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FAULTY FOUNDATIONS: HOW THE FALSE ANALOGY TO ROUTINE FINGERPRINTING UNDERMINES THE ARGUMENT FOR ARRESTEE DNA SAMPLING

Corey Preston*

The scene has become indelible in our cultural consciousness: a suspected criminal is pulled away from the mean streets, dragged by his collar “downtown” and tossed into a neon-lit room. He hands over his belongings with a menacing smirk and sneers while the camera captures a mug shot that would make his mother shudder. But then the pad of ink comes out, and a flicker of uncertainty crosses his face. As each print is taken, we see him replaying the night before, straining to remember just what he had touched and with which hand, cursing himself for neglecting to wear gloves.¹

In just the past year, federal courts have begun to grapple with whether we should add a new step to this iconic scene: whether DNA sampling, like fingerprinting, should become a routine part of booking procedures upon arrest. The first courts to rule on the constitutionality of arrestee DNA statutes have split on the issue. A United States District Court in Pennsylvania² and the Court of Appeals of Minnesota³ have ruled that arrestee DNA sampling statutes are an unconstitutional encroachment on Fourth Amendment privacy rights. Conversely, a District Court in California,⁴ in a decision recently affirmed by the Ninth Circuit,⁵ and the Virginia Supreme Court⁶ have ruled

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¹ See *THE WRONG MAN* (Warner Bros. Pictures 1956). The booking and fingerprinting scene in Alfred Hitchcock’s dark thriller is notably grim, an ironic inversion of the classic scene outlined above. Peter Fonda’s character is an innocent man, and his reactions while being fingerprinted vacillate between confusion and horror, yet the police see only the hardened, smug criminal described above. This theme of Hitchcock’s film, the idea that even an innocent man with nothing to hide has something to fear, will be a discussion point throughout this Note.

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

³ *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. Ct. App. 2006).

⁴ *United States v. Pool*, 645 F. Supp. 2d 903 (E.D. Cal. 2009), *aff’d*, 2010 WL 3554049 (9th Cir. Sept. 14, 2010).

⁵ Shortly before the publication of this Note, the Ninth Circuit Court of Appeals affirmed the District Court’s decision in *Pool*. *United States v. Pool*, 2010 WL 3554049 (9th Cir. Sept. 14, 2010). The Court of Appeals decision did not deviate significantly from the District Court’s decision, *id.*, and this Note will focus primarily on the language and analysis of the District Court.

⁶ *Anderson v. Commonwealth*, 650 S.E.2d 702 (Va. 2007), *cert. denied*, 553 U.S. 1054 (2008).

that DNA sampling represents the natural next step, from routine fingerprinting, in identification technology, and is, thus, constitutional.

While these rulings are merely opening salvos in what seems likely to become a broad judicial discussion of arrestee DNA sampling,⁷ they effectively outline the probable parameters of the constitutional argument. The courts upholding arrestee DNA sampling statutes have relied heavily on the argument that DNA sampling is merely a harmless “technological progression” from fingerprinting⁸—no more intrusive and no more objectionable—in order to circumvent Fourth Amendment concerns.⁹ This analogy certainly makes intuitive sense, but with a close analysis of the differences between DNA and fingerprint testing, both procedurally and substantively, the analogy falls apart.

Our intuitive acceptance of fingerprinting as a routine part of criminal booking stems from the simplicity the process promises. The guilt, and resultant fear of detection, we project on the arrested rogue described above stems from a basic linear logical progression: if the man is guilty, fingerprint evidence offers a tangible—some would say indisputable¹⁰—link between an individual’s body and the physical evidence left at a crime scene.¹¹ The opposite, then, also becomes intuitive: if he has nothing to hide, he has nothing to fear.¹² These same intuitions undoubtedly inform our cultural

⁷ To date, twenty-one states have enacted some form of DNA arrestee statute, making the issue ripe for judicial consideration. *State Laws on DNA Data Banks: Qualifying Offenses, Others Who Must Provide Sample*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issuesresearch/civilandcriminaljustice/statelawsondnadatabanks/tabid/12737/default.aspx> (last visited Nov. 17, 2010).

⁸ *Pool*, 645 F. Supp. 2d at 910.

⁹ *Id.* at 910–14. The many Fourth Amendment privacy concerns surrounding arrestee DNA sampling will be discussed, at length, throughout this Note, but particularly in Part II.B. *Pool* also addresses, and rebuts, a Fifth Amendment Due Process argument suggesting that an independent judicial inquiry into whether cause exists to take a DNA sample, *id.* at 914, and an Eighth Amendment claim arguing that DNA sampling is an impermissible condition of bail, *id.* at 915. The *Pool* court responds to both challenges by reiterating its analysis of the Fourth Amendment challenge, *id.* at 914–15, but it is worth noting that other constitutional challenges to arrestee DNA sampling have been posited.

¹⁰ See SIMON A. COLE, SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION 4 (2001) [hereinafter COLE, SUSPECT IDENTITIES] (noting that the “fundamental reliability” of fingerprint evidence has never been successfully challenged).

¹¹ See *id.*

¹² Even when the fingerprints of the accused are wholly irrelevant to his case, for example a suspect arrested for tax fraud or drunken disorderly conduct, we still countenance his fingerprinting. A 2001 report from the Bureau of Justice Statistics, a component of the Department of Justice, found that 94 percent of adults believed the practice of collecting fingerprints upon arrest to be either “very acceptable” (78 percent), or “somewhat acceptable” (16 percent). BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PUBLIC ATTITUDES TOWARD USES OF CRIMINAL HISTORY INFORMATION, 43 (2001), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pauchi.pdf>.

feelings about the new “great science of identification,”¹³ DNA evidence, which has quickly developed an even stronger air of infallibility than fingerprinting in the public consciousness.¹⁴

But the establishment, almost a century ago,¹⁵ of fingerprinting as a part of routine booking procedures had little to do with these cultural intuitions.¹⁶ Rather, routine fingerprinting arose out of a legitimate law enforcement need to definitively identify criminal suspects during an era when identity could easily be disguised.¹⁷ The analogy between DNA sampling and fingerprinting ignores this history, and the fact that no similar need for DNA sampling exists today. Furthermore, the “technological progression” argument ignores the obvious conclusion that with “progression” comes legitimate substantive differences between the two types of evidence, and the intrusions on privacy those differences represent.¹⁸

A fair and full analysis of these two key differences between DNA sampling and fingerprinting undermines both frameworks by which courts can find a suspicion-less search “reasonable” under the Fourth Amendment.¹⁹ Moreover, in ignoring these

¹³ A 1911 New York Times article coined this phrase, promising that fingerprinting would be the “great science” for untold years to come. *Keeping Track of the Criminal By His Finger Prints: The Wonderful Art, Long Used in China, Rapidly Being Adopted by the Police of This Country, with the New York Force Leading*, N.Y. TIMES, July 30, 1911 (Sunday Magazine), at 12 [hereinafter *Keeping Track of the Criminal*].

¹⁴ In fact, a Gallup poll in 2005 found that 85 percent of Americans believed DNA evidence to be either completely reliable (27 percent of those polled), or very reliable (58 percent of respondents). If anything, the poll found, we already accept DNA testing as more definitive than fingerprinting, which only 69 percent of Americans found to be either completely reliable (16 percent) or very reliable (53 percent). See Darren K. Carlson, *Americans Conclusive About DNA Evidence*, GALLUP, Nov. 15, 2005, <http://www.gallup.com/poll/19915/americans-conclusive-about-dna-evidence.aspx>.

¹⁵ Simon A. Cole, *Fingerprint Identification and the Criminal Justice System: Historical Lessons for the DNA Debate*, in DNA AND THE CRIMINAL JUSTICE SYSTEM: THE TECHNOLOGY OF JUSTICE 63, 71–72 (David Lazer ed., 2004) [hereinafter Cole, *Fingerprint Identification*] (noting that routine fingerprinting became standard procedure throughout the United States following the First World War).

¹⁶ This is not to say that these intuitions did not exist; they clearly did. See, e.g., *Keeping Track of the Criminal*, *supra* note 13 (“Guilty men have grown to dread the finger prints.”).

¹⁷ While the historic reasoning for routine fingerprinting is sound, one issue that will be discussed in this Note is the lack of a firm judgment from any court regarding fingerprinting and the Fourth Amendment. See *infra* Part IV. While courts in the middle of the 20th Century did examine the constitutionality of fingerprinting, they did not directly discuss privacy concerns, but rather more colloquial complaints such as the public humiliation associated with fingerprinting. See, e.g., *State ex rel. Mavity v. Tyndall*, 66 N.E.2d 755 (Ind. 1946).

¹⁸ See *infra* Part II.B.1–2 (discussing the substantive differences between fingerprint evidence and DNA samples).

¹⁹ See *infra* Part III (applying the differences between DNA sampling and fingerprinting to the “totality of circumstances” framework for allowing a suspicion-less search, and the “special needs” exception to the Fourth Amendment).

important differences, the technical progression argument becomes wholly reliant on cultural intuitions. The line between the merely accused and the legally guilty is continually blurred by cultural perceptions, and our courts have historically gone to great lengths to, at least in the courtroom, counteract this blurring.²⁰ Yet the courts that have upheld arrestee DNA sampling statutes have enthusiastically embraced just such a blurring.²¹

This Note will argue, in part, that the rulings of courts upholding arrestee DNA sampling statutes represent a surrender to cultural intuitions regarding DNA evidence. The promise of a massive DNA database, a revolutionary law enforcement tool, is a powerful one, and the first courts to uphold arrestee DNA sampling have allowed this promise to cloud their legal judgment. These courts have shrouded the argument for constitutionality in the precedential value of routine fingerprinting,²² but, as this Note will make clear, that analogy rings false.

Part I of this Note will look at the basic Fourth Amendment framework for analysis of the constitutionality of DNA sampling statutes. Part II will apply that framework to the strained analogy between fingerprinting and DNA sampling through analysis of the history of fingerprinting in the United States. Part III will argue that neither a totality of circumstances test, nor a special needs analysis, can lead to a finding of constitutionality without the false support of the faulty fingerprinting analogy. Finally, Part IV will acknowledge that the faulty fingerprinting analogy is fueled in part by the fact that routine fingerprinting, and the use of arrestee fingerprints for broad investigative purposes, has never been subjected to serious judicial scrutiny. In fact the strongest argument for arrestee DNA testing stems from this lack of clear precedent; by not explicitly rejecting the use of arrestee fingerprints in databases, courts have implicitly opened the door for a “progression” to arrestee DNA sampling. However, Part IV will demonstrate that this argument, too, ignores a deep history of both judicial and societal wariness of routine arrestee fingerprinting as a broad investigative tool. If anything, the judiciary’s failure to define the parameters of routine fingerprinting, its silent acquiescence to what has long been perceived as a boon for law enforcement, should serve as a warning for courts grappling with arrestee DNA statutes.

This Note will conclude that routine fingerprinting—its history and its status in our society today—does far more to undermine the case for arrestee DNA sampling than it does to support it. Absent the intuitive, but ultimately false, analogy to routine fingerprinting, the argument for arrestee DNA sampling rests almost exclusively on

²⁰ The most obvious example of this is our intuitive suspicion of a criminal defendant’s silence at trial, and our judicial system’s requirement that this silence does not become prejudicial.

²¹ In fact, both the *Pool* and *Anderson* courts couched their rulings in the questionable assertion of a lesser privacy right for arrested individuals. See *United States v. Pool*, 645 F. Supp. 2d 903, 910–12 (E.D. Cal. 2009), *aff’d*, 2010 WL 3554049 (9th Cir. Sept. 14, 2010); *Anderson v. Commonwealth*, 650 S.E.2d 702, 705 (Va. 2007), *cert. denied*, 553 U.S. 1054 (2008).

²² See, e.g., *Pool*, 645 F. Supp. 2d 903.

cultural intuitions. We perceive DNA evidence as the next great crime-fighting science, and therefore the grizzled, hardened criminal above has nothing to fear, so long as he has nothing to hide. This Note will argue that, even with nothing to hide, that man has reason to fear, and that courts should strike down arrestee DNA statutes as an unconstitutional search under the Fourth Amendment.

I. THE BASIC FOURTH AMENDMENT FRAMEWORK

The Fourth Amendment promises protection of individuals from “unreasonable searches and seizure,” unless probable cause has been established, and the particularities of the person and/or place to be searched are clearly delineated.²³ Courts have consistently found both methods for collecting DNA samples, drawing blood²⁴ and swabbing cells from an individual’s mouth,²⁵ to be a “search” under the Fourth Amendment. The question for the courts then becomes whether that search is “reasonable?” For broad law enforcement searches, absent any individualized suspicion, courts have carved out two potential exceptions by which DNA sampling could be deemed a “reasonable search” under the Fourth Amendment.

The “totality of circumstances” test requires balancing the degree of intrusion on an individual’s privacy and the legitimate government interest that intrusion serves.²⁶ The slightly more arduous “special needs” test, on the other hand, requires a showing that the intrusion serves a special need beyond typical law enforcement needs, which make the probable cause requirement impractical.²⁷

In uniformly upholding various statutes mandating collection from *convicted* individuals against Fourth Amendment challenges, a majority of circuits have used

²³ U.S. CONST. amend. IV.

