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Brave New Circuit: Creeping Towards DNA Database Dystopia in U.S. v. Weikert

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Brave New Circuit: Creeping Towards DNA Database Dystopia in *U.S. v. Weikert*

INTRODUCTION

On August 9, 2007, in a matter of first impression, the First Circuit Court of Appeals addressed the issue of the constitutionality of requiring current or former prisoners to produce a blood sample for the purpose of creating a DNA profile and entering it into a centralized database.[1] In *United States v. Weikert*, a divided Court joined every other federal circuit that has confronted the issue in holding that the taking of a supervised releasee's blood, the creation of a digital DNA profile and entry of this profile into the FBI's centralized DNA database "CODIS" is not an unreasonable search and seizure under the Fourth Amendment of the U.S. Constitution.[2]

Although perhaps otherwise unremarkable from other circuit courts' Fourth Amendment DNA database cases, *Weikert* is emblematic of the unintelligibility in this area of the law. It is thus in many ways a fitting case to examine, as its anonymity itself is illustrative of how the crucial issue of genetic searches has proceeded to sneak under the constitutional radar. Some circuits have found the mandatory collection of DNA and entry into the federal DNA database constitutional under what is called the "special needs" test and others under the "totality of the circumstances" test. Regardless of the nomenclature the courts

1. United States v. Weikert, 504 F.3d 1 (1st Cir. 2007).
2. *Id.*

have assigned to their analyses, ultimately they are guilty of nonsensical results-oriented reasoning. *Weikert* is no exception in this regard. Even though the First Circuit is almost certainly correct that in light of the recent U.S. Supreme Court decision *Samson v. California*[3] the totality of the circumstances test must be applied to a supervised releasee's claim that using his DNA in a database is an unreasonable search and seizure, which test is applied is ultimately irrelevant.

This casenote attempts to present a sample of the array of problems in the area of Fourth Amendment searches as applied to the creation and maintenance of a DNA database by focusing on the *Weikert* decision. It argues that DNA extraction and storage in a national database is an unreasonable search and seizure under the Fourth Amendment—in opposition to the *Weikert* decision, and indeed every circuit court.

Part I provides the statutory and scientific background of felons' DNA sample collection and the entry of this information into the FBI database CODIS. Part II provides the factual background of defendant Weikert's situation and the rationale of the lower court's decision, and closely examines the First Circuit *Weikert* decision, comparing it to the lower court decision as well as scrutinizing the reasoning the majority engages in and the authorities it relies upon in supporting its holding.

Part III argues that even under the totality of the circumstances analysis, the balancing of the privacy interests of supervised releasees subjected to DNA profiling and analysis against the governmental interest in law enforcement favors the supervised releasee for two reasons. First, the totality of the circumstances weigh in favor of an individual supervised releasee because there is a lack of proof that a DNA database addresses any of the governmental goals that the First Circuit assumes it does, thus undermining the weight of the "governmental interest." Second, because a supervised releasee regains the full privacy interest of a normal citizen upon completion of the supervised release program, his full privacy rights subject to full Fourth Amendment protections outweigh the government's stated goals in creation of a DNA database. Further weighing against the government interest in entering an individual's DNA information

3. Samson v. California, 126 S.Ct. 2193 (2006).

into a centralized computer database is the possibility that the sampling of a person's DNA, creation of a DNA profile and even the act of matching DNA profiles within the computerized database are all separate searches requiring individual and distinct Fourth Amendment analyses.

Under this broader vision of what the "totality" of the circumstances is, the *Weikert* decision is unpersuasive. Despite the First Circuit's refusal to confront the issue of whether retention of a supervised releasee's DNA profile and sample are constitutional after the period of supervised release is complete, the *Weikert* decision is but another link in a chain of cases in which the judiciary has been hypnotized by technology and thereby sacrificed the Fourth Amendment to the enticing conveniences of forensic science.

PART I. SCIENTIFIC AND STATUTORY BACKGROUND

A. DNA Profiling

Humans are made up of millions of microscopic cells.[4] The most crucial part of the cell for the science of genetics is the nucleus—the spherical inner part of the cell.[5] The nucleus houses numerous threadlike, linear microscopic strands, called chromosomes.[6] The core of each chromosome is made up of a long, thin thread of deoxyribonucleic acid, commonly known as "DNA."[7] The DNA molecule itself is a double thread, which is twisted into a helical shape.[8] The genetically important portion of DNA are four nucleotides, also called "bases" (abbreviated A, T, G, and C), which pair together.[9] The DNA molecule can thus be visualized as a "twisted rope ladder with four kinds of stairsteps."[10] Each chromosome has base pairs (the "rungs" in the ladder) in a specific

4. National Commission on the Future of DNA Evidence, *The Future of Forensic DNA Testing: Predictions of the Research and Development Working Group*, (Nov. 2000), at 8, [hereinafter *National Commission*] *available at* http://www.ncjrs.gov/pdffiles1/nij/183697.pdf.

5. *Id.*

6. *Id.*

7. *Id.* at 10.

8. *Id.*

9. *Id.* (A always pairs with T and G with C, such that the combinations possible of any base pair is AT, TA, GC, or CG).

10. *Id.*

order and it is this sequence which determines genetic individuality.[11] A cell in the human body contains roughly 6 billion base pairs and any DNA samples from two unrelated persons differ in only about one base pair per thousand.[12]

A gene is a section of DNA from 1,000 to 100,000 or more base pairs in length that has a specific function, usually encoding how to make specific proteins.[13] Proteins encoded by genes make up the body's physical cells, and are indispensable for a majority of the body's functions.[14] In fact, every gene has a particular position on a given chromosome, called a "locus" (plural "loci").[15] Only a small amount of DNA, roughly 3-5 percent is genes.[16] The vast majority of DNA has no currently ascertainable purpose and is commonly referred to as "junk DNA."[17] A DNA "profile" refers to an individual's genetic pattern for the group of loci involved in forensic DNA analysis.[18]

Although there are multiple methods which can be used to create a genetic profile of a human being, the most common method for DNA identification is the polymerase chain reaction (PCR) technique.[19] This method takes a small tissue sample and uses it to create a plethora of copies of the DNA present, so that an amount of DNA sufficient to be analyzed is produced.[20] Once this DNA copy is created, "'short tandem repeat' technology (STR) is used to identify genetic locations to distinguish DNA profiles by

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11. *Id.*

12. *Id.*

13. *National Commission*, *supra* note 5, at 11; Lisa Schriner Lewis, Comment, *The Role Genetic Information Plays in the Criminal Justice System*, 47 ARIZ. L. REV. 519, 522 (2005).

14. Lewis, *supra* note 14, at 522.

15. *National Commission*, *supra* note 5, at 11.

16. *National Commission*, *supra* note 5, at 12; Lewis, *supra* note 14, at 521.

17. *National Commission*, *supra* note 5, at 12; *see also* Lewis, *supra* note 14, at 521, n.16 (referring to this portion of DNA as "junk DNA").

18. *National Commission*, *supra* note 5, at 12.

19. Lewis, *supra* note 14, at 522; 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).

20. Lewis, *supra* note 14, at 522-23; Maclin, *supra* note 20, at 166. Such a biological sample can be obtained from blood, hair, semen, cheek cells, skin cells, bones, and even cigarette butts, shirt collars, hats, weapons, bottles, envelopes and urine. Maclin, *supra* note 20, at 166; CODIS Brochure, http://www.fbi.gov/hq/lab/pdf/codisbrochure.pdf (last visited Mar. 30, 2008).

examining the gene sequence on a specific location on a chromosome and comparing that length with the gene sequence on the chromosome from another individual."[21] In forensic DNA analysis a standard battery of thirteen locations are used to create a genetic profile.[22] Thus in lay terms, using a human biological sample the gene sequence lengths at thirteen standardized locations are measured. These measurements are represented by numerals, which can be uploaded into a database. When a DNA database is searched, this thirteen measurement profile is compared with others within the database with the goal of finding a matching profile—a profile which has the same measurements at these same thirteen locations.

B. Government Use of Forensic DNA Evidence: The FBI and CODIS

Forensic DNA testing in the United States is a technology that is only two decades old.[23] DNA testing and profiling by the government was first instituted against convicted sex-offenders and was rationalized by the belief that such offenders have a particularly high recidivism rate.[24] Yet subsequent data never confirmed the assumption that recidivism rates were dramatically high for sex offenders as compared with other offenders.[25] DNA databases were subsequently expanded to include not only offenders believed to have high recidivism rates, such as violent offenders, but other types of offenders as well.[26] Presently all fifty states statutorily mandate DNA sample collection from individuals convicted of certain felonies.[27]

In 1990 the FBI began a pilot software project for fourteen state and local laboratories called the "Combined DNA Index System" (CODIS) which is touted as "blend[ing] forensic science

21. Maclin, *supra* note 20, at 166.
22. *National Commission*, *supra* note 5, at 19; CODIS Brochure, *supra* note 21.
23. The first U.S. case admitting DNA evidence was *Andrews v. State*, 533 So.2d 841 (Fla. Dist. Ct. App. 1988).
24. D.H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413, 415-16 (2003).
25. *Id.* at 416.
26. Maclin, *supra* note 20, at 165.
27. *Id.*

and computer technology into an effective tool for solving crime."[28] The DNA Identification Act of 1994 statutorily authorized the FBI "to establish a National DNA Index System (NDIS) for law enforcement purposes."[29] Regardless of their geographic location within the U.S., forensic laboratories that participate in NDIS can exchange and compare DNA profiles within the database with other participating laboratories.[30]

According to the FBI, CODIS uses biological evidence recovered from crime scenes to generate investigative leads utilizing two of the CODIS indices: the Forensic Index (containing DNA profiles developed from crime scene evidence) and the Convicted Offender Index (containing DNA profiles of individuals convicted of crimes), which are searched by computer.[31] Matches made between profiles in the Forensic Index can link crime scenes to identify a potential serial offender who has left DNA at more than one crime scene, while matches made between the Forensic and Convicted Offender Indexes supply the identities of suspected perpetrators by matching DNA information left at a crime scene with the DNA profile of a known and identifiable convict or ex-convict.[32]

CODIS and NDIS have grown exponentially in the last few years. Presently, over 170 law enforcement laboratories in the

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28. CODIS Brochure, *supra* note 21; Federal Bureau of Investigation – Laboratory Services, CODIS-Crime, www.fbi.gov/hq/lab/html/codis3.htm (last visited Mar. 30, 2008) [hereinafter *CODIS website*].

