under current Fourth Amendment jurisprudence and is therefore ripe for either judicial or legislative reform. After first addressing alternative solutions at the judicial level, this Part proposes a legislative reform of the statute as the soundest solution for protecting an arrestee's expectation of privacy while still accounting for the important public interests served by a robust CODIS database.

A. Possible Judicial Solutions

Given the strong public policy rationales and law enforcement interests served by expansive and integrated DNA databases, many commentators have advocated for remedying the constitutional defects of all-arrestee DNA collection laws simply by expanding existing exceptions to the warrant requirement or creating new ones. Some scholars have argued for the Supreme Court to use the special needs exception employed by the Second[165] and Seventh[166] Circuits, reasoning that the primary purpose test can be circumvented given that DNA collection also serves the purposes of preventing recidivism, exonerating the innocent, and solving past and future, rather than current, crimes.[167] As noted above, these rationales are largely inapplicable in the arrestee context and seem unlikely to persuade the

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164 *See* Nat'l Comm'n on the Future of DNA Testing, *supra* note 62, at 35; Gibbs, *supra* note 63, at 48 (suggesting that junk DNA contains useful genetic programming information).

165 *See* United States v. Amerson, 483 F.3d 73, 89 (2d Cir. 2007).

166 *See* United States v. Hook, 471 F.3d 766, 772 (7th Cir. 2006).

167 *See, e.g.*, Carnahan, *supra* note 128, at 21–28 (exploring these other purposes); Robert Molko, *The Perils of Suspicionleess DNA Extraction of Arrestees Under California Proposition 69: Liability of the California Prosecutor for Fourth Amendment Violation? The Uncertainty Continues in 2010*, 37 W. St. U. L. Rev. 183, 206 (2010) (noting that "[u]nless the [C]ourt redefines or expands the Special Needs test," it will have to adopt the totality of the circumstances test); Regensberger, *supra* note 65, at 385–86 (acknowledging that the totality of the circumstances test is not applicable in the context of arrestees and arguing that the special-needs test should be used instead, given the government's interest "in streamlining investigations and preventing innocent people from being wrongly targeted or convicted"). Regensberger, however, goes on to note that the primary purpose test makes application of the special needs doctrine unlikely. Regensberger, *supra* note 65, at 386.

Supreme Court given the Court's apparent commitment to preserving the narrowness of the exception, as evidenced by recent cases.[168]

Another possibility is for the Supreme Court to create an entirely new and distinct exception to the warrant requirement for all-arrestee DNA statutes. For example, Professor D.H. Kaye has advocated for the creation of a "trace evidence database" exception to the Fourth Amendment that explicitly recognizes the constitutionality of collecting DNA samples, not just for recordkeeping purposes, but also for crime control and prevention.[169] Similarly, Professor Derek Regensberger argues that given the limitations of current Fourth Amendment jurisprudence, the Supreme Court should create a new framework for evaluating suspicionless search regimes by reverting back to a barebones version of the special needs doctrine that places no weight on the existence of a law enforcement purpose.[170]

Creating a new exception to the warrant requirement to specifically address DNA collection statutes will further complicate an increasingly incoherent area of law. Fourth Amendment jurisprudence is already convoluted by decades of inconsistent opinions that have established exceptions to the warrant requirement, often with ambiguous parameters.[171] Consequently, the Supreme Court does not—and should not—establish new categorical exceptions lightly.[172] Furthermore, as with past exceptions intended to be narrow in scope, even Professor Kaye's trace evidence database exception could expand rapidly, given the possibility of technological advancements. As the information in junk DNA becomes more easily used for predictive purposes, a DNA collection exception to the Fourth Amendment could serve as the basis for law enforcement to use increasingly more invasive DNA profiling tactics, transforming what began as a narrow exception into a far less than clear-cut component of the Court's Fourth Amendment jurisprudence.

In contrast to those who argue for a judicial solution to preserve the federal all-arrestee DNA statute, others have suggested that the Supreme Court grant certiorari to a case challenging the law and strike it down as violating the Fourth Amendment.[173] These critics argue that the distinguishing factors between an arrestee and a con-

168 *See supra* Part III.A.

169 Kaye, *supra* note 25, at 498–504.

170 Regensberger, *supra* note 65, at 387–89.

171 *See generally* SALTZBURG & CAPRA, *supra* note 117, at 166–84.