²⁴ See *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 616 (1989) (finding that drug and alcohol testing through blood samples by Federal Railroad Administration did involve a “search” under the Fourth Amendment); see also *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (finding that a search of the suspect’s fingernails was a physical examination beyond characteristics that are “constantly exposed to the public” and constituted a search).

²⁵ *Padgett v. Donald*, 401 F.3d 1273, 1277 (11th Cir. 2005), *cert. denied sub nom. Boulineau v. Donald*, 546 U.S. 820 (2005) (extending the term “search” to include the taking of saliva samples from the inside of an individual’s mouth).

²⁶ See, e.g., *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990) (finding a police highway sobriety checkpoint constitutional because the state interest in curbing drunk driving outweighed the relatively slight intrusion on motorists).

²⁷ See, e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 873–77 (1987) (finding that a probation officer’s warrantless search of a probationer’s home based on a tip from another officer met the special needs test, as seeking a warrant for the search was impractical); see also *New Jersey v. T. L. O.*, 469 U.S. 325, 351–52 (1985) (Blackmun, J., concurring) (stressing that a totality of circumstances test should be the exception, not the rule, and that a special needs test—based firmly on the impracticality of a warrant or probable cause requirement—suffices to allow the searching of school students absent a warrant).

the totality of circumstances framework.²⁸ In analyzing the degree of intrusion on the individual, many of these courts leaned heavily on the precedent of routine fingerprinting as a similarly minor intrusion,²⁹ with the caveat that, as convicted criminals, the individuals being subjected to DNA sampling have a “diminished expectation of privacy.”³⁰ While at least one early DNA court hinted at a diminished expectation of privacy when a person is not yet convicted, but merely arrested,³¹ the convicted status of the subjects of DNA testing in each case was definitive.³²

The three circuits that have rejected Fourth Amendment challenges based on the special needs test have similarly found fingerprinting to be a helpful analogy.³³ For instance, in evaluating the state need for DNA sampling, the Second Circuit in *Nicholas v. Goord* noted that, despite the slightly more intrusive nature of drawing blood or swabbing saliva, DNA collection plays “the same role as fingerprinting.”³⁴ The *Goord* court also dutifully noted that the plaintiffs’ status as convicted individuals

²⁸ See *Banks v. United States*, 490 F.3d 1178 (10th Cir. 2007) (referring to FBI DNA database system as more efficient updating of fingerprint databasing in upholding collection of samples from paroled offenders); *United States v. Kraklio*, 451 F.3d 922, 924–25 (8th Cir. 2006) (upholding amendment of convicted individual’s probation orders to include mandatory DNA collection, based on federal statute, for inclusion in DNA database), *cert. denied*, 549 U.S. 1044 (2006); *United States v. Sczubelek*, 402 F.3d 175, 184–86 (3d Cir. 2005) (upholding federal collection requirement for probationer), *cert. denied*, 548 U.S. 919 (2006); *Donald*, 401 F.3d at 1280 (upholding DNA collection from incarcerated felons); *Groceman v. United States*, 354 F.3d 411, 413 (5th Cir. 2004) (upholding collection from incarcerated individuals); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004) (upholding DNA collection from certain offenders on conditional release), *cert. denied*, 544 U.S. 924 (2005); *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992) (upholding DNA collection from incarcerated individuals), *cert. denied*, 506 U.S. 977 (1992).

²⁹ See, e.g., *Sczubelek*, 402 F.3d at 185.

³⁰ *Id.* at 177; see also *Groceman*, 354 F.3d at 413–14 (“Though, like fingerprinting, collection of a DNA sample for purposes of identification implicates the Fourth Amendment, persons incarcerated after conviction retain no constitutional privacy against their correct identification.”).

³¹ See *Murray*, 962 F.2d at 306 (“[W]hen a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it. . . . While we do not accept even this small level of intrusion for free persons without Fourth Amendment constraint . . . the same protections do not hold true for those lawfully confined to the custody of the state.”).

³² *Id.* at 307 (“Thus, in the case of convicted felons . . . we find that the minor intrusion caused by the taking of a blood sample is outweighed by Virginia’s interest . . .”).

³³ See *Nicholas v. Goord*, 430 F.3d 652, 671–72 (2d Cir. 2005), *cert. denied*, 549 U.S. 953 (2006); *Green v. Berge*, 354 F.3d 675 (7th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003), *cert. denied*, 540 U.S. 1083 (2003); see also *United States v. Conley*, 453 F.3d 674, 679–81 (6th Cir. 2006) (finding a DNA collection statute constitutional under both the special needs and the totality of circumstances analysis).

³⁴ *Goord*, 430 F.3d at 671.

further minimized the intrusion.³⁵ The Seventh Circuit, in *Green v. Berge*, inflated the law enforcement need by finding DNA samples to be merely a “stronger” form of identity verification than fingerprinting.³⁶

The courts that have, to date, upheld arrestee DNA sampling statutes against Fourth Amendment challenges have leaned heavily on the fingerprint analogies from convicted DNA sampling cases. To make this case, these courts have necessarily minimized the focus in those earlier cases on the plaintiffs’ status as convicts. For instance, a district court in California in *United States v. Pool*³⁷ recently became the first court to uphold two federal provisions that require DNA sampling upon arrest.³⁸ The court in *Pool* pointed to DNA testing as a “technological progression” from fingerprinting³⁹ which serves the same valid state goals of determining definitive identification of criminal suspects and poses, if anything, a lesser physical invasion than its forebearer.⁴⁰ To make the leap from testing convicted felons to testing arrested individuals, the *Pool* court relied on the Virginia Supreme Court’s ruling in *Anderson v. Commonwealth*.⁴¹ *Anderson* suggested that arrestee DNA testing was permissible based on arrested individuals’ lessened right to privacy.⁴² This questionable and vague conclusion, based on the sole federal circuit that declined to draw a clear line between the privacy rights of the legally convicted and the merely accused,⁴³ is one that will be discussed in

³⁵ *Id.*; see also *Berge*, 354 F.3d at 678–79.

³⁶ *Berge*, 345 F.3d at 679 (“[G]iven that DNA is the most reliable evidence of identification—stronger even than fingerprints or photographs—we see no Fourth Amendment impediments . . .”). The *Berge* court, it should be noted, was also careful to focus on the complaining inmate’s convicted status. *Id.*

³⁷ 645 F. Supp. 2d 903 (E.D. Cal. 2009), *aff’d*, 2010 WL 3554049 (9th Cir. Sept. 14, 2010).

³⁸ 18 U.S.C. § 3142(c)(1)(A) (2006) (listing DNA sampling among the conditions of pretrial release for individuals arrested and charged with certain crimes); 42 U.S.C. § 14135(a) (2006) (granting the Attorney General authority to regulate and carry out DNA sampling from individuals arrested for a federal offense).

³⁹ *Pool*, 645 F. Supp. 2d at 910.

⁴⁰ See *id.* at 911 (noting the minimal invasive nature of DNA testing).

⁴¹ *Id.* (drawing upon *Anderson v. Commonwealth*, 650 S.E.2d 702 (Va. 2007), *cert. denied*, 553 U.S. 1054 (2008)). The *Anderson* court upheld a state statute that authorized taking a DNA sample from anyone convicted of a violent felony and noted:

Fingerprinting an arrested suspect has long been considered a part of the routine booking process. Similarly, the taking of a DNA sample by minimally intrusive means is justified by the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution.

Anderson, 650 S.E.2d at 706 (internal quotation marks omitted).

⁴² *Anderson*, 650 S.E.2d at 706 (“Like fingerprinting, the ‘Fourth Amendment does not require an additional finding of individualized suspicion’ before a DNA sample can be taken.” (quoting *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992), *cert. denied*, 506 U.S. 977 (1992))).

⁴³ The *Murray* court, among the first courts to rule in favor of a convicted felon DNA sampling statute, has been the only court to hint that a diminished privacy expectation could be

Part IV of this Note, and is an issue that seems certain to be controversial amongst other courts.⁴⁴

Putting this argument aside for now, the framework for both a totality of circumstances analysis, and a special needs analysis, of the constitutionality of pre-conviction DNA sampling seems to invite two basic questions: first, to what degree is the sampling intrusive on the individual; second, what is the government's need for these intrusions? Courts using both tests have relied on the fingerprinting analogy to answer these questions, and Part II of this Note will examine the holes in that analogy through the lens of these two questions.

II. GOVERNMENT NEED VERSUS DEGREE OF INTRUSION

A. *A Historical Need, a Law Enforcement Convenience*

Under both the totality of circumstances test and the special needs analysis, the government need, or rationale, for an intrusion into individual privacy is a central issue. The argument for pre-conviction DNA sampling suggests that DNA testing is a technological progression from fingerprinting,⁴⁵ merely a superior way to meet the same needs that led to fingerprinting becoming a routine part of any arrest.⁴⁶ This argument fails by ignoring both the historical basis for routine fingerprinting and the simple fact that the need for definitive identification that led to routine fingerprinting is already fully met, making DNA sampling for that purpose wholly redundant.

I. "The Great Science of Identification"

Shortly following the turn of the nineteenth century, fingerprinting was hailed as the ultimate bane to criminal existence,⁴⁷ having led to heralded convictions in England⁴⁸ and the United States.⁴⁹ But these crime-solving successes aside, the real basis

extended to include not just convicted individuals, but also anyone subject to the custody of the state. *Murray*, 962 F.2d at 306.

⁴⁴ In fact, a federal district court in *United States v. Mitchell*, 681 F. Supp. 2d 597 (W.D. Pa. 2009), and the Minnesota Court of Appeals in *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. Ct. App. 2006), have both strongly criticized this reasoning in striking down arrestee DNA sampling statutes.

⁴⁵ *United States v. Pool*, 645 F. Supp. 2d 903, 910 (E.D. Cal. 2009), *aff'd*, 2010 WL 3554049 (9th Cir. Sept. 14, 2010).

⁴⁶ *Id.* (citing *United States v. Sczubelek*, 402 F.3d 175, 185 (3rd Cir. 2005), *cert. denied*, 548 U.S. 919 (2006)).

⁴⁷ See *Keeping Track of the Criminal*, *supra* note 13.

⁴⁸ COLIN BEAVEN, *FINGERPRINTS: THE ORIGINS OF CRIME DETECTION AND THE MURDER CASE THAT LAUNCHED FORENSIC SCIENCE* (2001) (exploring the investigation into and conviction of two brothers for the murder of an elderly couple in a London suburb).

⁴⁹ See *People v. Jennings*, 96 N.E. 1077 (Ill. 1911). Thomas Jennings of Illinois was the first person convicted of murder in a U.S. court based, in part, on fingerprint evidence. See COLE, *SUSPECT IDENTITIES*, *supra* note 10, at 159–60.

for the inclusion of fingerprinting in common booking practices was a simple administrative need, epitomized in the legend of Will and William West.⁵⁰ While accounts of the story differ, the basic premise is that one Will West was brought to Leavenworth Prison in Kansas and, upon processing, claimed to have never been incarcerated in the prison before.⁵¹ When prison officials examined his Bertillon measurements,⁵² they were convinced he was lying until they discovered that the prison already housed a William West who had identical Bertillon measurements to the new prisoner.⁵³ The prison found that fingerprints were the only reliable way to distinguish the two prisoners, and it became one of the first American penitentiary systems to install a fingerprint system in 1904.⁵⁴

Although inconsistent retellings of the West story have raised questions as to its veracity,⁵⁵ the basic problem faced by Leavenworth was prevalent in all police agencies: as criminal statutes evolved to include increased punishment for prior offenses, simply identifying an individual was a challenge.⁵⁶ With identification documents such as passports lacking detailed descriptions and easily forged,⁵⁷ and systems geared

⁵⁰ See JOE NICKELL & JOHN F. FISCHER, *CRIME SCIENCE: METHODS OF FORENSIC DETECTION* 115 (1999).

⁵¹ *Id.*

⁵² The “Bertillon method,” founded by the French police officer Alphonse Bertillon, involved measurements of an individual’s head and body, combined with photographs and physical descriptions of tattoos and other identifying marks, to create a catalogue system for identifying multiple offenders. Because it was believed that Bertillon measurements were unique to all individuals, the system was popular in Europe and the United States from roughly 1884 until fingerprints proved more reliable in the early twentieth century. The primary downfalls of the system were the complexity of the measuring process, and the fact that measurements of individuals could change over time. See G. Larry Mays et al., *Review Essay: DNA (Deoxyribonucleic Acid) Evidence, Criminal Law, and Felony Prosecution: Issues and Prospects*, 16 *JUST. SYS. J.* 111, 112 (1992). See generally, HENRY T.F. RHODES, *ALPHONSE BERTILLON: FATHER OF SCIENTIFIC DETECTION* (1956).

⁵³ NICKELL & FISCHER, *supra* note 50, at 115.

⁵⁴ MITCHEL P. ROTH, *PRISONS AND PRISON SYSTEMS: A GLOBAL ENCYCLOPEDIA* 159 (2006). By 1907, Leavenworth had developed the largest fingerprint collection, roughly 20,000 prints, in the United States. *Id.*

⁵⁵ See, e.g., Robert D. Olsen, Sr., *A Fingerprint Fable: The Will and William West Case*, *IDENTIFICATION NEWS*, Nov. 1987, <http://www.scafo.org/library/110105.html> (arguing that the Leavenworth records do not indicate any confusion regarding either William West, who was incarcerated and underwent Bertillon measurements in September of 1901, and Will West, who was incarcerated and measured in May of 1903; both Wests were fingerprinted in October of 1905). Nickell and Fischer suggest that Will West and William West were, in fact, identical twins, which would account for much of the initial identity confusion. NICKELL & FISCHER, *supra* note 50, at 115.