29. *CODIS website*, *supra* note 29. In addition to NDIS (referred to as "the highest level in the CODIS hierarchy"), CODIS also supports the State DNA Index System (SDIS) which allows laboratories within states to exchange DNA profiles and the Local DNA Index System (LDIS) where all DNA profiles originate, "then flow to SDIS and NDIS." CODIS Brochure, *supra* note 21.

30. CODIS Brochure, *supra* note 21.

31. *CODIS website*, *supra* note 29. In addition to these two indices, CODIS is also made up of an Arrestee Index (containing DNA profiles of arrested persons if state law allows for the collection of arrestee samples); a Missing Persons Index (containing DNA reference profiles from missing persons); an Unidentified Human Remains Index (containing DNA profiles developed from unidentified human remains); and a Biological Relatives of Missing Persons Index (containing DNA profiles voluntarily contributed from relatives of missing persons). CODIS Brochure, *supra* note 21.

32. *CODIS website*, *supra* note 29; *National Commission*, *supra* note 5, at 20 (CODIS does not contain social security numbers, criminal history, or case-related information, but does store information necessary for obtaining profile matches).

United States participate in NDIS.[33] The total number of convicted offender profiles in CODIS has increased more than ten-fold since 2000, topping out at an astounding 6,539,919 as of December 2008.[34] The FBI also claims that through December 2008, 80,900 investigations have been aided by CODIS.[35]

As previously stated, the thirteen measurement loci used in creating a DNA profile are thought to be junk DNA—that is, the genes at these loci are widely believe to possess no known genetic purpose that correlates with any perceptible physical attribute of human beings.[36] However, even using these measurements in the CODIS database means that it is still likely that a search of the database can identify a person who is a relative of the person contributing the evidence sample,[37] thus potentially infringing upon privacy interests of those biologically related to those whose profiles are in CODIS. There is currently no overall policy as to what happens to the biological samples taken after DNA profiles are created and added to the CODIS database, but the majority of states have policies to store and maintain such biological samples.[38] This is worrisome to many because there is full and complete genetic information (including information about an individual's propensity for diseases, personality traits and possibly even sexual orientation or likelihood to engage in criminal behavior) of millions of people that is a potential scientific research and experimentation goldmine simply waiting to be utilized.

C. The DNA Analysis Backlog Elimination Act

The DNA Analysis Backlog Elimination Act of 2000 (DNA Act)[39] mandates that "[t]he Director of the Bureau of Prisons shall

33. CODIS Brochure, *supra* note 21. Internationally forty law enforcement laboratories in more than twenty-five nations use CODIS software. *Id.*

34. NDIS Statistics, http://www.fbi.gov/hq/lab/codis/clickmap.htm (last visited Dec. 20, 2008).

35. CODIS Investigations Aided, www.fbi.gov/hq/lab/codis/aidedmap.htm (last visited February 15, 2009).

36. *National Commission*, *supra* note 5, at 35.

37. *Id.*

38. *Id.* at 36.

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

collect a DNA sample from each individual in the custody of the Bureau of Prisons who is, or has been, convicted of a qualifying Federal offense" (including any felony, any crime of violence or attempt, or conspiracy to commit a felony, crime of violence or attempt).[40] It also requires a probation office to collect a DNA sample from an "individual on probation, parole, or supervised release who is, or has been, convicted of a qualifying Federal offense" in the past.[41] The DNA Act authorizes the use of means "reasonably necessary to detain, restrain, and collect a DNA sample from an individual who refuses to cooperate in the collection of the sample."[42] The DNA Act provides for a criminal penalty of misdemeanor for refusal to provide a sample[43] and courts are required to order compliance with the DNA Act as an express condition of supervised release.[44]

Despite repeated government assurances that the genetic markers used in DNA analysis pursuant to the DNA Act are non-coding junk DNA which do not express any genetic traits, there is nothing in the DNA Act itself that requires the government to use exclusively junk DNA in creating an individual's DNA profile.[45] This is significant because as the law now stands, if the government chose, it could use coding genetic information to create a DNA profile. This could empower the government to go far beyond the matching of identities and potentially allow testing of the full panoply of genetic information of an individual.

14135(e) (West 2008)).

40. 42 U.S.C.A §§ 14135a(a)(1) & (d)(A-G) (West 2008).

41. 42 U.S.C.A. §§ 14135a(a)(2) & (d)(A-G) (West 2008).

42. 42 U.S.C.A. § 14135a(a)(4)(A) (West 2008).

43. 42 U.S.C.A. § 14135a(a)(5)(A) (West 2008). A Class A misdemeanor is punishable by imprisonment for up to one year and a fine of $100,000. 18 U.S.C.A. § 3571(b)(5) (West 2008).

44. 18 U.S.C.A. § 3583(d) (West 2008).

45. *See e.g.* H.R. REP. NO. 106-900(I) at 27 (2000), 2000 WL 1420163 (letter of Robert Raben, Assistant Attorney General, to The Honorable Henry J. Hyde, Chairman House Judiciary Committee) (noting that DNA profiles rely on junk DNA that are not associated with any human traits). *Cf.* United States v. Weikert, 504 F.3d 1, 13 n.10 (1st Cir. 2007) (pointing out that the use of junk DNA is neither statutorily mandated nor required by regulations promulgated by the Attorney General under the DNA Act).

PART II. BACKGROUND TO THE FIRST CIRCUIT DECISION OF U.S. V. WEIKERT

A. Factual and Procedural Background of the District Court Decision

Defendant Leo Weikert pleaded guilty to conspiracy to possess cocaine with intent to distribute in 1990, and was incarcerated in the Western District of Texas in February of 1991.[46] He managed to escape, only to be caught again and charged with escape from custody, to which he pleaded guilty in October of 1999.[47] The following January Weikert was sentenced to eight months incarceration (to be served consecutively with the balance of the previous cocaine sentence) followed by two years of supervised release.[48] Weikert was released from incarceration on December 10, 2004 and alleged that his probation office notified him of its intent to take his blood sample to collect his DNA.[49] On November 16, 2005 Weikert filed a Motion for Preliminary Injunction and Request for Hearing, asking the District Court to prohibit the government from taking a blood sample from him and entering his DNA into CODIS.[50]

The case came before District Court for the District of Massachusetts, which framed the issue as whether "the forced extraction of [a supervised releasee's] blood and DNA, absent a warrant or individualized suspicion, violates the Fourth Amendment" prohibition of unreasonable searches and seizures.[51] The District Court held the following: because the case dealt with the constitutionality of a warrantless search that was not grounded on individualized suspicion the special needs test was the appropriate analysis[52] and the government lacked a cognizable special need because in taking DNA samples, crime-solving was its primary objective.[53] Moreover, the District Court found that Weikert's claim that the DNA Act provided for

46. United States v. Weikert, 421 F. Supp. 2d 259, 260 (D.Mass. 2006).
47. *Id.* at 260-61.
48. *Id.* at 261.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 264.
53. *Id.* at 265.

unconstitutional searches of supervised releasees even in the absence of individualized suspicion would probably be successful on the merits irrespective of a court's finding that a governmental special need existed.[54] The District Court, finding that the other elements of a Preliminary Injunction (the possibility of irreparable injury, the balance of harm, and the public interest)[55] weighed in Weikert's favor, granted the motion.[56] The Government appealed the case to the First Circuit.[57]

B. Overview of the Controlling Law

In a 2-1 decision, the First Circuit joined eleven other circuits in *U.S. v. Weikert* by holding that it is not a violation of the Fourth Amendment's prohibition of unreasonable searches and seizures to require an individual on supervised release to provide a DNA sample for the purpose of creating a DNA profile and entering it into a centralized database.[58] The First Circuit interpreted the recent U.S. Supreme Court decision of *Samson v. California*[59] as requiring that the court apply the totality of the circumstances analysis rather than the special needs analysis used by a minority of circuits in determining the constitutionality of DNA sampling.[60] The court declined to resolve whether retention of Weikert's DNA profile in the database after his term of supervised release expired was constitutional.[61] The dissent, distinguishing the case from the limited circumstances validating the legality of the search in *Samson*, would have held the suspicionless search of Weikert unconstitutional under the Fourth Amendment because it failed to meet the *Samson* criteria.[62]

1. General Fourth Amendment Background

The Fourth Amendment of the U.S. Constitution provides:

The right of the people to be secure in their persons,

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54. *Id.* at 270.
55. *Id.* at 261.
56. *Id.* at 272.
57. United States v. Weikert, 504 F.3d 1, 5 (1st Cir. 2007).
58. *Id.* at 2-3.
59. Samson v. California, 126 S.Ct. 2193 (2006).
60. *Weikert*, 504 F.3d at 3.
61. *Id.*
62. *Id.* at 19.