172 *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 395 (1978) (declining to create a "murder scene exception" to the warrant requirement of the Fourth Amendment).

173 *E.g.*, Biancamano, *supra* note 46, at 658–60.

victed offender render any all-arrestee regime constitutionally defective, requiring the Supreme Court to rule against the statute.[174]

Arguments to strike down the all-arrestee statute altogether certainly have merit, but doing so could prevent the Supreme Court from definitively ruling on what the Fourth Amendment will and will not permit when it comes to DNA collection statutes. Congress and state legislatures with similarly structured all-arrestee laws would be forced to either revert to earlier versions of those statutes in hopes that they will survive if a subsequent challenge ever arises, or to go back to the drawing board to experiment with other ways to expand their DNA databases without violating the Constitution.

B. Proposed Legislative Solution

To preserve arrestees' constitutional rights and recognize the legitimate government interest in expanding CODIS, Congress should adopt reforms to the DNA Fingerprint Act of 2005 that isolate each step in the DNA databasing process to ensure each complies with the Fourth Amendment. This Section first explains the legislative changes required by the proposed solution and then applies the proposed solution to the scenario from the Introduction. Finally, it examines why these changes make the statute constitutionally permissible.

1. Reforming the Amendments to the DNA Fingerprinting Act

The proposed reform to the current federal all-arrestee statute focuses on the government's handling of DNA samples after they have been collected from arrestees.[175] Under the new regime, the federal government would still be permitted to collect a DNA sample from any individual upon arrest; as discussed in Part II.A, the minimal intrusiveness of this search makes it reasonable under the Fourth Amendment given the Supreme Court's willingness to uphold far more intrusive physical invasions. The key is that after this first step in the DNA databasing process, law enforcement officials would be required to store the unanalyzed DNA sample of the arrestee in a databank—completely separate from the CODIS database—where it would remain without proceeding to step two (analysis to create a

174 *Id.* at 649–60. By contrast, other scholars believe that the best way to confront the legal and policy problems associated with all-arrestee statutes is to create a universal database that contains DNA profiles for all Americans. *See* Michael Seringhaus, Op-Ed, *To Stop Crime, Share Your Genes*, N.Y. TIMES, Mar. 15, 2010, at A23.

175 Although this proposal is specifically tailored to reform the federal all-arrestee statute, the twenty-one states that currently collect DNA from some or all arrestees, *see supra* note 37, could certainly enact similar legislative amendments.

DNA profile) or step three (inclusion of the DNA profile in the CODIS database to make it available to law enforcement officials querying the system) until one of two triggering events occurred.

The federal government could proceed to steps two and three of the DNA databasing procedures only if: (1) the arrestee is convicted on a charge stemming from the circumstances that led to her arrest, or (2) the arrestee consents to the analysis and subsequent inclusion of her DNA in the CODIS database. Accordingly, the text of 42 U.S.C. §§ 14135a(a)(1)(A) and 14135a(b), as amended, would read as follows[176]:

> **(a) Collection of DNA samples**
>
> **(1) From individuals in custody**
>
> (A) The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested, facing charges, or convicted or from non-United States persons who are detained under the authority of the United States. The Attorney General may delegate this function within the Department of Justice as provided in section 510 of title 28 and may also authorize and direct any other agency of the United States that arrests or detains individuals or supervises individuals facing charges to carry out any function and exercise any power of the Attorney General under this section.
>
> . . . .
>
> **(b) Analysis and use of samples**
>
> *(1)* The Attorney General, the Director of the Bureau of Prisons, or the probation office responsible (as applicable) shall furnish each DNA sample collected under subsection (a) of this section, *except those DNA samples collected under subsection (a) from individuals who are arrested,* to the Director of the Federal Bureau of Investigation, who shall carry out a DNA analysis on each such DNA sample and include the results in CODIS.
>
> *(2) For those DNA samples collected under subsection (a) of this section from individuals who are arrested:*
>
> *(A) The Attorney General shall, as prescribed by the Attorney General through regulation, store such unanalyzed DNA samples in a databank that is not*

176 The text in regular typeface is the current language of 42 U.S.C. §§ 14135a(a)(1)(A) and 14135a(b) (2006). Additions are indicated by italics.