⁵⁶ COLE, *SUSPECT IDENTITIES*, *supra* note 10, at 9–10 (discussing the emerging need, beginning in the late eighteenth century, for some people, particularly criminals, to have “an identity that existed outside the physical body, in the files and paper records of some government bureaucracy”).

⁵⁷ *Id.* at 10.

specifically towards criminals seriously flawed,⁵⁸ the need for a legitimate identification system was dire.⁵⁹

A New York district court expressed that need in *United States v. Kelly*,⁶⁰ an early case looking specifically at the process of taking fingerprints as a part of routine booking upon arrest. The *Kelly* court commented that “names and appearances may easily be assumed and changed and while, like everything else that is human, occasional mistakes appear, it is exceedingly rare for this means of identification [fingerprinting] to fail.”⁶¹ The District Court in *Kelly* stressed that the value of fingerprinting goes well beyond mere evidentiary value at criminal trial, citing statistics finding that fingerprinting allowed for more than 103,000 positive identifications of prisoners in London between 1901 and 1914, and more than 31,000 positive identifications in New York City over a four-year period between 1911 and 1915.⁶²

2. A Need Fulfilled

Compared to the dire need for effective identification tools facing law enforcement in the early twentieth century, the need for DNA testing for basic identification purposes today is diminutive. Courts upholding statutes requiring DNA sampling from arrested individuals have emphasized the need for “absolute certainty” in ensuring that an arrested individual is who he says he is.⁶³ This assertion is undermined by the fact

⁵⁸ See *id.* at 11. Cole recounts one of the more feckless identification systems at the Pennsylvania Penitentiary in Philadelphia, which attempted to keep tabs on its massive prison population through a detailed cataloguing system that included notation of birthplace, age, complexion, hair color, eye color and stature, along with any identifying marks or tattoos. Despite the Penitentiary’s dogged efforts, Cole notes, there was still “no way for a prison clerk to use a physical feature to look up a prisoner’s name,” so that, “a prisoner using an alias, unless actually recognized by a prison official, was shielded from identification.” *Id.*

⁵⁹ See *Pinkerton’s London Trip: American Detective Studies Fingerprint System at Scotland Yard*, N.Y. TIMES, July 23, 1911, at C4. This recounting of an American’s trip to London to study fingerprint cataloguing, amusingly gives credit to Mr. Pinkerton for the “comparative inactivity of American crooks in London” during his visit. *Id.*

⁶⁰ 51 F.2d 263, 265 (E.D.N.Y. 1931), *rev’d*, 55 F.2d 67 (2d Cir. 1932).

⁶¹ *Id.* The district court in *Kelly* found that fingerprinting was inappropriate because the State lacked statutory authority. *Id.* The case was overturned on appeal, with the appeals court echoing the district court’s understanding of fingerprinting as “a very certain means [of identification] . . . especially important in a time when increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no longer a ready means of identification.” *United States v. Kelly*, 55 F.2d 67, 69 (2d Cir. 1932).

⁶² *United States v. Kelly*, 51 F.2d 263, 265 (E.D.N.Y. 1931).

⁶³ *Anderson v. Commonwealth*, 650 S.E.2d 702, 706 (Va. 2007), *cert. denied*, 553 U.S. 1054 (2008). The Virginia Supreme Court in *Anderson* upheld a Virginia statute requiring DNA sampling of any individual arrested for a violent crime. It based its ruling partially on the argument that, while fingerprints can be a reliable means of making an identification, DNA is more reliable. *Id.* at 705.

that there has never been a showing that an individual's fingerprints can be altered,⁶⁴ and by recent tests by scientists showing that DNA evidence can be successfully fabricated.⁶⁵ Even ignoring this evidence and granting the proposition that DNA sampling may provide a higher degree of certainty in determining identity, the possibility that a previously convicted felon in the modern world could simply lie away his identity is extremely unlikely, considering the vastly stricter identification requirements present in all aspects of everyday life.⁶⁶

Furthermore, for the basic process of confirming and monitoring identities through an interconnected database, fingerprinting remains as valid and efficient a process as DNA collection and databasing.⁶⁷ Although courts have questioned the reliability of fingerprint evidence in recent years,⁶⁸ these concerns have surrounded their reliability as evidence—particularly the value of blurry partial prints left at crime scenes—not their value as basic marks of identity.⁶⁹ Since paper fingerprint files were first computerized in the 1960s⁷⁰ in systems such as the FBI's Integrated Automated Fingerprint Identification System (IAFIS), the reliability of fingerprinting as a means for assuring the identity of an individual has only increased.⁷¹ While IAFIS is limited in its capacity to produce “direct hits” when a particular set of prints is entered into the database,⁷² this limit is irrelevant to the process of verifying an arrested individual's identity and

⁶⁴ See NICKELL & FISCHER, *supra* note 50, at 116 (noting that even John Dillinger's attempt to surgically alter his fingerprints failed to erase them).

⁶⁵ Israeli scientists successfully fabricated blood and saliva samples containing DNA from a person other than the actual donor. Andrew Pollack, *Scientists Show That It's Possible to Create Fake DNA Evidence*, NY TIMES, Aug. 18, 2009, at D3.

⁶⁶ For instance, requirements of identification for travel, banking and other necessities now typically include state-issued photo identification. See, e.g., *ID Requirements for Airport Checkpoints*, TRANSP. SEC. ADMIN., http://www.tsa.gov/travelers/airtravel/acceptable_documents.shtm (last visited Nov. 17, 2010).

⁶⁷ See INTERPOL EUROPEAN EXPERT GROUP ON FINGERPRINT IDENTIFICATION, METHOD FOR FINGERPRINT IDENTIFICATION, May 2000, <http://www.interpol.int/public/Forensic/fingerprints/WorkingParties/IEEGFI/ieegfi.asp> (noting that fingerprints will remain a major forensic tool for years to come). This INTERPOL report finds that the essential reliability of fingerprints as identifiers is based on two axioms, that fingerprints are unique, and that they don't change over time. *Id.*

⁶⁸ Jason Felch, *Smudge Science*, L.A. TIMES, Mar. 20, 2009, at A37.

⁶⁹ *Id.* Felch notes that scientists generally agree with the age-old principle that no two fingerprints are exactly alike, though he adds ominously that this assertion has gone relatively unstudied. *Id.*

⁷⁰ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AUTOMATED FINGERPRINT IDENTIFICATION SYSTEMS: TECHNOLOGY AND POLICY ISSUES 1 (1987) [hereinafter AFIS POLICY].

⁷¹ *Id.* However, the full potential of computerized fingerprint databasing would not be realized until the 1980s. *Id.*

⁷² AFIS systems generally narrow the database down to a handful of possible matches. COLE, SUSPECT IDENTITIES, *supra* note 10, at 255.

criminal history through fingerprints.⁷³ In fact, the issue of fingerprint and DNA value for “cold hits” in a database is a separate question altogether from the law enforcement need that spawned the routine fingerprinting of individuals during booking.

DNA evidence undeniably offers considerable promise and potential for solving crime, but to say that the need for routine DNA collection upon arrest is akin to, or a natural progression from, the need for routine fingerprinting a century ago is misguided. When fingerprinting became popularized in the early twentieth century, law enforcement was desperate for some means of documenting and tracing the identities of convicted criminals.⁷⁴ The only serious alternative to fingerprinting for criminal identification was the Bertillon method, which had proven both administratively and scientifically suspect.⁷⁵ Law enforcement faces no such challenges today, precisely because fingerprinting remains an effective and efficient way to document an individual’s identity.⁷⁶

Admittedly, the value of routine fingerprinting as a tool for seeking “cold hits” with unsolved cases has expanded with law enforcement’s ability to cross-reference and search enormous databases.⁷⁷ But the initial intent behind routine fingerprinting at booking was aimed at merely identifying definitively arrested persons, and that intent has been reflected in more recent case law regarding the constitutionality of pre-conviction fingerprinting.⁷⁸ To suggest that routine DNA sampling is merely a natural progression from that aim ignores two critical facts: 1) fingerprinting remains a viable, presumptively foolproof, method of establishing identity, and 2) arrested individuals today are far less likely, and less able, to conceal their identity upon arrest. Acknowledging these facts, it seems reasonable to suggest what some courts have acknowledged,⁷⁹ that DNA sampling from arrestees has nothing to do with the

⁷³ Mere identification from fingerprinting, in the context examined in *United States v. Kelly*, 55 F.2d 67 (2d Cir. 1932), involves only matching the name given by an arrested individual and his or her fingerprints against prints already on file for that individual.

⁷⁴ See Martine Kaluszynski, *Republican Identity: Bertillonage as Government Technique*, in DOCUMENTING INDIVIDUAL IDENTITY: THE DEVELOPMENT OF STATE PRACTICES IN THE MODERN WORLD 123, 127 (Jane Caplan & John Torpey eds., 2001) (discussing precursors to fingerprinting).

⁷⁵ See *id.* at 131.

⁷⁶ See COLE, SUSPECT IDENTITIES, *supra* note 10, at 4 (stating that there have been “no successful challenges to [fingerprinting’s] reliability”).

⁷⁷ IAFIS currently has more than 66 million subjects in its Criminal Master File, and can process submissions for a database search in an average of ten minutes for a criminal request. *Integrated Automated Fingerprint Identification System*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/hq/cjisd/iafis.htm> (last visited Nov. 17, 2010) [hereinafter FBI IAFIS].

⁷⁸ *McGovern v. Van Riper*, 54 A.2d 469 (N.J. Ch. 1947) (finding that the primary goal in collecting fingerprints upon arrest was to definitively identify the individual to determine if he had prior convictions, and to expedite recapture in case the individual were to escape).

⁷⁹ In fact, the Virginia Supreme Court in *Anderson* qualified its platitudes about the need for “absolute certainty” in identifying arrested individuals with the caveat that the routine taking

original aims of fingerprinting and everything to do with an effort to grow DNA databases in order to solve future crimes.

3. Casting a Wider Net

If DNA evidence can provide no practical net value to the process of identifying and maintaining criminal histories of individuals beyond that already offered by fingerprinting, then what is its value in the context of routine booking procedures? As the viability of DNA evidence has grown in the past twenty years, states have sought, and courts have supported, the expansion of DNA databases to include samples from more and more classes of individuals.⁸⁰ Courts first upheld collection from convicted, incarcerated felons,⁸¹ followed by collection from felons convicted of violent crimes on parole or supervised release,⁸² and ultimately collection from paroled individuals convicted of *any* federal felony.⁸³ State courts have mirrored federal courts in this regard, and have further expanded collection by upholding collection from individuals convicted of some misdemeanors,⁸⁴ and individuals convicted of certain sex offenses even after they have been released and have fulfilled state supervision requirements.⁸⁵

This steady expansion of DNA databases should be unsurprising, considering the potential value to law enforcement and similar attempts to capitalize on the potential of fingerprinting and expand fingerprint databases in the past.⁸⁶ Still, the courts upholding

of fingerprints during booking, and thus the taking of DNA as well, is primarily aimed at solving past and future crimes. *Anderson v. Commonwealth*, 650 S.E.2d 702, 705 (Va. 2007), *cert. denied*, 553 U.S. 1054 (2008).

⁸⁰ As of a September 2006 report from the Bureau of Justice Statistics, all fifty-five United States jurisdictions (including all fifty states, the District of Columbia, Guam, Puerto Rico, federal offenders, and offenders charged by the Department of Defense) required databasing of DNA samples for convicted sex offenders. More than fifty jurisdictions included DNA sampling from individuals convicted of murder, offenses against children, kidnaping, assault and battery, robbery and burglary. forty-four jurisdictions required DNA sampling from individuals convicted of any felony, and thirty-one jurisdictions as of 2006 had expanded their database to include samples from juveniles. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DNA FORENSICS: EXPANDING USES AND INFORMATION SHARING 2 (2006) [hereinafter DNA FORENSICS].

⁸¹ *See, e.g., Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992), *cert. denied*, 506 U.S. 977 (1992).

⁸² *United States v. Kincade*, 379 F.3d 813, 839 (9th Cir. 2004), *cert. denied*, 544 U.S. 924 (2005).

⁸³ *See United States v. Kriesel*, 508 F.3d 941, 950 (9th Cir. 2007).

⁸⁴ *See, e.g., State v. Raines*, 857 A.2d 19 (Md. 2004) (upholding sampling of persons convicted of certain burglary misdemeanors).

⁸⁵ *See, e.g., Good v. Superior Court*, 71 Cal. Rptr. 3d 125 (Cal. Ct. App. 2008).