> 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.[63]

In broad strokes, the Supreme Court has interpreted the Fourth Amendment to require a judicial warrant based upon probable cause, unless the search is among one of the established exceptions to the warrant requirement.[64] The reasonability requirement of the Fourth Amendment presents the strongest constitutional argument against the existence and expansion of the government's DNA databases.[65] Part of the problem in interpreting the Fourth Amendment as it applies to DNA databanks is that the practice of taking, measuring, and comparing human DNA samples is not clearly analogous to any of the searches and seizures contemplated by the Founders at the time the Constitution was drafted.[66]

Traditionally, the Fourth Amendment's search and seizure scheme was essentially property-based; it was created and interpreted to protect a citizen's rights only in his tangible property.[67] The jurisprudence of the Supreme Court in the first part of the 20th century "revolved around a property axis,"[68] and the idea that the law and the Constitution protected privacy, in the form of information either about ones' person or relationships, was unknown.[69] This conceptualization of searches and seizures was succinctly put forth in 1928 in *Olmstead v. U.S.*, in which the Court held that the Fourth Amendment protected only "material things."[70]

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63. U.S. CONST. amend. IV.

64. Kaye & Smith, *supra* note 25, at 442.

65. Kaye & Smith, *supra* note 25, at 442; Jason Tarricone, Comment, *"An Ordinary Citizen Just Like Everyone Else:" The Indefinite Retention of Former Offenders' DNA*, 2 STAN. J. C.R. & C.L. 209, 217 (2005-06).

66. Kaye & Smith, *supra* note 25, at 444.

67. Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 TEX. L. REV. 49, 54 (1995).

68. *Id.*

69. *Id.*

70. Olmstead v. United States, 277 U.S. 438, 464 (1928) (The full quote reads "The amendment itself shows that the search is to be of material

The Warren Court[71] is credited with the paradigmatic shift towards a privacy-based model of interpreting the Fourth Amendment.[72] Scientific advancement and technological change caused a re-conceptualization of the Fourth Amendment's role and the protections it provides to American citizens.[73] In 1967, the landmark decision *Katz v. U.S.* clearly elucidated a radically different conception of the Fourth Amendment: that it "protects people, not places."[74] *Katz* was a watershed decision in that it was the first to recognize that intangible information, rather than real property or chattels, was protected from searches and seizures under the Constitution.

The "touchstone" of Fourth Amendment analysis is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."[75] Establishing the reasonableness of a search normally necessitates that the government demonstrate probable cause to a neutral magistrate and obtain a particularized warrant authorizing the search.[76] However, the Supreme Court has recognized exceptions to these requirements, one of which is the special needs doctrine.

2. The Special Needs Doctrine

The term "special needs" first appeared in Justice Blackmun's concurrence in *New Jersey v. T.L.O.*[77] In *T.L.O.*, Blackmun agreed with the majority that there were limited exceptions to the warrant and probable cause requirement of the Fourth Amendment in which the reasonableness of a search is

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things—the person, the house, his papers, or his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or *things* to be seized.")

71. Chief Justice Earl Warren, October 5, 1953—June 23, 1969.

72. Krent, *supra* note 68, at 60.

73. *Id.* at 57.

74. Katz v. United States, 389 U.S. 347, 351 (1967). The Supreme Court held that, given the expectation of privacy that people have for their conversations in public telephone booths, the attachment of an electronic listening device to the glass of the booth by law enforcement personnel was a search under the Fourth Amendment. *Id.* at 359.

75. Pennsylvania v. Mimms, 434 U.S. 106, 108-09 (1977) (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968)).

76. United States v. U.S. Dist. Ct., 407 U.S. 297, 315-16 (1972).

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

determined by engaging in a balancing test in which the weight of the governmental interest is compared with that of private interests.[78] However, he concluded that such a balancing test should only be applied "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[79] In addition to the *Weikert* dissent and the District Court's decision, a minority of federal circuit courts have applied the special needs analysis in confronting the question of the constitutionality of the federal DNA Act or a corresponding state law analog under the Fourth Amendment.[80]

Several Supreme Court rulings in the last ten years have had a great deal of influence on the issue of what Fourth Amendment test to apply to the DNA Act, albeit in a sometimes oblique manner. These cases culminate in the most recent decision of *Samson v. California*,[81] but because most circuit courts determined the DNA Act to be constitutional prior to *Samson*, to understand the special needs doctrine, it is necessary to review the relevant earlier Supreme Court caselaw.

Two highly influential cases regarding the special needs analysis, *City of Indianapolis v. Edmond*[82] and *Ferguson v. City of Charleston*,[83] dealt with the scope of permissible warrantless searches and seizures upon persons when the government lacked any individualized suspicion. In *Edmond*, the Supreme Court held that because the primary purpose of the highway checkpoint program was not distinguishable from the City's general interest in crime control, the special needs warrantless exception did not

78. *Id.*

79. *Id.* The so-called "special needs" doctrine has been used to analyze searches in a variety of contexts where the government has neither obtained a warrant nor established individualized suspicion. *Weikert*, 504 F.3d at 6.

80. *See generally* United States v. Amerson, 483 F.3d 73 (2d Cir. 2007) (collecting DNA for DNA index qualifies as special need); United States v. Hook, 471 F.3d 766 (7th Cir. 2006) (collection of DNA did not violate the Fourth Amendment); United States v. Conley, 453 F.3d 674 (6th Cir. 2006) (finding the DNA Act constitutional under both the special needs and the totality of the circumstances analysis); United States v. Kimler, 335 F.3d 1132 (10th Cir. 2003) (DNA Act constitutional under special needs exception).

81. Samson v. California, 126 S.Ct. 2193 (2006).

82. City of Indianapolis v. Edmond, 531 U.S. 32 (2000).

83. Ferguson v. City of Charleston, 532 U.S. 67 (2001).

apply and the program violated the Fourth Amendment.[84] Shortly thereafter, the Supreme Court held in *Ferguson* that the governmental interest in preventing pregnant women from abusing cocaine by means of the imposition of criminal penalties was not a valid special need that permitted departure from the Fourth Amendment's warrant requirement.[85]

Together, these two cases seems to stand for the proposition that the special needs doctrine[86] can only be applied to programs of searches and seizures which have a primary purpose *other than* catching or deterring offenders, which *is* a general interest in law enforcement. From its inception, it is impossible to deny that the primary purpose of the DNA database CODIS program has been to catch offenders,[87] leading some academics to find that in the wake of *Ferguson* and *Edmond* it would be highly unlikely that any law enforcement data bank could be deemed constitutional and that these decisions completely undermine the Fourth Amendment DNA database cases that precede them.[88] Interestingly, the District Court determined that it clearly must apply the special needs analysis to the constitutionality of taking and keeping Weikert's DNA under the DNA Act.[89]

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84. *Edmond*, 531 U.S. at 47.

85. *Ferguson*, 532 U.S. at 70, 85.

86. The special needs doctrine of the Supreme Court has faced strong academic criticism for being opaque and incomprehensible. *See, e.g.* Maclin, *supra* note 20, at 170 (pointing out the incoherence of the special needs doctrine and the lack of effort on the part of the court to enumerate what the special needs are).

87. *CODIS website*, supra note 29; *see also* David H. Kaye, *The Science of DNA Identification: From the Laboratory to the Courtroom (and Beyond)*, 8 MINN. J.L. SCI. & TECH 409, 424 (2007) (noting that, despite other uses, the reason DNA databases exist is to further criminal investigations).

88. David H. Kaye, *Two Fallacies About DNA Data Banks for Law Enforcement*, 67 BROOK. L. REV. 179, 199-200 (2001) [hereinafter *Two Fallacies*]; *see also* David H. Kaye, *Who Needs Special Needs? On the Constitutionality of Collecting DNA and Other Biometric Data From Arrestees*, 34 J.L. MED. & ETHICS 188, 192 (2006) (agreeing that the special-needs analysis is not well suited to confronting the constitutional issues posed by DNA databases).

89. United States v. Weikert, 421 F. Supp. 2d 259,263 (D.Mass 2006) (pointing out that not only is there a circuit split on which test, special needs or totality of the circumstances, to apply, but also that there is confusion between the circuits as to which test is the more stringent).

3. The Totality of the Circumstances Doctrine

In analyzing the constitutionality under the Fourth Amendment of the federal DNA Act or state equivalents, the majority of circuit courts have applied the totality of the circumstances analysis.[90] In *Weikert*, the First Circuit noted that most of the circuit courts' decisions, as well as the District Court decision, preceded *Samson v. California*, but that *Samson* suggested that the totality of the circumstances test is the appropriate analytical tool. In order to properly make sense of the role *Samson* plays in the analysis of the constitutionality of the DNA Act as it applies to supervised releasees such as Weikert, it is again necessary to examine prior Supreme Court precedent.