> *linked to CODIS, nor searchable by any law enforcement official for any crime-solving purpose.*
> *(B) The Attorney General shall, upon the occurrence of either of the events in subparagraphs (i) or (ii) below, furnish the unanalyzed DNA samples to the Director of the Federal Bureau of Investigation, who shall carry out a DNA analysis on each such DNA sample and include the results in CODIS—*
> *(i) the conviction of the individual arrestee for a charge stemming from the circumstances that led to her arrest; or*
> *(ii) the knowing and voluntary consent of the individual arrestee for analysis of her DNA sample and the inclusion of the results in CODIS is obtained by the Attorney General.*
> *(C) If neither of the events detailed in subparagraphs (i) or (ii) occur, the Attorney General shall, upon final disposition in favor of an arrestee of any charges stemming from the circumstances that led to her arrest, remove the arrestee's DNA sample from the databank described in paragraph (2)(A) and destroy it.*

The consent mentioned in § 14135a(b)(2)(B)(ii) can manifest itself in a variety of ways, provided that it is both voluntary and knowing. One context in which consent will occur is in negotiating plea bargains: under this proposal, federal prosecutors will have wide discretion to condition an arrestee's plea bargain on the release of her DNA to the government for steps two and three. Additionally, the flexibility of the statute would allow the DOJ, through administrative regulations, to create ways for federal officials to actively seek the consent of an individual arrestee against whom all charges are ultimately dropped due to a revelation of police misconduct, a discovery mistake, or an exercise of prosecutorial discretion. For example, the Attorney General could adopt a regulation that requires all federal agencies that arrest or detain individuals to seek consent from arrested individuals who are not charged by a specified point in time, perhaps by sending a consent form via certified mail to the arrestee's home with instructions for returning it to the DOJ.

Obviously, such a system would need ample safeguards in place to ensure that law enforcement officials completely and accurately disclose the implications of consent to arrestees. One possibility would be to require law enforcement officials to explain the extent of DNA databasing procedures before an arrestee is released from custody and

to alert her that she will receive a request for consent to such procedures in the near future. Just as in other Fourth Amendment contexts, whatever regime adopted by the Attorney General, it would need to ensure any consent that is obtained is knowing and voluntary.[177]

This proposal, of course, also leaves open the traditional—and unquestionably constitutional—method of obtaining a DNA sample: by means of a warrant. In addition to the various ways to obtain consent under the amended statute, federal officials would still be free to independently obtain a warrant to proceed to steps two and three of the DNA databasing process for a particular arrestee's DNA based on a showing of probable cause. Similarly, the proposal does not diminish the efficacy of using DNA as a means of exoneration. An individual who believes she has been erroneously arrested in relation to a case where law enforcement officials have gathered DNA evidence would still be free to use DNA to clear her name.

2. Applying the Proposed Solution

The anecdote in the Introduction about Lily Haskell, the peaceful rally protestor, provides a means for applying the proposed legislation. If Haskell had been arrested pursuant to the proposed legislation (rather than the California statute), she would still have been compelled to provide a DNA sample to federal law enforcement officials. Her sample, however, would not have immediately been processed for analysis and inclusion in the CODIS database, but rather would have been stored in a separately maintained databank along with other unanalyzed DNA samples.

If Haskell were ultimately charged and convicted, the Attorney General would retrieve her DNA sample from the databank upon conviction and forward it to the FBI for analysis and inclusion within CODIS. If Haskell were to enter into a plea agreement with the federal prosecutor, she might consent to analysis of her DNA sample and its inclusion in the CODIS database as a term of the plea agreement. Alternatively, if Haskell were never charged because the federal government recognizes police misconduct occurred, Haskell might nonetheless consent to an analysis of her DNA sample and its inclusion in the CODIS database through some sort of regime established by the Attorney General through regulation. Finally, if neither a conviction nor consent is obtained, the Attorney General would be required to

177 *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973) (holding that a search may be conducted without a warrant if voluntary and intelligent consent is given).

remove Haskell's unanalyzed DNA sample from the databank and destroy it upon the final disposition of her case.