⁸⁶ *See infra* note 225 and accompanying text (discussing efforts of J. Edgar Hoover to promote universal fingerprinting).

these expansions have been careful to limit their scope. Many courts have explained the basic law enforcement “need” as an interest in dissuading and preventing recidivism,⁸⁷ a rationale that has been parroted by the Department of Justice,⁸⁸ and that clearly can only apply to convicted individuals.⁸⁹ All courts upholding DNA sampling of convicted individuals have stressed that their rulings apply only to convicted individuals, and reflect an interest in keeping track of those individuals, be it upon their release, their escape, or merely throughout their incarceration.⁹⁰

Based on these rationales, and solely in the context of post-conviction DNA testing, the analogy to fingerprinting from a “need” standpoint is a good one. The historic need for fingerprinting is, in a sense, an inversion of the stated post-conviction DNA testing need: keeping track of convicted criminals.⁹¹ The initial intent of routine fingerprinting was primarily “archival,” an effort to ensure that arrested individuals with prior convictions could not erase those previous crimes.⁹² But the analogy, for purposes of discussing DNA sampling, is strictly dependant on dealing with *convicted* individuals, a point ignored in both *Anderson* and *Pool*.

In upholding Virginia’s arrestee DNA collection statute, the *Anderson* court cited a state interest in “maintaining a permanent record to solve other past and future crimes.”⁹³ This rationale was pulled directly from *Jones v. Murray*, but it lacked the

⁸⁷ *Jones v. Murray*, 962 F.2d 302, 310–11 (4th Cir. 1992), *cert. denied*, 506 U.S. 977 (1992).

⁸⁸ DNA FORENSICS, *supra* note 80, at 9–10. The Justice Department report uses recidivism data to suggest that DNA sampling can have both a deterrent effect and lead to the solving of more serious crimes. The report discusses the controversial “lesser offenses” initiative in New York City, whereby law enforcement seeks DNA samples after convictions for minor property crimes in hopes of prompting a database match with unsolved or future serious crimes, such as murder or rape. The program identified a link between lesser offenses and open murder and rape cases, and prompted an expansion of the city’s forensic program. *Id.*

⁸⁹ After all, if an arrestee is presumed innocent, there can be no state interest in preventing recidivism in the future until he is convicted.

⁹⁰ *See, e.g.*, *United States v. Sczubelek*, 255 F. Supp. 2d 315, 323 (D. Del. 2003) (“[T]he ultimate goals of solving past and future criminal investigations, exonerating the innocent and deterring recidivism.”), *aff’d*, 402 F.3d 175 (3d Cir. 2005).

⁹¹ Consider a story, relayed in a brief 1930 book published by the Finger Print Publishing Association, in which convicted killer Luke O’Neill escaped police custody and altered his physical appearance. T.G. COOKE, FINGERPRINTS SECRET SERVICE CRIME DETECTION 48–49 (1930). O’Neill, even after he was arrested on a burglary charge, continued “laughing at police,” until he was taken to be fingerprinted, where “he became really alarmed.” *Id.* at 47. This need to keep track of O’Neill via his fingerprints is at least somewhat analogous to the needs expressed by the post-conviction DNA sampling courts.

⁹² *Cole, Fingerprint Identification, supra* note 15, at 83 (“In the 1930s, the primary application of criminal identification databases was archival: linking individual suspects to their ‘true’ criminal histories so that they could be adjudicated with the highest degree of fairness (for them) and safety (for society).”).

⁹³ *Anderson v. Commonwealth*, 650 S.E.2d 702, 705 (Va. 2007) (quoting *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992)), *cert. denied*, 553 U.S. 1054 (2008).

element of a need to monitor convicted criminals, and thus represented a far broader “need” than those expressed in the post-conviction DNA cases. The *Anderson* court attempted to justify this need by relying on the fingerprint analogy. Once probable cause has been established for arrest, the court reasoned, the suspect’s identification becomes a legitimate state interest, and that interest extends to collecting DNA evidence for databasing purposes.⁹⁴ The court suggested that DNA sampling upon arrest, “while more revealing, is no different in character” than fingerprinting,⁹⁵ and cited *Murray*, again, to support this proposition.⁹⁶

The *Anderson* court ignored the fact, however, that *Murray* was limited to the collection of DNA samples from persons lawfully confined to prison, a crucial fact the *Murray* court was careful to emphasize.⁹⁷ While the *Murray* court remained notably open to the possibility of a lesser expectation of privacy upon arrest, it also specifically pointed to case law that limited the intrusion of fingerprinting under the Fourth Amendment.⁹⁸ Furthermore the *Murray* court couched its decision in the fact that Fourth Amendment protection applies less to those already convicted.⁹⁹

The court in *Pool*, meanwhile, simply cited *Anderson* in finding that the “need” for DNA sampling is analogous to fingerprinting as part of the routine booking process.¹⁰⁰ It too relied primarily on *Murray*, despite the *Murray* court’s emphasis on the importance of conviction in the erosion of Fourth Amendment rights.¹⁰¹

4. Conclusions—Comparing “Need”

Ultimately, there is no denying that the “need” expressed in *Anderson* and *Pool* is just that, a need. But the issue of that need’s legitimacy, and its potency in the face of real encroachments on the privacy rights of presumptively innocent individuals, is significantly called into question when the false analogy to fingerprinting is accepted as such.

⁹⁴ *Id.*

⁹⁵ *Id.* at 705.

⁹⁶ *Murray*, 962 F.2d at 306 (noting that even a tax evader is fingerprinted to further the State’s legitimate interest in identification).

⁹⁷ *Id.*

⁹⁸ *Id.* at 306–07 (citing *Davis v. Mississippi*, 394 U.S. 721, 727 (1969) (finding that the Fourth Amendment protected against fingerprinting when a number of black youths were targeted by police without individualized suspicion)).

⁹⁹ *Murray*, 962 F.2d at 307 n.2.

¹⁰⁰ *United States v. Pool*, 645 F. Supp. 2d 903 (E.D. Cal. 2009), *aff’d*, 2010 WL 3554049 (9th Cir. Sept. 14, 2010). In affirming the District Court in *Pool*, the Ninth Circuit stressed the arguably greater accuracy of DNA identification. *United States v. Pool*, 2010 WL 3554049 at *8 (9th Cir. Sept. 14, 2010). The Ninth Circuit also made a case for monitoring the accused during the period between arrest and trial—determining if the individual has committed prior unsolved crimes is critical to deciding whether, and under what conditions, to release the individual pre-trial. *Id.*

¹⁰¹ *Pool*, 645 F. Supp. 2d at 910–11.

To simply accept the need for “routine” DNA sampling upon arrest as a natural progression from the need for routine fingerprinting is erroneous. Fingerprinting historically served a specific administrative need—the need to definitively establish the identity of arrested individuals when identities could easily be falsified.¹⁰² But, that specific need is no better met by the innovation of DNA sampling. If anything, DNA is arguably less reliable as a basic identification system.¹⁰³

The comparison between the need for fingerprinting and DNA sampling in the post-conviction DNA sampling cases is probably best treated as no more than a helpful comparison. A case can certainly be made that routine fingerprinting was meant to be “archival,” an effort to link convicted felons, released and subsequently arrested again, to their true criminal histories.¹⁰⁴ This same need to monitor convicted criminals is inherent in post-conviction DNA statutes, but the precedential value is lost in the non-criminal context.

If we take away any precedential value of the fingerprinting comparison and acknowledge it as false, then the rationale in *Anderson* and *Pool* comes down to a simple call for continued expansion of DNA databases. Although this “need” is certainly intuitively legitimate and reasonable—after all, if you’re arrested and you have nothing to hide, what would you possibly have to fear?¹⁰⁵—it loses significant weight as a counter to the more drastic invasions of privacy it proposes.

After discussing the faulty comparison between fingerprinting and DNA sampling as it relates to the invasion of the privacy prong of the Fourth Amendment analysis in the following section, Part III will break down the full arguments in *Anderson* and *Pool* to determine if, absent that comparison, those decisions can stand.

B. Untapped Potential, Privacy Fears

Much of the early judicial consideration of the “intrusion” of DNA sampling focused on the physical intrusion—the drawing of blood or a swab of saliva from inside the cheek.¹⁰⁶ The broader concern for any advocate of civil liberties, however, involves the immense potential, both real and perceived, that DNA samples carry.

1. The Classic Civil Liberties Argument

The genius of fingerprinting for identification purposes, according to forensic expert Simon Cole, is that fingerprints have proven over time to offer no valuable or

¹⁰² See *supra* notes 56–59 and accompanying text.

¹⁰³ See *supra* note 65 and accompanying text.

¹⁰⁴ Cole, *Fingerprint Identification*, *supra* note 15, at 83.

¹⁰⁵ Based on the questionable assertion of lesser privacy rights for arrested individuals. See *United States v. Pool*, 645 F. Supp. 2d 903, 915 (E.D. Cal. 2009) (making the assertion that arrestees have diminished privacy rights), *aff’d* 2010 WL 3554049 (9th Cir. Sept. 14, 2010).

¹⁰⁶ See, e.g., *Nicholas v. Goord*, 430 F.3d 652, 669 (2d Cir. 2005), *cert. denied*, 549 U.S. 953 (2006).

personal information beyond the mere identity of the individual they belong to.¹⁰⁷ Despite substantial research seeking to prove a hereditary or racial link to fingerprints, no such link has been found.¹⁰⁸ This lack of depth in fingerprint evidence, Cole argues, has been essential to its staying power as strong evidence of identification, in that fingerprint experts asked to testify at criminal trial are not influenced by traits that may indicate a particular type of suspect.¹⁰⁹

DNA samples, alternatively, carry significant potential for revealing information beyond mere identity,¹¹⁰ and the process of DNA databasing has led to significant questions from civil liberties advocates regarding how databases would be protected and the extent to which collection would be expanded.¹¹¹ “[M]ight access to these databases change in the future?” asks social psychologist and legal scholar Julie Singer.¹¹² “Could the information contained in these databases be exploited or used in illegal or unethical ways? Finally, might the government not stop at requiring DNA tests of those arrested? Might they someday require this submission of all its citizens?”¹¹³ These concerns regarding access, exploitation and overreach have already been argued in recent years,¹¹⁴ although proponents of expanded DNA databases point to crime-solving successes to justify any expansion.¹¹⁵

Much of the recent argument has involved the potential “predictive value” of DNA, and the debated contention that DNA collected for criminal identification purposes is merely “junk DNA,” or DNA that does not contain key personal information regarding

¹⁰⁷ COLE, SUSPECT IDENTITIES, *supra* note 10, at 101.

¹⁰⁸ *Id.* at 103.

¹⁰⁹ *Id.* at 101.

¹¹⁰ *See, e.g.*, United States v. Kincade, 379 F.3d 813, 842 n.3 (9th Cir. 2004) (Gould, J., concurring) (“DNA stores and reveals massive amounts of personal, private data about that individual, and the advance of science promises to make stored DNA only more revealing in time.”), *cert. denied*, 544 U.S. 924 (2005).

¹¹¹ *See* Julie A. Singer et al., *The Impact of DNA and Other Technology on the Criminal Justice System: Improvements and Complications*, 17 ALB. L.J. SCI. & TECH. 87 (2007).

¹¹² *Id.* at 123.

¹¹³ *Id.* (citing Paul E. Tracy & Vincent Morgan, *Big Brother and His Science Kit: DNA Databases for 21st Century Crime Control?*, 8 PSYCHOL. PUB. POL’Y & L. 339, 339–40 (2002)).

¹¹⁴ For instance, in Orange County, California, the local District Attorney created his own DNA database in order to circumvent federal and state evidentiary rules. Jason Felch & Maura Dolan, *A War for Control of Forensic Science*, L.A. TIMES, Dec. 14, 2008, at A1. Felch and Dolan also reported that the D.A. engaged in a power struggle with the local Sheriff over control of the county’s DNA samples. *Id.*

¹¹⁵ For instance, one of the most controversial DNA search methods, a “familial search” using a known DNA sample to match unsolved crimes to the sampled individual’s family members recently yielded a major law enforcement coup, the arrest of a long-wanted serial killer. Jennifer Steinhauer, *‘Grim Sleeper’ Arrest Fans Debate on DNA Use*, N.Y. TIMES, July 9, 2010, at A14. While the two states that allow familial searches, Colorado and California, strictly regulate their implementation, the process has nonetheless raised concerns with civil liberties advocates. *Id.*

genetic history.¹¹⁶ Cole argues that the potential “predictive value” of DNA has been both overstated by civil libertarians seeking to limit DNA collection and understated by proponents of increased collection.¹¹⁷ He concludes that the concern with DNA databasing is that society will begin assigning “predictive value” to all DNA, leading to subconscious, and erroneous, correlations between basic DNA types and perceived criminal propensities.¹¹⁸ Ignoring the scientific argument for the moment, this possibility that perceptions could play a role in the “intrusion” inherent in DNA sampling is an important point of discussion.

2. Law Enforcement Perceptions

The *Pool* court’s summation that “[t]here is no evidence that an oral swab [to obtain a DNA sample] is any more physically invasive than taking fingerprints”¹¹⁹ ignores these substantial and undeniable differences between DNA and fingerprint evidence, as well as the concerns raised by Cole. The court wrote off concerns of “Big Brother” persecution based on genetic characteristics as “theoretically possible” but unlikely based on the debatable “junk DNA” contention.¹²⁰

Even granting the premise that DNA samples may contain more personal information than mere personal identification information, the court in *Pool* pronounced its trust that DNA samples would not be misused based on criminal penalties built into the statute aimed at punishing such misuse.¹²¹ This troubling idealism and faith in the system ignores a long history of abuses of police records,¹²² and it fails to recognize the

¹¹⁶ See Elizabeth E. Joh, Essay, *Reclaiming “Abandoned” DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. U. L. REV. 857 (2006). But see D. H. Kaye, *Science Fiction and Shed DNA*, 101 NW. U. L. REV. COLLOQUY 62 (2006), http://colloquy.law.northwestern.edu/main/2006/12/science_fiction.html (replying to Joh, *supra*). Joh and Kaye debate the merits of the “junk DNA” argument. To avoid simply rehashing the argument, this Note focuses on the perceptions of genetic value DNA evidence carries, and assumes merely that there is potential for DNA samples to be used improperly based on this perception.