A key case in the Supreme Court's Fourth Amendment jurisprudence as it pertains to supervised releasees is *Griffin v. Wisconsin*.[91] In *Griffin*, the Court held that a warrantless search of a probationer did not violate the Fourth Amendment because State probation systems have special needs that render fulfillment of the otherwise constitutionally mandated warrant requirement "impracticable," thus justifying a replacement of the probable cause standard with a lesser, "reasonable grounds" standard.[92] The Court in *Griffin* reasoned that probation is simply one type of punishment along a sliding scale of increasing degrees of restrictiveness and that those subject to probation are not permitted the "absolute liberty" to which free citizens have a right, but only have a claim to a "conditional liberty" that is predicated upon compliance with particular enumerated limitations.[93]

90. *See* United States v. Kraklio, 451 F.3d 922 (8th Cir. 2006) (taking DNA from probationer not unreasonable under totality of the circumstances); Johnson v. Quander, 440 F.3d 489 (D.C. Cir. 2006) (requiring probationer to provide DNA reasonable under totality of the circumstances); United States v. Conley, 453 F.3d 674 (6th Cir. 2006) (finding DNA Act constitutional under both special needs and totality of circumstances analysis); United States v. Sczubelek, 402 F.3d 175 (3d Cir. 2005) (DNA sampling was reasonable under totality of the circumstances); Padgett v. Donald, 401 F.3d 1273 (11th Cir. 2005) (collection of saliva is reasonable under totality of the circumstances); United States v. Kincade, 379 F.3d 813 (9th Cir. 2004) (DNA Act reasonable under totality of the circumstances); Groceman v. U.S. Dep't of Justice, 354 F.3d 411 (5th Cir. 2004) (DNA from prisoners under DNA Act is reasonable under totality of the circumstances).

91. Griffin v. Wisconsin, 483 U.S. 868 (1987).

92. *Id.* at 876.

93. *Griffin*, 483 U.S. at 874 (citing Morrissey v. Brewer, 408 U.S. 471,

Although the Supreme Court recognized that a state's operation of a probation system is a special need beyond that of normal law enforcement that may justify departures from the normal warrant and probable cause requirements,[94] this case differed from the later *Edmond* and *Ferguson* decisions in that there was some suspicion of the individual searched, though not sufficient to rise to the level of probable cause.

Fourteen years later and very shortly after deciding both *Edmond* and *Ferguson*, the Supreme Court heard *United States v. Knights*.[95] Although *Knights* was factually similar to *Griffin*, the Court abandoned the special needs test without explanation. The Court held that the search of a probationer absent a warrant "was reasonable under [the] general Fourth Amendment approach of 'examining the totality of the circumstances,'"[96] provided that the search was supported by reasonable suspicion and authorized by a condition of probation.[97] The *Knights* Court made a particular effort to distinguish *Griffin* in holding that the State's concerns so grossly outweighed Knights' limited privacy expectation that the lesser standard of reasonable suspicion was adequate to legitimize the search of a probationer's dwelling.[98]

In broad terms, *Knights* essentially gave courts license to consider warrantless searches of a supervised releasee (or probationer/parolee) under a different analysis than special needs. After *Knights*, it remained to be seen whether the Supreme Court would consider a warrantless search of a supervised releasee with *absolutely no suspicion whatsoever* to be a constitutionally

480 (1972)).

94. *Id.* at 874.

95. United States v. Knights, 534 U.S. 112 (2001).

96. *Id.* at 118 (quoting Ohio v. Robinette, 519 U.S. 33, 39 (1996)). Knights was on probation for a drug offense, and agreed to probation conditions allowing for search of his person, property, place of residence, vehicle, and personal effects without a search warrant, warrant for arrest, or reasonable cause. *Knights*, 534 U.S.at 114. Shortly after release a sheriff put Knights under surveillance based on suspicion that he performed acts of vandalism. *Id.* at 115. A detective found suspicious objects in Knights' truck, and proceeded to conduct a warrantless search of Knights' apartment under the awareness of Knights' probation conditions and belief that a warrant was unnecessary. The detective found various ammunition, chemicals, and drug paraphernalia. *Id.*

97. *Id.* at 122.

98. *Id.* at 117-18 & 121.

permitted search.

4. Adding Insult to Incarceration: *Samson v. California*

Samson squarely confronted this unanswered question.[99] The Court held that a warrantless, suspicionless search of a parolee by a law enforcement officer without any level of cause whatsoever did *not* violate the Fourth Amendment.[100] The Court reasoned that such a search was reasonable because the condition of his release diminished or eliminated the parolee's reasonable expectation of privacy.[101] The Court refused to apply the special needs analysis to California's parole search condition "because our holding under general Fourth Amendment principles renders such an examination unnecessary."[102] The Court noted that

[A]lthough this Court has only sanctioned suspicionless searches in limited circumstances, namely programmatic and special needs searches, we have never held that these are the only limited circumstances in which searches absent individualized suspicion could be 'reasonable' under the Fourth Amendment. In light of California's earnest concerns respecting recidivism, public safety, and reintegration of parolees into productive society, and because the object of the Fourth Amendment is *reasonableness*, our decision today is far from remarkable. Nor, given our prior precedents and caveats, is it 'unprecedented.'[103]

In the aggregate, in this series of cases it seems that the Supreme Court has come to view the lack of a warrant and lack of

99. Samson v. California, 126 S.Ct. 2193, 2198 (2006).

100. *Id.* at 2202. "California law provides that every prisoner...on state parole 'shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time'" regardless of the existence of a warrant or of probable cause. *Id.* at 2196 (quoting CAL. PENAL CODE ANN. § 3067(a) (West 2000)). The petitioner, a felon on parole was walking down a street and was spotted by a police officer who recognized him, proceeded to search him without cause and found a plastic bag of crystal meth on his person. *Id.* at 2196.

101. *Id.*

102. *Id.* at 2199 n.3.

103. *Id.* at 2201 n.4. Lamenting the majority's decision, the dissent stated both that "[t]he suspicionless search is the very evil the Fourth Amendment was intended to stamp out," and also that "[t]he requirement of individualized suspicion, in all its iterations, is the shield the Framers selected to guard against the evils of arbitrary action, caprice, and harassment." *Id.* at 2203 & 2207.

individualized suspicion (*probable cause*, or even the lesser *reasonable grounds*) as the *trigger* for immediately applying some form of Fourth Amendment balancing analysis, instead of viewing such warrantless searches as presumptively unconstitutional unless supported by an exception to the warrant requirement. If the governmental interest at issue is a general interest in crime control, the totality of the circumstances doctrine is applied, weighing the interest in crime control against the privacy interest of the individual (a reduced privacy interest in the case of ex-prisoners—be they probationers, parolees, or supervised releasees). If the government interest at issue is something other than a general interest in crime control, this special need is weighed against the privacy interest of an individual (again, a reduced interest in the case of ex-prisoners). Alarmingly, *Samson* seems in no way limited to simply probationers or parolees, but appears to open the door to the possibility that *all* future warrantless and completely suspicionless searches of *any* citizen can be justified simply on the basis of the government's interest in controlling crime. *Samson* holds that the Court need only balance the government interest against the privacy interest of the individual to find that a warrantless, completely suspicionless search of that individual is constitutional, and the warrant requirement, instead of being given primacy, is essentially relegated to the status of an afterthought.[104]

In contrast to *Samson*, for a warrantless and suspicionless search, the *Weikert* District Court decision and the First Circuit's dissent *required* a primary special need beyond the normal need

104. This is an incredibly frightening possibility for all U.S. citizens, irrespective of its application to DNA databanks. Couched in the terms it is, it will be extremely difficult under *Samson* for any individual who undergoes a contested search and seizure at the hands of the government to balance his lone, isolated, individual concerns against the staggering, monolithic, and amorphous State need to "control crime." Framing the totality of the circumstances in this fashion makes it seem a selfish endeavor for an individual to cherish his privacy, and puts the onus upon individuals to explain how their seemingly private, individual concerns are greater than the concerns of the entire society in eradicating crime. Individual privacy concerns are thus no longer the object the state is employed to protect, but the obstacle to achieving all it can. Although beyond the scope of this paper, *Samson* can be seen as creating a "totality of the circumstances" exception to the Fourth Amendment warrant requirement, holding essentially that 'The government needs a warrant to search an individual, unless it doesn't.'

for law enforcement to justify the search and if the need is tertiary or non-extant, then the search necessarily fails Fourth Amendment analysis.[105] Although a recent decision, *Samson* has already faced strong criticism within the academic community regarding its application to the Fourth Amendment question of DNA databases, particularly for its reliance upon the "diminished privacy interests" of released prisoners.[106]

This series of cases exhibit a dearth of logical consistency in both the special needs and the totality of circumstances doctrines and as a whole foreshadow the grave issue of the niggling erosion of the boundaries of Fourth Amendment protections. In light of *Samson*, however, it seems difficult to analyze the issue of DNA databases and searches of supervised releasees under the Fourth Amendment using anything but the totality of the circumstances doctrine. Based upon *Samson*, the First Circuit thus makes the predictable decision that because the extraction, analysis, and cataloging of a supervised releasee's DNA is undoubtedly a warrantless search completely lacking in any level of suspicion of the person tested, and because the DNA Act's primary interest is law enforcement and a general interest in crime control, the totality of the circumstances test applies.[107] Weighing the government interest in crime control against the (currently) diminished privacy expectation of a supervised releasee, it is not difficult to see how the majority found that society's goal in eradicating the scourge of crime is much more significant than the selfish privacies of a known lawbreaker (or perhaps *anyone* for that matter). Despite this, the First Circuit majority's view of the "totality" is far from panoramic, let alone complete, and its analysis of the DNA Act and Weikert's claim in light of *Samson* is far from problem-free.

105. United States v. Weikert, 421 F. Supp. 2d 259, 264-65 (D.Mass. 2006); United States v. Weikert, 504 F.3d 1, 18-20 (1st Cir. 2007); *see supra* text accompanying note 63 for a summary of the dissent's argument.

106. *See, e.g.* Paul M. Monteleoni, Comment, *DNA Databases, Universality, and the Fourth Amendment*, 82 N.Y.U. L. REV. 247, 248 (2007) (arguing inter alia that courts' findings of diminished privacy interests for supervised releasees is completely conclusory).

107. *Weikert*, 504 F.3d at 9.