3. The Proposed Solution Makes the All-Arrestee Statute Constitutional Under the Totality of the Circumstances Test

The proposed solution solves the constitutional defects in the current regime by focusing on reforming steps two and three of the DNA databasing procedures to be constitutional under the totality of the circumstances test.[178] The reform leaves the initial search in place because as noted previously, the physical invasion required to obtain a DNA sample collection is no more intrusive than other bodily searches of arrestees upheld by the Supreme Court. The proposed amendments instead focus on shifting the point when the government can intrude upon an arrestee's privacy interest in her DNA to coincide with the point when her expectation of privacy is actually diminished: conviction. At this point in time, the government's interest in proceeding with steps two and three of the DNA databasing procedure outweighs the arrestee's interest in the privacy of her DNA under the totality of the circumstances test. Alternatively, the government is free at any point in time to proceed with steps two and three when an arrestee gives knowing and voluntary consent, or if law enforcement can obtain a warrant based upon probable cause.

Of course, it could be argued that creating a separate databank of unanalyzed DNA samples will simply increase the potential for governmental abuse of arrestee DNA,[179] at least in comparison to the solution of simply striking down arrestee collection laws altogether. Additionally, considering the legislative history of the DNA Fingerprint Act of 2005,[180] Congress might be reluctant to create a system that places more administrative requirements on the government. Although valid counterarguments, both are solvable problems if the proper bureaucratic procedures are enforced. For example, with the appropriate implementing regulations, budget allocations, and oversight, the officials responsible for overseeing CODIS can implement a process for ensuring that the only arrestee DNA samples that are moved forward in the process for analysis are from those arrestees

178 By contrast, the proposed solution does not pass muster under the special needs exception, as the primary purpose of the statute remains unchanged: to achieve the law enforcement goals of expanding CODIS and solving crimes. *See supra* Parts II.B.1.a–b.

179 *See, e.g.*, Kaye, *supra* note 25, at 506–07.

180 *See* 151 CONG. REC. 28,855–56 (2005) (statement of Sen. Kyl).

who ultimately have been convicted or who have consented. By contrast, the current regime's constitutional defects cannot be remedied simply through administrative safeguarding and streamlining.

Some might also argue that the same objectives of this proposed legislative reform can be accomplished simply by reverting back to an earlier version of the federal law that allows collection only from convicted offenders. As noted above, however, completely eliminating laws that authorize DNA sampling upon arrest ignores the policy rationale that DNA databases will function more effectively by expanding the number of samples they include, which will ultimately increase the number of past and future crimes that law enforcement officials solve. The proposed legislative solution allows the constitutionally permissible collection of DNA upon arrest, but prevents the subsequent analysis of the sample and its inclusion in the CODIS database without individualized suspicion or consent.

To be logical, this legislative solution must be capable of expanding the number of samples in the CODIS database in a constitutional way. Otherwise, it would be no different than simply reverting to prior versions of the statute that collect samples only from convicted offenders. In addition to adding the DNA samples of individuals arrested and convicted of misdemeanor charges not covered by earlier iterations of the statute, the proposal's consent provision also has the potential to expand CODIS. Admittedly, this consent-based system would certainly test one of the main rationales used by proponents of DNA databasing: that individuals who are arrested erroneously have no problem with their DNA being accessible to officials for crime-solving purposes.[181] Depending on whether this reasoning is manifested in the actions of real-life arrestees, the number of additional DNA samples that are ultimately analyzed and included in CODIS may be only slightly higher than a convicted offender regime. Yet this legislative solution is still preferable to the Supreme Court striking down the federal all-arrestee statute in its entirety because it gives the federal government a legislatively sanctioned way to pursue the goal of expanding CODIS without violating the Fourth Amendment rights of arrestees.

CONCLUSION

As currently structured, the federal DNA database law that permits DNA sampling from all arrestees for subsequent analysis and in-

181 *See supra* Part III.B.

clusion in CODIS violates the Fourth Amendment's prohibition against unreasonable searches and seizures. The statute cannot be justified under Supreme Court precedent delineating the special needs exception because it has a primary law enforcement purpose of crime-solving. It also fails under the totality of the circumstances approach because the government's interest in crime solving simply does not outweigh an arrestee's privacy interest. Although the Supreme Court could create a new exception to the warrant requirement to uphold the law or could simply strike it down in its entirety, Congress should instead reform the statute in a way that isolates the distinct steps of the DNA databasing procedure to make each constitutional. Under this proposal, a DNA sample could still be collected from an arrestee pursuant to the Fourth Amendment, but the subsequent analysis of that DNA sample and its inclusion in CODIS to be subject to recurrent searches would occur only when the government obtains either the arrestee's conviction or the arrestee's consent. This solution takes into account the legitimate interest that the government has in building a robust DNA database without compromising the Fourth Amendment rights of arrestees.