¹¹⁷ Simon A. Cole, *Is the “Junk” DNA Designation Bunk?*, 102 NW. U. L. REV. COLLOQUY 54 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/23/lrcoll2007n23cole.pdf>.

¹¹⁸ *Id.*

¹¹⁹ *United States v. Pool*, 645 F. Supp. 2d 903, 911 (E.D. 2009), *aff’d*, 2010 WL 3554049 (9th Cir. Sept. 14, 2010). The Ninth Circuit echoed this “physically invasive” argument, and concluded that, while DNA evidence may be more revealing of various personal characteristics, the government is only *lawfully* authorized to look for mere identity. *United States v. Pool*, 2010 WL 3554049 at *7–8 (9th Cir. Sept. 14, 2010).

¹²⁰ *Pool*, 645 F. Supp. 2d. at 912.

¹²¹ *Id.*

¹²² A 1974 law review article noted that abuses of confidential arrest information were rampant, including unauthorized disclosure to employers, private entities, and unauthorized government personnel. Andrew L. Gates III, Comment, *Arrest Records—Protecting the Innocent*, 48 TUL. L. REV. 629, 632 (1974). “This widespread accessibility to records has prompted one commentator to write that ‘any private investigator worthy of the name can get access to the

added threat of abuse inherent with DNA samples. If there is any truth—or even any societal perception of truth—to the suggestion that “the advance of science promises to make stored DNA only more revealing in time,”¹²³ then it follows that stored DNA would become proportionately more valuable, making criminal penalties prohibiting misuse a less persuasive deterrent.¹²⁴

Perhaps most importantly, the *Pool* court failed to recognize the legitimate suggestion that any whiff of predictive value within the DNA could contaminate the identification process¹²⁵ or the investigative process as a whole. Local and federal forensic labs tout certain safeguards to avoid misuse of DNA samples and the potential for faulty reliance on DNA’s predictive value, most notably a federal policy that DNA matches through the FBI’s Combined DNA Index System (CODIS) will not include personal criminal history information.¹²⁶ Thus, when a “cold hit” match is made through the national database, analysts see only the identity match, not the criminal background of the individual or any other personal information.¹²⁷ But is this “safeguard” more or less helpful in securing an uncorrupted investigation?

3. Something to Fear, Even With Nothing to Hide

Imagine an innocent man—who we, as a culture, agree should have nothing to fear—arrested erroneously, processed and forced to give a DNA sample. This sample is run through CODIS,¹²⁸ and matched with DNA found on the edge of a glass at the scene of a gruesome rape and murder. This individual may have a perfectly legitimate explanation—the victim was a friend, they visited one another frequently—not to mention an airtight alibi. But none of this information, nor the details of the erroneous underlying arrest, is available to the technician, who is merely thrilled to have

information” *Id.* (quoting Kenneth L. Karst, “*The Files*”: *Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 *LAW & CONTEMP. PROB.* 342, 365 (1966)).

¹²³ *United States v. Kincade*, 379 F.3d 813, 842 n.3 (9th Cir. 2004) (Gould, J., concurring), *cert. denied*, 544 U.S. 924 (2005).

¹²⁴ Even if DNA does not prove, over time, to be more scientifically revealing, the enduring cultural perceptions of its scientific potential should ensure that its perceived value remains high.

¹²⁵ If fingerprints were merely *believed* to contain some sort of identifying information about an individual’s race, hereditary history, or criminal propensities, this perception could corrupt the identification process. COLE, *SUSPECT IDENTITIES*, *supra* note 10, at 101. If, for instance, an examiner was told a suspect was of a certain race, that examiner would be more inclined to find a match based on the characteristics of that race. *Id.* Because fingerprints contain no such information, examiners need focus *only* on a pure identification match. *Id.* However even the perceived enhanced evidentiary value of DNA evidence, can create similar concerns. *Id.*

¹²⁶ DNA FORENSICS, *supra* note 80, at 12.

¹²⁷ *Id.*

¹²⁸ CODIS collects DNA samples from state and local law enforcement, runs the samples through the national database, and reports any matches back to local law enforcement. *Id.* at 8.

gotten a “cold hit.”¹²⁹ The news of the “cold hit” is forwarded to police investigating the murder,¹³⁰ who have been at a standstill with no viable suspects. Will the innocent man’s alibi and explanation, his sterling record, eventually come to the forefront? We should certainly hope so. Still, basic human intuition suggests that, before the innocent man is exonerated, the investigating officers could allow the fortuitous “cold hit” to cloud their assessment of this exculpatory information,¹³¹ prompting them to push for an investigation that would be harmful to both the individual and the pursuit of justice.¹³²

The Department of Justice lists four ways in which DNA evidence can be collected by law enforcement: 1) through voluntary submission when an individual, for instance, wishes to rule himself out as a suspect in a crime; 2) through a court order when the judge deems there to be reasonable cause to take a sample from a suspect; 3) after abandonment, like when a suspect leaves a cigarette behind and law enforcement collects it; and 4) based on a statute such as a pre-conviction DNA testing statute.¹³³ Under the first three methods of collection, the individual in the hypothetical above would have already been a subject in the investigators’ case, meaning the exculpatory information would be plain to police long before any match was made to DNA on a glass. Only under the fourth method is the individual not already “in the case,”¹³⁴ and only under

¹²⁹ The “hit” provides reasonable cause for law enforcement to collect a follow-up, comparative DNA sample to confirm the accuracy of CODIS. *Id.*

¹³⁰ *See id.*

¹³¹ Simon Cole expressed a similar concern with arrestee DNA sampling, noting that a DNA sample in a database offers no information regarding racial or geographical biases and therefore becomes “laundered” of other potentially relevant information, and treated by law enforcement as “objective information imbued with the considerable authority of science.” Cole, *Fingerprint Identification*, *supra* note 15, at 83.

¹³² Ironically, the reverse of this scenario—prosecutors allowing one seemingly intractable piece of evidence to block out significant evidence to the contrary, including exculpatory DNA evidence—played out in the office of one of the country’s most ardent DNA sampling advocates. Felch & Dolan, *supra* note 114. When investigators and DNA lab technicians used a DNA sample to rule out the prosecutors’ primary suspect, prosecutors, convinced of the suspect’s guilt by eyewitness identification, pressured the DNA technicians to amend their report. *Id.* When the technicians refused, prosecutors pursued the case anyway, pushing the suspect to accept a plea agreement and two years in jail. *Id.* Eight months later, the DNA from the crime was definitively matched to another individual, who confessed to the crime. *Id.*

¹³³ DNA FORENSICS, *supra* note 80, at 7.

¹³⁴ In 1917, a New York court rejected an argument that submitting to fingerprinting amounted to self-incrimination, hinging its decision on the fact that the “defendant was already in the case.” *People v. Sallow*, 165 N.Y.S. 915, 924 (N.Y. Ct. Gen. Sess. 1917). This language is clearly a harbinger of the type of language common to Fourth Amendment arguments today, but it also speaks to the basic issue suggested in the hypothetical above. Had the innocent man been “in the [murder-rape] case” to begin with, self-incrimination would not be an issue. But because he was completely unknown to law enforcement prior to the DNA match, he finds himself wrongfully incriminated based in part on this lack of involvement as a suspect to this point.

the fourth method could investigative process be so gravely corrupted by a false sense of the value of the DNA match. None of this is to say that “cold hits” leading to convictions are not valid; they have been undeniably helpful to successful prosecutions. But the sheer weight of perceived infallibility these hits carry creates the potential for a corruption of the investigative process.¹³⁵

4. Community Perceptions

Based on the history of court rulings on routine fingerprinting, concerns about perceptions of examiners and investigators can easily be extended to community perceptions related to DNA testing. Throughout the first half of the twentieth century, a number of courts grappled with whether persons arrested and subsequently exonerated had a right to retrieve their arrest records, including photographs and fingerprints.¹³⁶ Although many courts showed deference to the judgment of law enforcement in refusing to expunge the records,¹³⁷ a distinct line of cases expressed serious concerns with the privacy intrusions inherent in such actions. These courts based this early finding of a privacy interest on the proposition that mere presence in a police “rogues’ gallery” was an unacceptable encroachment on the dignity of an unconvicted individual.¹³⁸

In a routine fingerprinting case, *State ex rel. Mavity v. Tyndall*, the Indiana Supreme Court allowed the retention of booking materials, namely photographs and fingerprints, after acquittal over the protestations of the individual.¹³⁹ The court echoed the familiar argument that individuals must suffer “indignities” such as fingerprinting for the benefit

¹³⁵ Cole suggested that, while a detailed criminal and arrest history creates a nuanced portrait of an individual’s potential dangerousness, a DNA sample in a database takes on an air of “neutral authority,” which can lead to false assumptions by law enforcement. Cole, *Fingerprint Identification*, *supra* note 15, at 83.

¹³⁶ Most jurisdictions have since responded to this question by passing laws allowing arrest files, including fingerprints, to be expunged upon the request of the individual. *See, e.g.*, WIS. STAT. § 165.84(1) (2008) (“Any person arrested or taken into custody and subsequently released without charge, or cleared of the offense through court proceedings, shall have any fingerprint record taken in connection therewith returned upon request.”).

¹³⁷ *See, e.g.*, *Herschel v. Dyra*, 365 F.2d 17, 20 (7th Cir. 1966), *cert. denied*, 385 U.S. 973 (1966) (finding that, absent legislative instruction to the contrary, police officials have the right to maintain arrest records of individuals against whom all charges had been dropped).

¹³⁸ *See State ex rel. Mavity v. Tyndall*, 66 N.E.2d 755, 761 (Ind. 1946); *Itzkovitch v. Whitaker*, 42 So. 228, 229 (La. 1906) (finding that maintaining individual’s photograph, without conviction, would be “permanent proof of dishonesty”); *State ex rel. Reed v. Harris*, 153 S.W.2d 834, 837 (Mo. 1941) (limiting law enforcement’s ability to disseminate fingerprint records to untold “rogues’ galleries” across the country); *see also*, *Eddy v. Moore*, 487 P.2d 211, 216 (Wash. Ct. App. 1971) (finding “a direct correlation between the loss of individual privacy and the retention of arrest records”).

¹³⁹ *Mavity*, 66 N.E.2d at 762–63.

of society.¹⁴⁰ But the *Mavity* court also found that the display of the individual's photograph in a "rogues' gallery" of arrested individuals, which created a perception of guilt, took the indignity too far by creating an infringement on the individual's privacy.¹⁴¹

The *Mavity* court's focus on the "indignity" of fingerprinting is particularly telling as it relates to the difference in character between DNA evidence and fingerprints. The court noted that, because fingerprinting had become a mainstream form of identification used for civil service purposes, identification for passports and identification at hospitals, the potential "indignity" was relatively minimal.¹⁴² DNA evidence has no such practical, everyday applications.¹⁴³ In fact, it seems safe to assume that most people would balk at providing a DNA sample for some civil purpose, precisely because of the growing and unshakeable perception that DNA can unlock countless genetic secrets.¹⁴⁴

If the indignity of fingerprinting is tempered by the use of fingerprinting in other walks of life, and the certainty that prints will reveal only so much, DNA sampling must, by its nature, be considered a higher level of indignity and thus a greater privacy intrusion. To subject an individual to DNA sampling upon arrest is to subject that person to a process that is reserved, at least in the common perception, solely for criminals.¹⁴⁵ That DNA is used most commonly, both in the public perception and in reality, to detect more heinous crimes such as rape and murder also speaks to this negative perception.¹⁴⁶

¹⁴⁰ See *id.* at 761 (noting that the arrest process is a "humiliation" to which a potentially innocent arrestee "must submit for the benefit of society").

¹⁴¹ *Id.* at 762.

¹⁴² *Id.* at 760. This argument, that fingerprinting is too common to cause serious indignity, has been echoed in the debate over mandatory fingerprinting of schoolteachers. See, e.g., Christina Buschmann, *Mandatory Fingerprinting of Public School Teachers: Facilitating Background Checks or Infringing on Individuals' Constitutional Rights?*, 11 WM. & MARY BILL OF RTS. J. 1273, 1280–81 (2003).

¹⁴³ New York City Mayor Michael Bloomberg's suggestion of an employment-based compulsory DNA sampling program was rejected despite evidence that it would have seriously aided efforts at identifying illegal immigrants. Critics of the plan argued that it would not take long for the samples to be used in all aspects of government. See Jim Dwyer, *License, Registration, and DNA, Please*, N.Y. TIMES, Jan. 19, 2008, at B1.

¹⁴⁴ See Singer et al., *supra* note 111, at 114–15 (discussing the "CSI effect," or the impact popular culture has had on the perception that DNA evidence is infallible and easily obtained and tested).