PART III: ANALYSIS OF THE *WEIKERT* DECISION

Part II traced the controlling law in the Fourth Amendment analysis of the DNA Act as applied to supervised releasees of whom there is no individualized suspicion to search, such as Weikert. It showed the inconsistencies in the doctrines of special needs and totality of the circumstances and the problems that are potentially exacerbated by applying these tests to the technology of DNA databases. Nevertheless, *Samson* controls as U.S. Supreme Court precedent and it is the application of *Samson* that the First Circuit used in *Weikert* to hold that the compulsion of a DNA sample and uploading of a profile into the FBI database was not an unreasonable search and seizure of a supervised releasee.

Part III examines the analysis the *Weikert* majority used in applying *Samson* to the DNA Act. Section A looks at the governmental interests the First Circuit believed were implicated: 1) combating recidivism; 2) efficiency and accuracy; 3) promoting reintegration of supervised releasees; 4) exoneration of the innocent; and 5) the lack of discretion in application of the Act. Section B examines the privacy interests of supervised releasees such as Weikert, pointing out that 1) the reduced expectation of privacy of supervised releasees is not eternal and eventually shifts to a full privacy interest; and 2) the retention of DNA samples and DNA profiles beyond the term of supervised release further implicates privacy interests. Section C argues that given the strong possibility that the DNA Act does not clearly address legitimate governmental interests and that a supervised releasee's privacy interests are much broader than courts have acknowledged, a weighing of the totality of the circumstances is in favor of supervised releasees like Weikert. As such, the DNA Act and its creation of a government controlled database is an unreasonable search and seizure under the Fourth Amendment.

A. The Governmental Interest

In *Samson*, the Court held that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee without warrant or cause.[108] In examining the government's interest, the Supreme Court reasoned that the State

108. *Samson*, 126 S.Ct. at 2202.

had two interests to account for: reintegrating probationers into the greater society, as well as preventing any recidivist crimes they might commit.[109] The First Circuit in *Weikert* cited *Samson* in its decision and acknowledged that it was persuaded by the Government's "need to identify, monitor, and rehabilitate" supervised releasees.[110] What the First Circuit completely neglected to do in applying the *Samson* interpretation of the government's interest in its balancing calculus was to confront the issues of whether the DNA Act does in fact reduce recidivism and thereby, or separately, promote integration and positive citizenship of supervised releasees *at all.*

1. There is no Empirical Evidence Presented that DNA Databasing Prevents Recidivism

In the latest year for which statistics are available, it is unquestionable that recidivism is a grave problem for society and the justice system. A study by the Department of Justice Bureau of Justice Statistics notes that of the 272,111 persons released from prisons in fifteen states in 1994, within three years an estimated 67.5 percent were rearrested for a felony or serious misdemeanor, 46.9 percent of which were reconvicted and 25.4 percent resentenced to prison for a new crime.[111] The period showed an increase in rearrests within three years for all offenders in the aggregate, regardless of the type of crime.[112]

Although CODIS was started only as a pilot project in 1990 and there are numerous facts to consider in looking at this type of data, there is no hard evidence presented in *Weikert* that CODIS and DNA databanks actually have *any* kind of deterrent effect on supervised releasees *whatsoever.* It may seem that an increase in the probability of identification of an individual would deter the commission of crimes, but it does not follow that CODIS does in fact have such an effect on the criminal community. To believe so, particularly when there is no empirical proof addressing the matter, is an act of faith by the court that makes the dangerous

109. *Id.* at 2197.
110. *Weikert*, 504 F.3d at 13.
111. U.S. Department of Justice, Bureau of Justice Statistics, Criminal Offender Statistics, at 3, http://www.ojp.usdoj.gov/bjs/crimoff.htm (last visited Nov. 21, 2008) [hereinafter *Criminal Offender Statistics*].
112. *Criminal Offender Statistics*, *supra* note 112.

assumption that a majority of crimes are committed after careful and logical forethought. It ignores the strong possibility that many crimes are or will be committed by people who (1) do not know the CODIS database exists; (2) do not understand what DNA analysis is; (3) are aware of the DNA database but still believe they will not be caught; (4) are willing to take the risk that they will be identified by their DNA; (5) do not care if they are caught; or (6) are simply not thinking in a reasoned and coherent fashion at all when committing a crime.

The First Circuit in *Weikert* reasoned:

> [t]he government has an "overwhelming interest" in maintaining a record of the identities of [supervised releasees] because they "are more likely to commit future criminal offenses than are average citizens"; indeed, the interest in combating recidivism is the "very premise behind the system of close parole supervision."[113]

Notwithstanding the rather frightening proposition that based on the first clause of this quote, the court seems poised to find that the privacy interest of *any group of individuals* which is statistically more likely to commit crimes than average citizens is "overwhelmed" by the governmental interest,[114] this passage illustrates the court's blind acceptance that recidivism is actually reduced by the DNA Act and the CODIS database.

2. CODIS is More Than Simply a More Efficient and Accurate Form of Identification

In *Weikert*, the First Circuit accepted the government's argument that its interest in solving crimes "efficiently and accurately" is a factor to be balanced in the totality of the circumstances.[115] In so doing, the court reduced DNA collection

113. *Weikert*, 504 F.3d at 13 (quoting Penn. Bd. of Probation & Parole v. Scott, 524 U.S. 357, 365 (1998)).

114. *See e.g.* Kaye & Smith, *supra* note 25 at 420-21 (mentioning inclusion into DNA databases based on "predictivist theory"—the idea that those once convicted are more likely to commit crimes in the future). Kaye & Smith criticize this theory as hard to put into practice because a variety of factors exist, such as family background, geographic area, unemployment, age, and sex, that are better statistical predictors of future criminality than prior arrests or convictions. *Id.*

115. *Weikert*, 504 F.3d at 14.

and profiling to a "form of identification" which is not different from fingerprinting and photographing, only more precise.[116]

Although efficiency and accuracy are laudable law enforcement goals, it is fallacious to reason that any new method which is more efficient and accurate than a previous one is ipso facto a cognizable governmental interest that merits *any* weight when measured against an individual's Fourth Amendment constitutional protections. Even assuming that DNA collection and analysis are clearly comparable to photographing and fingerprinting, in making this analogy no circuit has pointed to any data *whatsoever* that either photographing or fingerprinting methods have decreased recidivism or proved an effective deterrent against crime in *themselves*. It would seem that if fingerprinting and photographing *were* effective deterrents, fewer than over two-thirds of ex-convicts would be arrested for recidivist offenses and fewer than one-half would be convicted within three years of release. Furthermore, one would also expect some type of empirical data that recidivist rates decreased with the introduction of photographing and fingerprinting techniques during the 20th century. Yet neither is the case. Similarly, in the case of DNA collection and analysis, two possibilities arise. First, if DNA analysis is truly no different than photographs and fingerprinting, then DNA analysis and databasing, like these forms of identification, cannot be expected to increase efficiency by reducing recidivism significantly. Thus, if DNA is merely a simple form of identification, the ability of DNA database creation to achieve the stated governmental interests is dubious. Second, if DNA databasing does indeed reduce recidivism, it would most

116. *Id.* (quoting United States v. Amerson, 483 F.3d 73, 87 (2d Cir. 2007)). For further explications on the analogy between DNA and fingerprinting databases *see e.g.* Kaye & Smith, *supra* note 25 at 421-22 (arguing that loci for typing DNA can be limited to those sites with no more social import than fingerprinting); Kaye, *Two Fallacies*, *supra* note 89, at 181(noting that the government tends to view taking DNA as no more contentious than fingerprinting); Lewis, *supra* note 14, at 524 (referring to "DNA fingerprint[s]" present in all people); *Cf.* Monteleoni, *supra* note 107, at 255-56 (noting that DNA collection has more burdens than fingerprinting because humans constantly shed skin cells, hair, and body oils full of DNA, thus it has a higher potential for chilling engagement in private activities); *see also Id.* at 254-55 (analogizing DNA collection to fingerprinting, which threatens privacy and invites abuse).

likely be because it is indeed different in kind than photographs and fingerprints, which destroys the convenient "form of identification" analogy, illustrating that DNA is not comparable to previous technologies as no more than a "better" version of law enforcement techniques already in use.[117]

If, on the other hand, photographs and fingerprints are not intended to have any crime-thwarting effect at all and are indeed purely for identification purposes, it is unlikely that there is a pressing governmental need to increase the efficiency and accuracy of this identification process that justifies mandatory DNA collection and cataloguing. It simply strains believability to say that the government does not know who the people it incarcerates *are* or that it does not know the identities of people such as Weikert that it frees from prison and puts on a program of supervised release, probation, or parole. If the government is at a loss to determine a prisoner or ex-prisoner's identity, it has ample means at its disposal that surely cannot be so time-consuming and arduous that they mandate the expedient of DNA collection and cataloguing.[118]

3. The DNA Act Does not Further the Goal of Promoting Reintegration for Ex-Prisoners

Even if the DNA Act does indeed reduce recidivism and help solve crimes efficiently and accurately, it is hard to see how it does this in a way that also promotes reintegration for supervised

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117. *See* United States v. Kincade, 379 F.3d 813, 842 n.3 (9th Cir. 2004) (Gould, J. concurring) (noting that unlike fingerprints, DNA has the capacity to reveal large amounts of private data, including an individual's health, likelihood of developing some diseases, race and gender, and possibly propensity for certain types of conduct); *see also* Tarricone, *supra* note 66, at 243 (pointing out that DNA, unlike fingerprints and mugshots, carries both a greater possibility of disclosing personal information as well as more "psychological weight"); Krent, *supra* note 68, at 95-96 (arguing that in contrast to fingerprinting, it is indisputable that taking blood and performing DNA analysis upon it are searches under present Fourth Amendment doctrine).

118. A further problem with the DNA Profile/Fingerprint analogy is that the rapid expansion of government use of fingerprinting occurred prior to modern Fourth Amendment jurisprudence introduced by *Katz* in 1967, thus allowing the "unchecked [spread of fingerprinting without] any judicial balancing against the personal right to privacy." *Kincade*, 379 F.3d at 874 (Kozinski, J., dissenting).

releasees such as Weikert. Ostensibly, a sincere, good-faith interest in the reintegration of supervised releasees into society would entail a goal of eventually treating them like full-fledged members of the community. Yet DNA testing and analysis, and more importantly the indefinite retention of one's DNA sample, are not experiences that normal citizens must undergo and countenance. Such a practice manifestly evidences that the state does not now, nor ever will, trust ex-convicts as much as those citizens without a criminal history.[119] Rather than reintegrating ex-felons, the DNA databasing under the DNA Act is more akin to a "genetic blacklist," by which invisible tabs can be kept on a select portion of society. It may be entirely true that such distrust of convicts, probationers, parolees and supervised releasees is prudent and justified. However, it is disingenuous to couch the DNA database as a governmental interest that does anything but ostracize, rather than integrate, ex-felons.

4. CODIS is not Necessary for Suspect Exoneration

In *Weikert*, the First Circuit argued that use of CODIS has the potential to exonerate criminal suspects who are in fact innocent. Further, by systematically excluding those within the database whose profile does not match DNA recovered at a crime scene, the First Circuit also contends that the DNA Act actually protects these individuals from becoming "potential suspects."[120] Yet no reason was given why a comprehensive, centralized DNA database in the exclusive hands of the government is necessary to exonerate someone wrongly suspected, accused, or convicted of a specific crime. A suspect or a defendant, against either of whom there is individualized suspicion for commission of a crime, might be reasonably compelled to undergo DNA profiling and search via issuance of a warrant by a neutral magistrate (or may indeed *volunteer* this information in order to exonerate themself). But a pre-emptive DNA profiling program such as CODIS essentially treats all those subject to its purvue as *inherently suspect* for any

119. *See* Tarricone, *supra* note 66, at 242 – 44 (arguing that retaining a person's DNA post-release sends a message to ex-felons that they are not to be trusted and is antithetical to the ideals of reducing recidivism and reintegrating them into society).

120. *Weikert*, 504 F.3d at 14 (quoting *Amerson*, 483 F.3d 73, at 88).

given crime. Moreover, in CODIS the government possesses the monopoly on the means by which innocence can be proven. To claim, as the First Circuit did in *Weikert*, that the DNA Act "protects innocent individuals," is to view citizens as presumptively guilty, rather than presumptively innocent. One possible use of CODIS may be to exonerate innocent individuals, but it is by no means a necessary precondition to doing so. A case-specific determination in which the standards of individualized suspicion and the issuance of warrants are required could function just as well to 'protect innocent individuals.'

5. Discretionless, Mandatory Searching is not a *Protection* of Fourth Amendment Rights

The court in *Weikert* also mentioned as a factor weighing in the government's favor the lack of discretion in the DNA Act as a guard against constitutional abuse. The First Circuit found that the DNA Act obviates the possibility of discretionary abuse in its application,[121] because collection of a DNA sample is mandatory for those on probation, parole, supervised release or who have been convicted of a qualifying offense.[122] It concluded that through the elimination of the possibility of discretion, the potential for "selective enforcement or harassment" is eradicated, which in turn prevents the government interest from becoming "diluted."[123]

It is not clear how or why selective enforcement or harassment 'dilutes' a governmental interest any more than mandatory enforcement or harassment would. This line of reasoning, that a search and seizure can be made more reasonable simply by imposing it non-arbitrarily upon more people, is fantastic. Under such logic, to further protect the threatened Fourth Amendment rights of targeted groups, the solution is not to cease or curtail the targeting activity, but simply to expand the

121. *See Weikert*, 504 F.3d at 14 (The *Weikert* majority noted that the DNA Act does not have a discretionary component, and that the presence of discretion in application affects balancing interests). The reason given is because the power of discretion in application may cause dignitary harms to parolees, which can be a source of resentment and consequently sabotage a parolee's reintegration into society. *Id.* (citing Samson v. California, 126 S.Ct. 2193, 2202 (2006).

122. *Weikert*, 504 F.3d at 14 (citing 42 U.S.C. § 14135 a(a)(2)).

123. *Weikert*, 504 F.3d at 14.

pool of targets.[124] Taken to its extreme, such rationalization could justify any and all manner of constitutionally suspect activity simply by making such activity universally applicable to all citizens. This approach is not only illogical, but also irresponsible for a court to so casually endorse.

6. Summary of the Government's Interests

In addition to the opacity as to what actually comprises the government's interests in taking a supervised releasee's DNA, grave doubts exist as to whether the DNA Act is effective in meeting the government's claimed interests. The *Weikert* majority did not seriously call into question these issues and took the government's assertions of what its interests are and the import it accords to those interests at face value. Yet, in a totality of the circumstances analysis, the questionability of the government's stated goals and a demonstrated lack of empirical evidence that the DNA Act does in fact address these goals would seem to make the weight of the government's interest appreciably lighter than that given to it in *Weikert*.

B. Privacy Interests of Supervised Releasees

In the totality of the circumstances test, the government interest in conducting a search must be weighed against the privacy interest of the person to be searched. Although the First Circuit found in *Weikert* that a supervised releasee's reduced expectation of privacy is outweighed by the government interests involved, it confined its holding specifically to *current* supervised

124. *See, e.g.* Tarricone, *supra* note 66, at 245 (pointing out that some groups disturbed by the imbalanced effects of DNA collection on poor and minorities might prefer mandatory DNA databasing, while proponents of individual rights would likely oppose such an idea); Monteleoni, *supra* note 107, at 249, (advocating a "universality exception" to the warrant requirement of the Fourth Amendment and arguing the possibility that a search is reasonable if applied equally to every member of the population); Lewis, *supra* note 14, at 531 n.89 (putting forth the idea of eliminating the controversy of DNA databasing by mandatorily sampling all newborns in the U.S., in addition to all immigrants, and further pontificating on the social usefulness of such a database); *cf.* United States v. Kincade, 379 F.3d 813, 842-50 (9th Cir. 2004) (Reinhardt, J. dissenting) (arguing that a complete DNA database of all citizens would aid in solving crime, but mass intrusion of such an order runs contrary to the Founders' intent).

releasees. The majority expressly declined to resolve the issue of the constitutionality of the retention and searching of the DNA profiles of individuals who have completed their terms of release.[125] The majority based the need to forego determination of this issue on the retention of the DNA sample in the databank (and also possibly in the digital DNA profile in CODIS) in light of the shifting privacy interests of an ex-felon as he reintegrates into society. The next section explores the possible implications of these issues to supervised releasees in the future, and shows how they further complicate a totality of the circumstances analysis in determining the Fourth Amendment constitutionality of the DNA Act.

1. Permanent Retention of DNA Profiles and Samples in the Face of Shifting Privacy Interests—Reduced Expectations of Privacy do not Extend Until Death

Recall that in taking a biological sample under the DNA Act, a small amount of tissue or blood is taken which contains that person's full genetic information. There is no present policy to destroy these samples, which could potentially be tested at a future time to reveal information about a person's heredity, kinship, propensity for disease, presence of mental illness and more.

Even academics who do not find DNA profiles and the CODIS database to be a significant privacy threat have emphasized the danger that retention of DNA samples represent.[126] At least one academic article has gone so far as to acknowledge the danger of the possible use of DNA samples in future genetic research into the biological roots of criminal behavior.[127] Some of the most avid

125. *Weikert*, 504 F.3d at 15.

126. *See, e.g.*, Tarricone, *supra* note 66, at 241(noting that irrespective of the common misunderstandings regarding genetics, physical DNA samples in storage contain a large amount of private information); Aaron B. Chapin, Comment, *Arresting DNA: Privacy Expectations of Free Citizens Versus Post-Convicted Persons and the Unconstitutionality of DNA Dragnets*, 89 MINN. L. REV. 1842, 1860 (arguing that it is indisputable that physical DNA samples are ripe with private information); Maclin, *supra* note 20, at 169-70 (arguing that the maintenance of DNA samples in the possession of the government raises privacy concerns, and noting the potential of either abuse of that information by the government or possible theft of it from the government).

127. David H. Kaye, *Behavioral Genetics Research and Criminal DNA Databases*, 69 LAW & CONTEMP. PROBS. 259, 260 (2006) (postulating that

supporters of CODIS in the academic world have endorsed the policy that at minimum, DNA samples be destroyed after DNA profiles are created and uploaded to CODIS.[128] Despite this, only one state has a policy requiring destruction of DNA samples after analysis and profiling is complete, and the FBI strongly opposes an explicit policy of sample destruction.[129]

The First Circuit presciently pointed out that although Weikert's reduced privacy interest was outweighed by the governmental interests promulgated by the DNA Act, this reduced expectation of privacy clearly changed with the expiration of the period of conditional release.[130] Thus *Weikert* suggested that probationers, parolees and supervised releasees may recover the complete privacy interests of normal full-fledged citizens upon completion of their respective programs and retention of their DNA samples or profiles beyond the completion of their program would require a separate balancing test that could shift the balance in the former conditional releasee's favor.[131] In explicating its concern about the mutable privacy interests of supervised releasees, the First Circuit relied heavily upon the concurrence of J. Gould and the dissent of J. Kozinski in *U.S. v. Kincade*,[132] as well as the concurrence of J. Easterbrook in *Green v. Berge*.[133]

The concurrence in *Green* pointed out that courts have not

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physical DNA samples could be re-examined in the future, focusing on loci that disclose more personal information than those currently analyzed, thus providing a tempting scientific research tool).