¹⁴⁵ Buschmann notes that "the process of fingerprinting is not required for an accurate background check unless the applicant is lying about his or her name or other identifying information." Buschmann, *supra* note 142, at 1282. Regardless of the pervasiveness of fingerprinting in the civil context, the process still involves a suspicion of criminality and a suggestion that an aspiring teacher would even consider lying, which is a clear "insult to [teachers'] character." *Id.* If the purpose, both perceived and practical, of DNA testing in fact has little to do with establishing identity, and more to do with solving past crimes, the "insult" becomes more severe.

¹⁴⁶ See DNA FORENSICS, *supra* note 80, at 9 (noting an emphasis on violent crimes in the DNA identification context).

5. Conclusions—Comparing the “Intrusion” of DNA and Fingerprints

While scientists debate the relative value of DNA samples, the mere *potential* for DNA samples to contain personal genetic information seems enough to draw a significant distinction between DNA sampling and fingerprinting.¹⁴⁷ Even those in favor of the “junk DNA” distinction acknowledge that DNA sampling may carry significant Fourth Amendment implications,¹⁴⁸ and even courts upholding post-conviction DNA statutes have expressed concern about the intrusion implicit in the potential of DNA.¹⁴⁹

Even granting the “junk DNA” argument, or simply reserving judgment on the potential of DNA until it has been fully hashed out by scientists, the broad cultural perceptions surrounding DNA evidence are unlikely to dissipate. As a culture, we see DNA evidence as a miraculous science capable of exposing untold individual truths and as a law enforcement tool reserved for solving the most heinous crimes. While suffering the “indignity” of DNA sampling may seem trivial to some, that issue has been a key question in courts’ consideration of fingerprinting. Moreover, law enforcement is not immune from these same cultural intuitions. If anything, the promise of DNA databases—the thrill of a cold hit—has more potential to cloud the judgment of law enforcement, by corrupting the investigative process and identifying a prime suspect who was previously not even “in the case.”

In short, the comparison between DNA sampling and fingerprinting for purposes of establishing an acceptable “intrusion” rings false. Based on the substantial scientific differences and the legitimate public perception differences between DNA evidence and fingerprints, it seems clear that routine DNA sampling requires stricter scrutiny than a mere presumption of a “natural progression” from fingerprinting. Part III of this Note will argue that this false assumption, in the context of both the “need” and the “intrusion” prongs of Fourth Amendment analysis, significantly undermines the analysis of rulings upholding pre-conviction DNA sampling.

III. APPLYING THE FOURTH AMENDMENT EXCEPTION TESTS

Accepting the argument posited in Part II of this Note—that the assumption of a legitimate legal analogy between pre-conviction fingerprinting and DNA sampling is false—is this failed analogy enough to make a case that pre-conviction DNA sampling statutes are unconstitutional? Because DNA sampling is undeniably a “search”

¹⁴⁷ Kaye, *supra* note 116, at 64. Kaye, defending the “junk DNA” argument, acknowledges that in time scientists may be able to trace alleles in DNA that signify personal information such as risk factors. *Id.* at 67. His emphasis is on debunking the criticism that warrantless DNA collection would lead to a government database of critical personal information. *Id.* at 63–64.

¹⁴⁸ *Id.* at 67.

¹⁴⁹ See, e.g., *United States v. Kincade*, 379 F.3d 813, 842 (9th Cir. 2004) (Gould, J., concurring), *cert. denied*, 544 U.S. 924 (2005).

under the Fourth Amendment,¹⁵⁰ an affirmative showing of *unconstitutionality* is not necessary. The State, in advocating this acknowledged intrusion upon personal privacy, bears the burden of proving that the intrusion is “reasonable.”¹⁵¹ And without the convenient, but faulty, precedent of fingerprinting, making that case for reasonableness would seem exponentially more difficult under both the totality of circumstances and the special needs tests.

A. The Totality of Circumstances Framework in Pool and Mitchell

The “reasonableness” of a search under the totality of circumstances test is determined by weighing the degree to which the search “intrudes upon an individual’s privacy” against the “degree to which it is needed for the promotion of legitimate governmental interests.”¹⁵² The *Pool* court used this exact standard and relied heavily on the precedential value of fingerprinting to inform both sides of the totality of circumstances balancing test.

Regarding the privacy intrusion represented in DNA sampling, the *Pool* court’s faulty reliance on fingerprinting leads more to a severe understatement of the intrusion rather than a blatant misstatement. The court used the buzzwords “technical progression” when comparing DNA evidence to fingerprints,¹⁵³ but glossed over the significant privacy concerns raised by this “progression.”¹⁵⁴ Rather than acknowledging the potential that DNA samples could contain limitless private information beyond mere identity, the *Pool* court suggests that the stated goal of DNA sampling—basic identification, a la fingerprinting—is evidence enough of the process’s limits.¹⁵⁵ Because fingerprinting has always been primarily about assuring identification, the *Pool* court argued, DNA evidence is bound to do the same.¹⁵⁶ Conversely, the *Mitchell* court, which found the same federal statute unconstitutional,¹⁵⁷ noted that the “oversimplification” of the relationship between fingerprinting and DNA sampling “ignores the complex, comprehensive, inherently private information contained in a DNA sample.”¹⁵⁸

¹⁵⁰ See *supra* notes 23–25 and accompanying discussion.

¹⁵¹ See U.S. CONST. amend. IV (protecting against “unreasonable searches and seizures”); *Maryland v. Buie*, 494 U.S. 325, 337 (1990) (describing the State’s burden).

¹⁵² *Samson v. California*, 547 U.S. 843, 848 (2006) (upholding the warrantless search of a probationer by his probation officer).

¹⁵³ *United States v. Pool*, 645 F. Supp. 2d 903, 910 (E.D. Cal. 2009), *aff’d*, 2010 WL 3554049 (9th Cir. Sept. 14, 2010).

¹⁵⁴ *Id.* at 912 (discussing junk DNA, suggesting that criminal penalties are enough to avoid civil liberty concerns).

¹⁵⁵ *Id.* at 910.

¹⁵⁶ *Id.*

¹⁵⁷ The *Mitchell* court dealt specifically with the amended DNA Fingerprinting Act, 42 U.S.C. §14135a (2006), which gave the Attorney General authority to collect DNA samples from arrested individuals. *United States v. Mitchell*, 681 F. Supp. 2d 597 (W.D. Pa. 2009).

¹⁵⁸ *Id.* at 608.

The *Mitchell* court also took issue with the other primary argument in *Pool* for the “minimal intrusion” of DNA sampling: the idea that arrestees enjoy a lesser privacy interest than everyday citizens.¹⁵⁹ The *Pool* court based its finding of a minimal intrusion on the premise that arrestees have a diminished privacy right, and based this premise on the historical analogy to fingerprinting.¹⁶⁰ The argument in *Pool*, essentially, is that fingerprinting already represents an acceptable infringement on an arrestee’s rights, and thus this diminished privacy interest can extend to DNA testing as well.¹⁶¹

The *Mitchell* court directly countered *Pool* by emphasizing that the substantial *potential* intrusion DNA sampling represents seriously outweighs the intrusion of fingerprinting, and thus a mere arrestee should have no diminished expectation of privacy.¹⁶² Furthermore, the *Mitchell* court acknowledged a diminished privacy interest in a pretrial detainee, an individual against whom there has been a judicial finding of probable cause.¹⁶³ However, the court stressed that any curbing of that detainee’s privacy expectation must serve a legitimate penological interest;¹⁶⁴ otherwise, his privacy rights should retain a presumption of innocence, particularly considering the privacy interests at stake.¹⁶⁵

While the exact privacy interests of arrested individuals will likely need to be delineated further by the courts, clearly the argument for a minimal intrusion in *Pool* suffers because of the faulty fingerprint analogy. Even if the *Pool* court merely understated the significant privacy intrusion DNA sampling represents, where would the court’s argument be without the faulty logic that DNA sampling is just the next step—and no more intrusive—than fingerprinting? Aside from a paragraph about the relative ease of buccal swabbing,¹⁶⁶ the *Pool* court has little to base its conclusion on absent the fingerprinting analogy.

Similarly, the *Pool* court’s consideration of the legitimate government interest prong of the totality of circumstances test is wholly reliant on a favorable, and flawed, comparison with fingerprinting. The court cited *United States v. Kelly*, implying that

¹⁵⁹ *United States v. Pool*, 645 F. Supp. 2d 903, 910 (E.D. Cal. 2009), *aff’d*, 2010 WL 3554049 (9th Cir. Sept. 14, 2010).

¹⁶⁰ *Id.* at 910–11.

¹⁶¹ This argument in *Pool* also spills over into the discussion of the “need” element of totality of circumstances analysis. The *Pool* court’s finding of a diminished right is based on the assumption that, once arrested, a suspect’s “identification becomes a matter of legitimate state interest and he can hardly claim privacy in it.” *Id.* at 911. This argument depends on the assumption that DNA sampling is a necessary and enhanced way of definitively determining an individual’s identity.

¹⁶² *Mitchell*, 681 F. Supp. 2d at 608–09.

¹⁶³ *Id.* at 606–07. This moment—the finding of probable cause—is the “watershed” moment for a significantly lessened privacy interest, according to the *Pool* court. *Pool*, 645 F. Supp. 2d at 909.

¹⁶⁴ *Mitchell*, 681 F. Supp. 2d at 607.

¹⁶⁵ *Id.* at 606–07.

¹⁶⁶ *Pool*, 645 F. Supp. 2d at 911.

if fingerprinting was a permissible “extension of methods of identification”¹⁶⁷ beyond, presumably, the Bertillon method, a further extension to DNA sampling should be similarly permissible.¹⁶⁸ This argument fails to acknowledge that, in terms of the administrative goal of fingerprinting upon arrest to verify identity, DNA evidence is not so much a “progression” as it is an alternate way to meet that aim. The court attempts to argue that DNA can offer more “precision” in determining identity,¹⁶⁹ but it makes no claim that fingerprinting is not fully adequate in that regard. Furthermore, it ignores the fact that, if anything, DNA used solely for identification purposes would be less reliable. Not only has it been proven that DNA samples can be falsified, but DNA databases are significantly smaller than fingerprint databases,¹⁷⁰ and are likely to remain so as long as a public stigma remains against DNA testing.¹⁷¹

Again, lacking the assistance of the faulty fingerprinting analogy, the rationale in *Pool* is significantly undermined in the “need” context. Without the benefit of the presumption of a permissible “technological progression,” the “need” prong in *Pool* becomes an argument for a government interest merely in further expansion of DNA databases by whatever means possible. While the practical law enforcement benefits of this “need” are undeniable,¹⁷² the question becomes whether this government interest is legitimate and substantial enough to outweigh the significant privacy interests being infringed upon.

Absent the reliance on the false fingerprinting analogy, the answer in *Pool* would have to be “no.” The *Pool* court, in relying on this false equivalency, seriously minimized the intrusion on privacy rights and plainly misstated an argument for precedent in terms of the countervailing government interest. With no precedent to fall back on, the argument for an unprecedented and broad government interest would seem to be outweighed by a more substantial intrusion as expressed in *Mitchell*. Therefore, a totality of circumstances test for pre-conviction DNA evidence would likely fail.

B. Imagining a Special Needs Argument

The special needs test for determining if a warrantless search is “reasonable” requires a showing that “special needs, beyond the normal need for law enforcement,

¹⁶⁷ *Id.* at 912–13 (citing *United States v. Kelly*, 55 F.2d 67, 68–69 (2nd Cir. 1932)).

¹⁶⁸ *Id.* at 913.

¹⁶⁹ *Id.* at 910 (quoting *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992)).

¹⁷⁰ According to the FBI, the IAFIS system for fingerprints contains roughly sixty-six million fingerprint cards, FBI IAFIS, *supra* note 77, while the CODIS system has no more than nine million DNA profiles. *CODIS-NDIS Statistics*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/lab/codis/ndis-statistics> (last visited Nov. 17, 2010).

¹⁷¹ See *supra* note 146 and accompanying text (discussing a negative public perception in that DNA sampling is used most commonly to detect more heinous crimes).

¹⁷² The basic, intuitive argument that expanded DNA databases will lead to more solved crimes will be addressed in Part IV of this Note.

make the warrant and probable-cause requirement impracticable.¹⁷³ The phrase, “beyond the normal need for law enforcement” has been somewhat ill-defined, but recent case law has honed the definition of a “special need” to be a need that does not involve a “general interest in crime control.”¹⁷⁴ Julie Rikelman, who litigated a seminal special needs case, *Ferguson v. City of Charleston*,¹⁷⁵ described the Supreme Court’s ruling in *Ferguson* as having delineated at least three “disqualifiers” for applying a special needs exception: “1) significant law enforcement involvement; 2) a primary law enforcement purpose; and 3) the use of normal law enforcement sanctions . . . to further the regime’s stated goals.”¹⁷⁶

Under this basic framework, it is not impossible to imagine an argument for routine fingerprinting as a “special need,” although the test was developed long after fingerprinting had been deemed routine.¹⁷⁷ While there is significant law enforcement involvement with the process of fingerprinting, the primary purpose could be described as more administrative than investigative, and any “sanctions” are merely incidental, rather than central, to the primary goal of definitive identification. Thus, if a valid case could be made that DNA sampling serves a similar administrative purpose, a special needs argument might also be tenable. However, as this Note has argued,¹⁷⁸ any proposed administrative purpose for routine arrestee DNA sampling is undermined by the fact that the administrative need is already being met by routine fingerprinting.