128. *See, e.g.*, Tarricone, *supra* note 66, at 252 (arguing that DNA samples should be destroyed after completion of the sentence).

129. National Commission on the Future of DNA Evidence, *Proceedings*, Sept. 26, 1999, http://www.ojp.usdoj.gov/nij/topics/forensics/events/dnamtgtrans7/trans-c.html (last visited Mar. 30, 2008) (The FBI argued four reasons for the retention of DNA evidence: (1) only one state requires destruction after analysis; (2) there is tremendous difficulty in regenerating or retyping databases after the samples have been destroyed; (3) the destruction of DNA samples would affect the quality assurance of the DNA database; and (4) there has been no real problem that warranted the destruction of potentially useful samples, stating "DNA databasing has occurred for ten years, and there has been no record of misuse of any sample in a DNA analysis database.").

130. *Weikert*, 504 F.3d at 16.

131. *Id.*

132. United States v. Kincade, 379 F.3d 813 (9th Cir. 2004).

133. Green v. Berge, 354 F.3d 675 (7th Cir. 2004).

differentiated between the diverse classes of people who are required by law to contribute DNA samples for analysis and cataloguing.[134] The *Weikert* majority stated "the distinction [J. Easterbrook] draws between current and former conditional releasees strongly suggests that the constitutionality of the DNA Act should be analyzed separately with respect to each group."[135] In *Weikert*, the court was also persuaded by Judge Gould's *Kincade* concurrence, which noted that the majority in that case did not conclude that an ex-felon's lawfully procured DNA sample could constitutionally be kept by the government past the temporal limits of the term imposed upon him.[136] The First Circuit also mentioned the dissents in *Kincade*, one of which said that supervised releasees have a "full future expectation of privacy,"[137] while the other vigorously emphasized that "once [a supervised releasee] completes his period of supervised release, he becomes an ordinary citizen like everyone else," thereby recovering his full Fourth Amendment rights in which the police have no greater authority to invade his privacy sphere than any other citizen.[138]

Based upon these opinions, the *Weikert* majority held

> [t]his authority alone suggests the wisdom of withholding judgment on whether retaining a former conditional releasee's DNA profile in CODIS passes constitutional muster. The distinction in status between a current and a former offender clearly translates to a change in the privacy interests at stake. A former conditional releasee's increased expectation of privacy warrants a separate balancing of that privacy interest against the government's interest in retaining his profile in CODIS.[139]

This view of the retention of DNA samples and/or profiles in light of transforming privacy interests of ex-felons has received a

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134. *Green*, 354 F.3d at 679.
135. *Weikert*, 504 F.3d at 15-16.
136. *Id.* at 15 (citing *Kincade*, 379 F.3d at 842 (Gould, J. concurring)).
137. *Weikert*, 504 F.3d at 16 (quoting *Kincade*, 379 F.3d at 870 (Reinhardt, J. dissenting)).
138. *Weikert*, 504 F.3d at 16 (quoting *Kincade*, 379 F.3d at 871-72 (Kozinski, J. dissenting)).
139. *Weikert*, 504 F.3d at 16.

great deal of attention in the academic community, but relatively little in the courts.[140]

Despite the transforming privacy interests involved, no circuit court has held that the DNA record of a human being (either the profile or the sample) once entered into CODIS must be expunged at some future time.[141] Taking into account both the changing privacy interests of supervised releasees and the concerns about indefinite retention of genetic samples and DNA profiles, *Weikert* indicates the possibility that an ex-felon who brings suit to have his DNA sample (and perhaps CODIS profile) expunged may be successful.[142] The Supreme Court has held that probationers and parolees do not have "the absolute liberty" that normal citizens have, but "only . . . conditional liberty dependent on observance of special restrictions."[143] But the Supreme Court has never explicitly held that being on probation, parole or supervised release *permanently* reduces or eliminates an individual's privacy expectation. It will be interesting to see in the near future whether the First Circuit, if presented with the issue, orders the expungement of a supervised releasee's DNA sample and profile as *Weikert* intimates they might. Should the First Circuit indeed order such expungement, it will undoubtedly be fascinating to observe the Supreme Court's response.

2. Time and Time Again: Each use of CODIS may be a Fourth Amendment Search of the DNA Profiles it Contains

One of *Weikert's* most interesting legal points, which the court

140. *See, e.g.*, Monteleoni, *supra* note 107, at 270 (contending that it is unreasonable for the government to be able to "tag" someone by taking their DNA sample and profile while they are in a temporary state of having weakened privacy interests, then maintaining that sample and profile when the individual becomes free of the judicial system and once more has a full expectation of privacy); Kaye, *Two Fallacies*, *supra* note 89, at 425 (pointing out the danger of rationalizing the idea that a criminal conviction equates with a permanent sacrifice of Fourth Amendment rights).

141. *Weikert*, 504 F.3d at 16 n.13.

142. *Id.* at 16-17; *see also* Tarricone, *supra* note 66, at 229-30 (conjecturing that the Ninth Circuit, based on the *Kincade* decision, would similarly allow for expungement of an ex-probationer, parolee, or supervised releasee's DNA information based upon their fully restored privacy interest outweighing the government's interest in preventing crime).

143. *See, e.g.*, Griffin v. Wisconsin, 483 U.S. 868, 874 (1987) (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).

raised and then failed to pursue, is the possibility that not only the blood extraction, but also the analysis of the DNA,[144] and even the subsequent acts of comparing the DNA profiles within the database are each separate searches potentially requiring separate Fourth Amendment analytical considerations.

The District Court indicated that both the taking of the DNA sample and the later analysis of that sample were intrusions upon an individual's privacy interest.[145] Furthermore, the lower court distinguished prior cases dealing with the level of intrusion authorized by the taking of blood samples[146] by noting that at the time those cases were decided, courts were not faced with a massive system in which an unlimited number of searches could be performed upon the procured samples.[147] The First Circuit acknowledged this argument, noting that "Weikert's privacy is implicated not only by the blood draw, but also by the creation of his DNA profile and the entry of the profile into CODIS,"[148] then simply skipped over it. This is unfortunate, as in many ways the issues brought up by this idea are very radical and thought-provoking.

Two circuit courts have held that maintaining DNA profiles in CODIS following a probationer's completion of his program are constitutional: the D.C. Circuit in *Johnson v. Quander*,[149] and the

144. This idea is not unprecedented, and has even been discussed by the Supreme Court. *See* Skinner v. Railway Labor Exec.s' Assoc., 489 U.S. 602, 616 (1989) (holding that not only does the physical intrusion to extract blood from an individual for alcohol testing infringe upon a person's reasonable expectation of privacy, but also that the analysis of that blood sample to glean information from that person is an additional invasion of privacy interests); *see also* Tarricone, *supra* note 66, at 246 (pointing out that Skinner might mean that not only the blood extraction and creation of a person's DNA profile are searches, but also that all future analyses of that profile are searches, each of which necessitates a separate reasonableness analysis).

145. United States v. Weikert, 421 F. Supp. 2d 259, 266 (D.Mass 2006).

146. *See, e.g.* Schmerber v. California, 328 U.S. 757 (1966) (holding that a compelled blood test to analyze alcohol content for suspect arrested for drunk-driving was a reasonable search under the Fourth Amendment).

147. *Weikert*, 421 F. Supp. 2d at 266 (quoting *Kincade*, 379 F.3d at 867 (Reinhardt, J. dissenting)).

148. United States v. Weikert, 504 F.3d 1, 12 (1st Cir. 2007).

149. Johnson v. Quander, 440 F.3d 489 (D.C. Cir. 2006). In *Johnson*, a probationer challenged not only the constitutionality of the government collecting his blood for DNA profiling and inclusion into CODIS while he was on probation, but he also challenged the constitutionality of the government's retaining his DNA profile and "re-searching" it in the CODIS database after

Second Circuit in *United States v. Amerson*.[150] Yet neither of these decisions is analytically sound and reliance upon them as authority should a supervised releasee attempt to expunge his DNA Profile from CODIS would be a mistake.

In opposition to the holdings of *Johnson* and *Amerson*, the *Weikert* majority tentatively breeched the issue that supervised releasees, and presumably others, may retain constitutionally cognizable privacy rights in the future uses of information which the government has lawfully seized. The *Weikert* majority stated that the time may be ripe to reconsider the previous Fourth Amendment paradigm. This paradigm deemed that so long as the government had seized personal information within the bounds of the law and the Constitution, that the person to whom that information pertained thereafter lost any expectation of privacy he may have had in that information [151]

The majority cited an article by Harold J. Krent which argued

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his probationary term expired. *Id.* at 492. The D.C. Circuit held that "accessing the records stored in the CODIS database is not a 'search' for Fourth Amendment purposes. As the Supreme Court has held, the process of matching one piece of personal information against government records does not implicate the Fourth Amendment." *Id.* at 498 (citing Arizona v. Hicks, 480 U.S.321 (1987)). The *Johnson* decision thus summarily ignores the logical likelihood that the "government records" implicated in the use of CODIS are themselves pieces of personal information, and makes a simple analogy to *Hicks* (involving the matching of stereo component serial numbers with a police list of stolen stereos) an extreme stretch. Furthermore, the analogy to *Hicks* by the D.C. Circuit is specious because the issue in *Hicks*, as framed by Justice Scalia (who authored the opinion) was whether the "'plain view' doctrine may be invoked when the police have less than probable cause to believe that the item in question is evidence of a crime or is contraband." *Hicks*, 480 U.S. at 323. *Johnson* also attempts to use the familiar analogy of DNA profiling to fingerprinting and mug-shots, which was discussed earlier in this paper in part III.A.2. The D.C. Circuit goes on to justify its decision in saying that if it did accept the petitioners argument that each matching of DNA profiles in the CODIS database was a Fourth Amendment search it would be too bothersome for the police: "the consequences . . . would be staggering: Police departments across the country could face an intolerable burden if every 'search' of an ordinary fingerprint database were subject to Fourth Amendment challenges. The same applies to DNA fingerprints." *Johnson*, 440 F.3d at 499.

150. United States v. Amerson, 483 F.3d 73 (2d Cir. 2007). *Amerson* justifies DNA profile and sample retention as an afterthought, providing little analysis or consideration of the implications of changing privacy interests or future searches.

151. *Weikert*, 504 F.3d at 16.

"that the reasonableness of a seizure extends to the *uses* that law enforcement authorities make of property and information even [following] a lawful seizure."[152] This article persuasively forces the reader to consider what *Johnson* and *Amerson* dismiss—that not simply the initial seizure of information, but each and every additional use of that information potentially brings the Fourth Amendment into play because use of private information by the government saps an individual's ability to exercise control over it.[153] Krent states,

> [b]ecause the original seizure no longer extinguishes all property or privacy rights of the individual, governmental authorities violate the Fourth Amendment if they use property or information unreasonably even when lawfully obtained. Particularly in light of new technology, privacy is threatened as much by what law enforcement authorities do with information as by the original acquisition itself.[154]

Krent also argues that the intended use by the government is not a factor divorced from the constitutionality of the seizure itself.[155] Furthermore, he asserts that subsequent uses of constitutionally seized items may be an even greater privacy intrusion than the initial seizure, and thus subsequent uses of such information must be "re-balanced" before such uses are deemed constitutional.[156]

Although this view may represent a re-conceptualization of the current Fourth Amendment reasonableness analysis, the rapid advance in technology and the exponential growth of the CODIS program may demand such an approach.[157] Such a framework would no doubt be time-consuming and place a heavy burden upon law enforcement to justify accessing its cache of DNA profiles; it may even make use of such a database constitutionally impossible. However, there is a valid constitutional argument that such a paradigmatic overhaul should be considered.[158]

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152. Krent, *supra* note 68, at 51 (emphasis added).
153. *Id.* at 51 n.14.
154. *Id.* at 60.
155. *Id.* at 64.
156. *Id.* at 69.
157. *Id.* at 92-93 n.199.
158. For an explanation of the contrasting view that all subsequent uses of

The U.S. Constitution predates the recognition of the importance of Mendelian genetics by over 100 years, and the discovery of DNA by nearly two centuries. Original and antiquated ideas of the literal protections of one's cabin and carriage may need to give way to a larger "gestalt" view of the individual which reaches beyond the physical body and acknowledges a person's interest in invisible information about them. It may be time for courts to recognize an interest in "genetic privacy" or "informational privacy." We already colloquially speak of "identity theft," which is at bottom a stealing of digital information, and this digital "identity" is certainly something in which most citizens would recognize a reasonable expectation of privacy. Surely one's DNA profile in CODIS is no less private.

C. Weighing the Interests

It appears that the mechanical application of balancing government interests against the privacy interests of supervised releasees is not as clear cut as the circuit courts would have it. The *Weikert* majority stated, "[i]n short, there may be a persuasive argument on different facts that an individual retains an expectation of privacy in the future uses of her DNA profile."[159] Because of this possibility, the First Circuit deemed it "wise" to circumvent making any explicit holding regarding the constitutional interests implicated by the government's current policy of failing to destroy DNA samples and profiles of probationers and parolees who have fulfilled their debt to society.[160] It cannot be denied that much remains unknown about DNA. Yet lack of information does not necessarily make the "decision not to decide" on the constitutional issues potentially implicated by CODIS as they apply to supervised releasees, or the population in general, "wise." *Weikert* and the general line of circuit court decisions which have faced the issue of the Fourth Amendment constitutionality of DNA sampling, databasing and

DNA profiles are legitimate, *see* Kaye & Smith, *supra* note 25, at 428 (arguing that additional uses of lawfully seized evidence in future criminal investigations may have detrimental effects upon a defendant, but that does not mean that these future uses are necessarily additional searches).

159. United States v. Weikert, 504 F.3d 1, 17 (1st Cir. 2007).

160. *Id.*

profiling have either maintained the status quo based upon questionable and result-oriented reasoning or have decided to wait for more information. The problem with a waiting approach is that 'lack of information at the present time' is not a non-fact; it is perhaps the most salient present circumstance that should be considered in Fourth Amendment totality of the circumstances analysis.

It is precisely *because* we currently do not know the potential of DNA profiles to reveal information, and precisely *because* we have not considered supervised releasees changing privacy interests more fully that Fourth Amendment limits on DNA databases should be set *now*. Should the issue be taken up in the future, as the *Weikert* decision suggests, and the DNA Act is found to be unconstitutional, rather than 'wise,' it will more likely seem unforgivably naïve to have foregone the opportunity to slow down the ravenous expansion of the CODIS database. In the future it may be Sisyphean to try to 'roll back' technologies the court now tacitly endorses, particularly because as a direct result of decisions such as *Weikert* we will have become increasingly inured to the government's sticky fingers fumbling through the nuclei of our cells.

CONCLUSION: AT HOME IN THE FISHBOWL[161]

The *Weikert* majority touched upon issues of monumental import, but has missed its chance to draw a meaningful line which delineates personal privacy interests from a technology that is inexorably creeping into the lives of not only supervised releasees and convicts, but all U.S. citizens. Already some states allow for the DNA sampling and entry into CODIS of mere arrestees[162] and

161. U.S. v. Kincade, 379 F.3d 813, 873 (9th Cir. 2004) (Kozinski, J. dissenting) ("My colleagues in the plurality assure us that, when [the inevitable expansion of CODIS] comes, they will stand vigilant and guard the line, but by then the line - never clear to begin with - will have shifted. The fishbowl will look like home.").

162. Maclin, *supra* note 20, at 165. The states of Louisiana and Virginia have statutorily authorized DNA sampling of people arrested for some offenses. *See* LA REV. STAT. ANN. §15:609(A)(1) (2004) (authorizing the taking of DNA samples from those arrested for the commission of a felony and other specified offenses); VA. CODE ANN. § 19.2-310.2:1 (1996) (allowing for taking and analysis of a DNA sample from every person arrested for the commission or attempted commission of a violent crime).

DNA dragnets of professed voluntary samples from communities are not uncommon phenomena.[163] In addition, the U.S. Army has a significant number of offender profiles in CODIS,[164] and the military has a remains-identification DNA database (which all members of the military are required to submit DNA samples to) that has been accessed for law-enforcement purposes.[165] The expansion of the DNA database is not limited simply to 'them,' but is quickly expanding to include 'us.' The *Weikert* decision itself has already become another footnote in yet another DNA databank decision unsurprisingly holding that DNA collection does not violate the Fourth Amendment.[166] Rather than the battleground of the struggle between the limits of our individual constitutional freedoms and of the protection of the populace from government prying, like all other circuit court decisions *Weikert* has been reduced to nothing more than 'persuasive authority.'

Part I of this casenote set forth the scientific and statutory background of government DNA Profiling, CODIS, and the DNA Act. Part II presented an overview of the controlling Supreme Court law that applies to suspicionless, warrantless searches of supervised releasees such as Weikert. Part III presented an analysis of the *Weikert* decision itself, particularly in light of *Samson v. California*. Part III, Section A argued that there is an utter lack of empirical evidence that the DNA Act effects the governmental interests put forth in *Weikert*, while Section B illustrated that the privacy interests of supervised releasees evolve over time and that the use of DNA database searches may necessitate a more complex view of what a Fourth Amendment 'search' is. Part III, Section C argued that weighing this reconfiguration of the governmental and privacy interests, the balancing of these factors in light of these complications should favor the individual privacy interests of a supervised releasee and

163. *See e.g.* Chapin, *supra* note 127, at 1844-46 (tracing the history of DNA dragnets in Great Britain and the United States).

164. Federal Bureau of Investigation, CODIS, *NDIS Statistics for U.S. Army Stats*, http://www.fbi.gov/hq/lab/codis/army.htm (last visited Nov. 25, 2008) (the U.S. Army has 9,504 offender profiles in CODIS as of November 25, 2008).

165. *See e.g.* Patricia A. Ham, *An Army of Suspects: The History and Constitutionality of the U.S. Military's DNA Repository and Its Access for Law Enforcement Purposes*, ARMY LAW. 1 (July/August 2003).

166. United States v. Kriesel, 508 F.3d 941 (9th Cir. 2007).

that DNA databasing such as the DNA Act is not constitutional under the Fourth Amendment.

The numbing effect of each successive encroachment into one's personal information makes it increasingly implausible that successive generations will view each subsequent government intrusion into their lives as 'unreasonable.' Each governmental step into our DNA makes it more unlikely that courts in the future will simply be able to bring to heel the government use of extant technologies when it believes things have gone too far. Instead of waiting to see if the parade of horribles will come, it is time that the courts realize the parade of horribles is here, and that protection of the Fourth Amendment rights of supervised releasees such as Weikert are ultimately our own protections.

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