Still, if the faulty fingerprinting precedent is removed from the totality of circumstances equation, and the argument for government need in *Pool* can be whittled down to an interest in simply expanding DNA databases, a special needs argument might seem appealing to proponents of pre-conviction DNA sampling. The problem is defining a need that reflects something other than a general law enforcement interest. Courts upholding post-conviction DNA sampling statutes have suggested that these statutes meet a “special need” because law enforcement is not in the midst of a specific investigation, but rather collecting information for a broader, generalized law enforcement purpose.¹⁷⁹ As the Second Circuit in *United States v. Amerson* put it:

¹⁷³ See *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

¹⁷⁴ *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (quoting *Delaware v. Prouse*, 440 U.S. 648, 659 n.18 (1979)) (finding vehicle checkpoints aimed at uncovering illegal drug activity unconstitutional).

¹⁷⁵ 532 U.S. 67 (2001).

¹⁷⁶ Julie Rikelman, *Justifying Forcible DNA Testing Schemes Under the Special Needs Exception to the Fourth Amendment: A Dangerous Precedent*, 59 BAYLOR L. REV. 41, 55 (2007). Rikelman’s article argues that the “special needs” exception to suspicion-less searches cannot apply to searches aimed at uncovering ordinary criminal conduct. *Id.*

¹⁷⁷ *T.L.O.*, 469 U.S. at 351 (recognizing the special needs exception).

¹⁷⁸ See *supra* Part II.A.2.

¹⁷⁹ See, e.g., *United States v. Amerson*, 483 F.3d 73 (2d Cir. 2007), *cert. denied*, 552 U.S. 1042 (2007); *United States v. Hook*, 471 F.3d 766 (7th Cir. 2006), *cert. denied*, 549 U.S. 1343 (2007).

The taking of DNA samples, unlike a normal law enforcement investigation, does not involve any suggestion that the individual is being suspected of having committed a crime (other than the one of which he had already been convicted). Nor does it force the individual to provide evidence to exonerate herself from a crime in which the government had no reason to think she was involved.¹⁸⁰

Thus, the argument in *Amerson* and similar cases is an inversion of the individualized suspicion requirement. Because there is no individualized suspicion involved in DNA sampling, *Amerson* contends, the process does not serve a typical law enforcement interest, but rather serves a special need.¹⁸¹

But this argument is not without significant holes. The *Amerson* court based its proposition regarding the special need of law enforcement to gather “information”¹⁸² on a case that allowed the suspicion-less stopping of vehicles to aid in the investigation of a fatal accident.¹⁸³ The *Amerson* court used this case to contend that the first “disqualifier” proposed by Rikelman, law enforcement involvement, is void.¹⁸⁴ However, the two other “disqualifiers,” a primary law enforcement purpose and the use of normal law enforcement sanctions to further the program’s stated goals,¹⁸⁵ remain unrefuted and would be exceedingly difficult to counter.¹⁸⁶

Ironically, the one alternative rationale occasionally suggested is a special need to pursue personal liberty.¹⁸⁷ The State could argue that its “special need” is an interest in diligently pursuing exoneration of the wrongfully convicted by growing the DNA databases.¹⁸⁸ Of course, this argument is upended by the extensive case law suggesting a clear law enforcement interest,¹⁸⁹ and a similarly extensive history

¹⁸⁰ *Amerson*, 483 F.3d at 82 (noting that DNA sampling also involves no law enforcement discretion over who is and is not subjected to testing).

¹⁸¹ *Id.*

¹⁸² An argument that certainly sounds like one that would be made in a hypothetical routine fingerprinting special needs case.

¹⁸³ *Amerson*, 483 F.3d at 80 (citing *Illinois v. Lidster*, 540 U.S. 419 (2004)).

¹⁸⁴ *Id.*

¹⁸⁵ Rikelman, *supra* note 176, at 55.

¹⁸⁶ *See* *United States v. Mitchell*, 681 F. Supp. 2d 597, 604–06 (W.D. Pa. 2009) (arguing that a special needs analysis is inappropriate in the context of DNA sampling because of the clear general law enforcement interest).

¹⁸⁷ *See* Deborah F. Barfield, Comment, *DNA Fingerprinting—Justifying the Special Need for the Fourth Amendment’s Intrusion into the Zone of Privacy*, 6 RICH. J.L. & TECH. 27 (2000), <http://jolt.richmond.edu/v6i5/note2.html>.

¹⁸⁸ *See id.*

¹⁸⁹ *See* *Nicholas v. Goord*, 430 F.3d 652, 657 (2d Cir. 2005) (noting that New York State’s intent for the DNA database would be “to maintain information available to solve future crimes.” (quoting *Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999)), *cert. denied*, 549 U.S. 953 (2006); *United States v. Sczubelek*, 255 F. Supp. 2d 315, 323 (D. Del. 2003) (“[T]he ultimate

of states' preventing, not encouraging,¹⁹⁰ the diligent pursuit of exoneration with DNA evidence.¹⁹¹

Ultimately, a special needs analysis for DNA sampling has been rejected as inappropriate,¹⁹² particularly in the absence of any articulated need that does not involve the second and third “disqualifiers” described by Rikelman.¹⁹³ Even if an argument could be made that DNA is a superior method of simple identification¹⁹⁴ and that a need still exists for an administrative process of definitively determining the identity of arrested individuals,¹⁹⁵ there is far too much evidence of an emphasis on expanding DNA databases to aid the common law enforcement purpose of solving and punishing crimes.

C. Conclusions—The Fourth Amendment Tests

If we take away the faulty rationale that DNA sampling upon arrest is analogous to, or a natural extension of, routine fingerprinting, statutes mandating arrestee DNA sampling are clearly unconstitutional under the Fourth Amendment. Under a totality of circumstances analysis, the weight tilts considerably towards the rights of the individual when the substantive differences between DNA evidence and fingerprints are adequately considered.¹⁹⁶ Moreover, when the legitimate government need is stripped of any pretext that DNA sampling is a mere extension of fingerprinting's legitimate administrative goals, what remains is a broad and unprecedented government rationale that seriously threatens individual privacy.

Meanwhile, a “special needs” analysis also suffers from the lack of a strong correlation, beyond mere intuition, between DNA sampling and fingerprinting. If a “special need” under the Fourth Amendment exception requires a purpose other than a general law enforcement goal, the argument for an administrative purpose is prohibited by the fact that this goal is already being met by fingerprinting.¹⁹⁷ Furthermore, both the government and supportive courts have made it clear that a critical goal of DNA sampling is expanding DNA databases in order to solve crimes. The lack of any quality

goals of solving past and future criminal investigations, exonerating the innocent and deterring recidivism.”), *aff'd*, 402 F.3d 175 (3d Cir. 2005), *cert. denied*, 548 U.S. 919 (2006).

¹⁹⁰ See, e.g., *District Attorney's Office v. Osborne*, 129 S. Ct. 2308 (2009).

¹⁹¹ As Barfield notes, “accompanying the statutory requirement that an individual provide a DNA sample, there should be an automatic right to its analysis and a guarantee that the sample will be used to ensure the conclusiveness of the conviction—even if the deadline for an appeal has passed.” Barfield, *supra* note 187.

¹⁹² See *United States v. Mitchell*, 681 F. Supp. 2d 597, 604–05 (W.D. Pa. 2009).

¹⁹³ See Rikelman, *supra* note 176, at 55.

¹⁹⁴ Which, to date, it cannot. See *supra* Part II.B.

¹⁹⁵ Which, to date, it does not. *Id.*

¹⁹⁶ See *Mitchell*, 681 F. Supp. 2d 597, 608–09 (recognizing that DNA extraction is “much more than a mere progression”).

¹⁹⁷ See *supra* Part II.A.2.

argument that such a goal does not serve a general law enforcement purpose suggests that a special needs analysis is wholly inappropriate for this question.

All of that said, the intuitive cultural response to such constitutional pronouncements remains attractively straightforward: “So what?” For all the discussion about an historic need for fingerprinting, there is currently an FBI database containing sixty-six million prints¹⁹⁸ capable of being searched in a matter of minutes¹⁹⁹—why would we not extend this same capability to an even more powerful form of evidence, DNA? The case for this intuition, which should not be dismissed, gets stronger with each rape and murder, many of which DNA sampling advocates claim could have been prevented with a broader DNA database.²⁰⁰ The Justice Department claims that collecting samples from offenders who commit minor crimes can lead to later convictions for major crimes;²⁰¹ why not increase the odds of solving murders and rapes by just folding arrestees into the database?²⁰²

That some courts will be inevitably swayed by the simplicity of this intuitive argument is only complicated by the fact that the intuition is, to some extent, increased by a significant gap in case law surrounding fingerprinting as a law enforcement tool. Part IV of this Note will discuss these gaps, and address the arguments for arrestee DNA sampling that will inevitably seek to exploit them.

IV. INFERRING PRECEDENT, FROM A LACK OF IT

This Note has, to this point, analyzed the comparison between routine fingerprinting and arrestee DNA sampling through the lens of a legal fiction: that routine fingerprinting has been, or presumptively would be, deemed a constitutional exception to Fourth Amendment protections. That fingerprinting upon arrest has never been subjected to the totality of circumstances or special needs tests unfortunately allows advocates of arrestee DNA sampling a narrow avenue to exploit the intuitive relationship between fingerprints and DNA. The lack of a clear and binding judicial

¹⁹⁸ FBI IAFIS, *supra* note 77.

¹⁹⁹ *Id.*

²⁰⁰ For instance, DNA Saves, a non-profit association that advocates for DNA arrestee sampling, points to situations where individuals were arrested for petty crimes, released on bail or acquittal, then went on to commit numerous violent crimes that *could* have been solved had a DNA sample been taken upon the initial arrest. *Why Pass This Law?*, DNA SAVES, http://www.dnasaves.org/dna_law.php (last visited Nov. 17, 2010). *But see* *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1201 (N.D. Cal. 2009) (finding the government’s argument that arrestee testing would prevent future crimes to be unpersuasive, on the grounds that mandatory DNA sampling upon conviction would have achieved the same results).

²⁰¹ DNA FORENSICS, *supra* note 80, at 9.

²⁰² Virginia’s Department of Forensic Sciences (DFS) boasts that the first “hit” on the state’s arrestee database in 2003 occurred immediately after the upload of the first 80 arrestee DNA samples into the database. *DNA Databank Statistics*, VA. DEP’T OF FORENSIC SCI., <http://www.dfs.virginia.gov/statistics/index.cfm> (last visited Nov 17, 2010). Between 2003, when Virginia began taking DNA samples from arrestees, and 2009, DFS reports 559 hits from arrestee samples, of the total 4,988 hits during that time period. *Id.*

delineation of routine fingerprinting as a Fourth Amendment *exception* welcomes the argument that fingerprinting represents more of an *open door*. Because the constitutional parameters of fingerprinting were never fully defined, the inclination is to define the parameters of DNA sampling based upon the enduring cultural intuitions that allowed arrestee fingerprinting to become “routine.”²⁰³

This is undoubtedly the case with the diminished privacy interest theory promoted in *Pool*. The acceptance of arrestee fingerprinting as “routine” confirms the existence of a diminished privacy interest for arrestees, but because the parameters of acceptable diminishment have long gone undefined, the *Pool* court simply tailored its definition to suit its needs. An arrestee’s interest in privacy is diminished just enough, *Pool* implies, to tilt the balance in a totality of circumstances test in the government’s favor.

Meanwhile, a California district court recently hinted at another mode of exploiting the lack of strong fingerprinting case law, and adding weight to the government interest side of the scale.²⁰⁴ The court in *Haskell v. Brown*, in rejecting a request for injunction against the State’s arrestee DNA sampling law, expanded the definition of the government’s interest in “identification” to include “both who that person is . . . and what that person has done”²⁰⁵ The court based this finding not on precedent, but on the absence of it: “Plaintiffs could point the Court to no case holding that once an individual has been identified through his fingerprints, the government was barred from running those same fingerprints against crime scene samples for investigative purposes”²⁰⁶

Both these arguments—for a diminished privacy interest for arrestees, and an embellished government interest in “identification”—essentially discern precedent from a marked lack of precedent. While this method seems on its face to be judicially suspect, it is also undermined by the extensive documentary, if not legally binding, history of routine fingerprinting.

A. The Diminished Privacy Interest Argument

Despite scholarly presumptions to the contrary,²⁰⁷ the *Pool* court’s suggestion of a diminished privacy interest²⁰⁸ seems all but certain to play a critical role in the debate

²⁰³ In a concurrence to the Ninth Circuit opinion affirming the District Court in *Pool*, Judge Lucero hinted at this attitude, noting that, “[a]lthough the historical basis for allowing fingerprinting is not entirely clear, the near universal acceptance of the practice casts a long shadow over this case.” *United States v. Pool*, 2010 WL 3554049 at *14 (9th Cir. Sept. 14, 2010) (Lucero, J., concurring) (citations omitted).

²⁰⁴ *Haskell v. Brown*, 677 F. Supp. 2d 1187 (N.D. Cal. 2009).

²⁰⁵ *Id.* at 1199.

²⁰⁶ *Id.* at 1199–1200.

²⁰⁷ Rikelman draws the logical conclusion that, because all jurisdictions have upheld post-conviction DNA statutes on a diminished expectation of privacy theory, DNA sampling of arrestees, who have no diminished expectation, should be presumptively prohibited. Rikelman, *supra* note 176, at 75–76.

²⁰⁸ *See United States v. Pool*, 645 F. Supp. 2d 903, 909–10 (E.D. Cal. 2009), *aff’d*, 2010 WL 3554049 (9th Cir. Sept. 14, 2010).

over arrestee DNA sampling. That said, the argument has been effectively rebutted by both courts that have ruled against arrestee DNA sampling.

For instance, in contrast to the approach in *Pool*, the Minnesota Court of Appeals rejected a pre-conviction DNA statute²⁰⁹ in *In re Welfare of C.T.L.* by emphasizing the distinction between a person's rights prior to conviction and post-conviction.²¹⁰ The *C.T.L.* court opted not to draw any comparisons to fingerprinting, instead reasoning that the Minnesota statute's requirement that a DNA sample be destroyed when an individual is acquitted suggests a legislative intent to protect the Fourth Amendment rights of persons who have not been found legally guilty.²¹¹ Consequently, the court reasoned, the presumption of innocence of an accused individual should protect him from the "search" inherent in DNA sampling absent individualized suspicion.²¹²

The *Mitchell* court, meanwhile, criticized *Pool* specifically for advocating an erosion of the presumption of innocence, the "moral polestar of our criminal justice system."²¹³ And while the *Mitchell* court accepted *Pool*'s premise to a degree, acknowledging that a pretrial detainee has a diminished privacy interest, it stressed that any intrusions on privacy must be based on a penological interest.²¹⁴

That distinction in *Mitchell* is critical, as it helps refute the suggestion in *Pool* that mandating DNA testing of arrestees is akin to restricting travel for flight risks or prohibiting certain activities for alleged sex offenders as conditions of pretrial release.²¹⁵ The problem with this analogy is that we do not mandate that all arrested individuals stay 100 yards from playgrounds. These pre-trial privacy restrictions suggested in *Pool* are based on individualized findings by the court, which are founded on public safety and administrative concerns.²¹⁶ These pre-trial restrictions require precisely the sort of individualized suspicion that DNA sampling statutes admittedly circumvent.

B. Expanding Government's "Identification" Interest

In expanding the definition of the government's interest in "identification" to include a broad, open-ended investigatory interest,²¹⁷ the court in *Haskell* tapped into

²⁰⁹ MINN. STAT. § 299C.105 (2009).

²¹⁰ *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. Ct. App. 2006).

²¹¹ *Id.* at 491–92.

²¹² *Id.*

²¹³ *United States v. Mitchell*, 681 F. Supp. 2d 597, 606 (W.D. Pa. 2009).

²¹⁴ *Id.* at 607.

²¹⁵ *United States v. Pool*, 645 F. Supp. 2d 903, 909 (E.D. Cal. 2009), *aff'd*, 2010 WL 3554049 (9th Cir. Sept. 14, 2010). Interestingly, the *Pool* court argued that because these conditions are identical in nature and purpose to conditions of probation, and because DNA sampling has been upheld for probationers, then sampling should be upheld for arrestees, ignoring, again, the minor difference of a criminal conviction. *Id.*

²¹⁶ To extend the logic of *Mitchell*, these conditions embody a "penological interest," but in a pre-trial release context. *Mitchell*, 681 F. Supp. 2d at 607.

²¹⁷ *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1199 (N.D. Cal. 2009) (ruling that the interest in "identification" includes what an individual has done, including past, unsolved, crimes).

one of the most basic intuitions fueling the fingerprinting/DNA sampling analogy. The court's reframing of the interest involved—from an unprecedentedly broad law enforcement hammer, to a mere extension of a process that has been in place for decades—is particularly potent because it is undeniably true. Few courts have challenged the expansion of arrestee fingerprinting from an administrative need to a law enforcement tool.²¹⁸ However, while a full reading of the history of fingerprinting confirms that many courts have been vulnerable to cultural intuitions, society has consistently rejected collection of fingerprints for a broad, suspicion-less, investigatory purpose.

Routine fingerprinting was undeniably instituted as an exception based on a dire need, but as that need diminished²¹⁹ and the whispers of a powerful law enforcement tool grew,²²⁰ courts did not take notable steps to limit or define that exception but rather just accepted it as “routine.”²²¹ Part of the reason for this may have been that, despite the whispers and occasional braggadocio²²² regarding fingerprinting as a law enforcement mechanism, those hopes for fingerprinting did not come into fruition until the late-1980s with major advances in computer technology.²²³ But law enforcement interest in expanding fingerprinting databases, no matter how technically lacking, was overt as far back as 1930, when a fingerprint expert declared that, “Universal Finger Printing is coming. How soon I cannot say. But it is being agitated on all sides.”²²⁴ That “agitation” continued through the 1930s and 1940s, when J. Edgar Hoover pushed hard for universal fingerprinting with campaign-like fervor,²²⁵ and two bills mandating universal fingerprinting were brought before Congress.²²⁶

²¹⁸ See *infra*, note 236 and accompanying text (discussing one notable case that pointedly rebutted a broad law enforcement intent).

²¹⁹ See COLE, SUSPECT IDENTITIES, *supra* note 10, at 249 (discussing the effect implementation of social security numbers in 1935 had on the need for fingerprinting).

²²⁰ See COOKE, *supra* note 91, at 18–19 (using the same “habitual criminal” rationale for increased, even universal, fingerprinting, that is being used by the Justice Department to support increased DNA sampling today); see also DNA FORENSICS, *supra* note 80, at 9 (noting some of the success of DNA sampling).

²²¹ In 1941, even in the *absence of statutory authority* for routine fingerprinting, one arrestee seeking to enjoin law enforcement officials from forwarding fingerprints and arrest information to other agencies, did not bother to challenge the routine collection itself. See *State ex rel. Reed v. Harris*, 153 S.W.2d 834, 836 (Mo. 1941).

²²² Cooke boasted that fingerprint technicians could process and identify a previously unidentified set of prints “in an average of three minutes. Think of that!” COOKE, *supra* note 91, at 17–18.

²²³ See COLE, SUSPECT IDENTITIES, *supra* note 10, at 257 (noting that the arrival of “inkless fingerprinting” and “livescan” technology allowed police to scan fingerprints directly into a computer, revolutionizing the possibilities of the AFIS system); see also, AFIS POLICY, *supra* note 70, at 5 (noting that technological advancements in the 1980s allowed the AFIS to process 500-600 fingerprint files per second).

²²⁴ COOKE, *supra* note 91, at 26.

²²⁵ See COLE, SUSPECT IDENTITIES, *supra* note 10, at 247–48 (describing “I have been fingerprinted” buttons and decals for businesses reading “100% fingerprinted”).

²²⁶ *Id.* at 249.

That both universal fingerprinting bills, and the efforts of Hoover, failed suggests the limits of our cultural acceptance of fingerprinting. Fingerprinting is fine for criminals, and we intuitively accept its utility with arrested individuals, but we do not accept the argument that we would all be better off if *everyone* were fingerprinted.²²⁷

Courts, in essence, have mirrored this cultural intuition. While courts accepted arrestee fingerprinting as “routine,” often citing the historical need argument,²²⁸ they drew the line at any attempt to conduct a broad law enforcement search through expanded access to fingerprints.

In *Davis v. Mississippi*,²²⁹ after a rape victim described her assailant as an African-American youth, police rounded up dozens of local youth who met that profile, processed them and took fingerprints until a match with a print on the victim’s window was found.²³⁰ The Supreme Court ruled the fingerprint evidence inadmissible at trial on the grounds that “[i]nvestigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention.”²³¹ This intuition in *Davis* towards suppressing evidence that is gained from a broad criminal investigative purpose,²³² or searches lacking individualized suspicion, has been consistently reaffirmed by the Court.²³³ For instance, programs aimed at discovering criminal drug use among pregnant women and random traffic stops aimed at uncovering drug trafficking were both overturned as unconstitutional because they were blanket investigations aimed at uncovering ordinary crime.²³⁴

Of course, it must be acknowledged that none of the above situations involved an individual against whom there has been a finding of probable cause for arrest, the central prong of the argument in *Pool*.²³⁵ But in 1941, at the height of Hoover’s push for

²²⁷ *Id.* (“Though Americans were susceptible to demagoguery aimed at immigrants and political dissidents, they remained steadfastly protective of their own privacy. Americans saw the universal fingerprinting movement for what it was: an effort by the state to establish a comprehensive surveillance system over its own citizens.”).

²²⁸ *See, e.g.,* *McGovern v. Van Riper*, 54 A.2d 469, 470–72 (N.J. Ch. 1947) (finding that the primary goal in collecting fingerprints upon arrest was to definitively identify the individual to determine if he had prior convictions, and to expedite recapture in case the individual were to escape).

²²⁹ 394 U.S. 721 (1969).

²³⁰ *Id.* at 722–23.

²³¹ *Id.* at 727–28.

²³² *See also* *United States v. Guevara-Martinez*, 262 F.3d 751 (8th Cir. 2001) (fingerprinting conducted as part of blanket immigration investigation, rather than routine procedures based on probable cause was inadmissible at trial); *State v. Walls*, 231 S.E.2d 196 (N.C. Ct. App. 1977). *But see* *Paulson v. State of Florida*, 257 So. 2d 303 (Fla. Dist. Ct. App. 1972) (finding that, despite unlawful arrest, because intent of arrest was not to obtain fingerprints, evidence was admissible).

²³³ *See* *Rikelman*, *supra* note 176, at 48.

²³⁴ *See id.* (citing *Ferguson v. City of Charleston*, 532 U.S. 67 (2000); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000)).

²³⁵ *United States v. Pool*, 645 F. Supp. 2d 903, 912 (E.D. Cal. 2009), *aff’d*, 2010 WL 3554049 (9th Cir. Sept. 14, 2010).

universal fingerprinting, the Missouri Supreme Court refused to recognize an implied right of law enforcement to disseminate arrestee information to other agencies²³⁶ by drawing a clear line between a convicted man and a man who has merely been arrested: “[T]here is a marked difference between making an adequate record of the identity of a person lawfully in custody . . . and the dissemination of the photographs and fingerprints of an innocent person about whose identity there can be no question.”²³⁷

C. Conclusions: Exploiting the Gaps

It is hard to imagine a California district court in 2009 affording much weight to a 1941 Missouri Supreme Court decision. Still, *Reed*, and the extensive history of societal rejection of fingerprinting as an open-ended investigative tool, should at very least give pause to courts intending to follow *Haskell*'s logic—or *Pool*'s, for that matter. The relative lack of jurisprudence discussing routine fingerprinting in a Fourth Amendment context works both ways. The myriad indicators of a societal, and occasionally judicial, wariness of fingerprinting must carry at least as much weight as the lack of judicial opinion to the contrary. Moreover, as this Note has discussed at length, fingerprinting and DNA sampling are fundamentally different, making the leap from silent judicial acquiescence to a fingerprinting exception to a binding judicial opinion on DNA sampling all the more arduous.

CONCLUSION

The analogy between fingerprinting and DNA sampling is obvious and intuitive, and has been used as a critical basis of support for arguments favoring expansion of DNA sampling to include sampling from arrestees. This Note has argued that this analogy, in a precedential context, is false based on serious differences between the underlying intents of routine fingerprinting and DNA sampling, and significant substantive differences between the two types of evidence.

When the analogy between fingerprinting and DNA sampling is considered accurately, the case for the constitutionality of arrestee DNA sampling under the Fourth Amendment falls apart. The significant intrusion on privacy rights inherent in DNA sampling greatly outweighs the expressed government need, rendering arrestee sampling unconstitutional under the totality of circumstances test. Meanwhile, the expressed need for DNA sampling is too obviously tied up in typical law enforcement actions to qualify for consideration under the special needs test.

Admittedly, the development of routine fingerprinting from an administrative need to a law enforcement tool has been historically under-examined by courts. There

²³⁶ *State ex rel. Reed v. Harris*, 153 S.W.2d 834 (Mo. 1941). It must be acknowledged that the *Reed* court's decision was based on the lack of a statutory authorization for dissemination of arrestee fingerprints. *Id.* at 837. Still, the sentiment in *Reed* is decidedly against a broad investigatory intent.

²³⁷ *Id.*

is no definitive case applying the totality of circumstances test because by the time that test was announced, fingerprinting had long been informally deemed “routine.” While the strongest argument for arrestee DNA sampling would likely take advantage of this vague judicial history, courts should acknowledge that creating precedent from a lack of precedent is, for lack of a better term, bad precedent.

Ultimately, while the appeal of broad DNA databases and powerful law enforcement capabilities is undeniable, the Fourth Amendment does not permit the encroachment on individual privacy inherent in arrestee DNA sampling. And although the cultural intuitions supporting the law enforcement purposes are strong—not to mention a natural progression from similar intuitions that led to a broad cultural acceptance of routine fingerprinting—they remain, merely, intuitions. Little in the history of routine fingerprinting suggests legitimate government authority to collect DNA samples upon arrest. On the contrary, this history begs for more discretion from modern judges, and a substantial reigning-in of government overreach that seriously threatens fundamental privacy rights. Thus, in accordance with, rather than in spite of, the history of routine fingerprinting, arrestee DNA sampling statutes should be ruled unconstitutional under the Fourth Amendment.