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AMERICAN COURTS ARE DROWNING IN THE "GENE POOL": EXCAVATING THE SLIPPERY SLOPE MECHANISMS BEHIND JUDICIAL ENDORSEMENT OF DNA DATABASES

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It is undoubtedly true that, were we to maintain DNA files on all persons living in this country, we would even more effectively further the public interest in having efficient and orderly criminal prosecutions, just as we would were we willing to sacrifice all of our interests in privacy and personal liberty. We chose, however, not to follow that course when we adopted the Fourth Amendment.1

I. INTRODUCTION

When a federal court of appeals recently reversed itself, narrowly declaring constitutional a law enforcement search of an individual’s genetic code, absent suspicion and probable cause, Judge Kozinski lamented, “My colleagues in the plurality assure us that, when [the] day comes, they will stand vigilant and guard the line, but by then the line – never very clear to begin with – will have shifted. The fishbowl will look like home.”2 Judge Kozinski is not alone in fearing that these changed expectations will serve to justify future intrusions, thereby starting the nation down a slippery slope,3 at

1. United States v. Kincade, 345 F.3d 1095, 1103 (9th Cir. 2003), rev’d en banc, 379 F.3d 813 (9th Cir. 2004) (6-5 decision).

2. United States v. Kincade, 379 F.3d 813, 873 (9th Cir. 2004) (en banc) (6-5 decision) (Kozinski, J., dissenting). Judge Kozinski argued that the majority’s result could lead to requiring every citizen to provide DNA for the government-run database, not just convicted felons. Id. See Maura Dolan & Andrew Blankstein, Parolee DNA Testing Okd, L.A. TIMES, August 19, 2004, at B1 (discussing Judge Kozinski’s dissent in Kincade and his assertion that the Fourth Amendment intrusion at issue in Kincade is not so much the taking of blood as it is the seizure of a DNA fingerprint and its inclusion in a searchable database).

3. A slippery slope is the metaphor describing all situations where one’s support for decision A ends up materially increasing the likelihood that others will bring about decision B. Eugene Volokh, The Mechanisms of the Slippery Slope, 116 HARV. L. REV. 1026, 1031 (2003). “It may be that [this] is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.”
the end of which every citizen's genetic code will lie in government hands.\textsuperscript{4}

The slippery slope argument, however, seems to fall on deaf ears, while the voices shouting for a population-wide DNA database grow louder. Why is this? In the wake of 9/11, are Americans finally willing to do away with fundamental liberty protections in the name of security? The answer may be much simpler. It may be ignorance of the basic mechanics\textsuperscript{5} of the slippery slope metaphor itself that blinds Americans to the potential dangers of DNA harvesting.\textsuperscript{6}

This Comment will explore the mechanics of the slippery slope metaphor as they relate to judicial legitimization of DNA databases. Part I briefly discusses the evolution of DNA collection statutes and law enforcement-run databases, and then describes the state of the law today. It also recounts arguments advanced both for and against DNA databases. Part II explores and challenges the theoretical framework in which judicial decision makers and supporters of DNA databases are operating, and uses the slippery slope argument as a means to identify the social, political, and human mechanisms influencing the judicial opinions in \textit{United States v. Kincade}. Part III proposes that the United States Supreme Court safeguard Fourth Amendment privacy rights by notching the slippery slope created by

\textit{See id.} at 1112 (quoting Boyd v. United States, 116 U.S. 616, 635 (1886), to illustrate how slippery slopes can develop through tolerance for small changes).

\textsuperscript{4} Judge Kozinski explained that when future proposals for expanding the federal government's DNA database inevitably arise, the database will have been praised for solving thousands of crimes and we will have become accustomed to the notion that the government is permitted to hold enormous databases of DNA fingerprints. \textit{Kincade}, 379 F.3d at 873 (Kozinski, J., dissenting).

\textit{See} Kenneth Jost, \textit{DNA Databases: Does Expanding Them Threaten Civil Liberties?}, 9 CONG. Q. RESEARCHER 449 (1999), available at http://www.denverda.org/DNA_Documents/CQ%20DNA%20Database%20Article.pdf [hereinafter CONG. Q. RESEARCHER] (discussing the argument that mandatory DNA profiling of arrestees will alter the public's attitude toward DNA databases, moving the nation down a slippery slope leading to "universal genetic registration" and a system "fraught with privacy implications"); D.H. Kaye, \textit{The Constitutionality of DNA Sampling on Arrest}, 10 CORNELL J.L. & PUB. POL'Y 455, 457 (2001) (describing how some law professors, along with sociology and public health scholars, view DNA data bases "as part of an insidious "surveillance creep" and the first step toward an Orwellian society" that will make "us a nation of suspects," and radically alters the relationship between the citizen and the government"); Liza Porteus, \textit{Supporters, Critics Debate DNA Database Expansion}, FOX NEWS, May 9, 2003, http://www.foxnews.com/story/0,2933,86390,00.html. (last visited Dec. 29, 2005)(quoting Jay Stanley, communications director of the Technology and Liberty Program at the American Civil Liberties Union: "We're heading towards a situation where the government has incredible personal bodily information about everybody that cannot only track you...but it's incredibly revealing about your body, your future health and characteristics of your family members")

\textsuperscript{5} \textit{See} Volokh \textit{supra} note 3, at 1031-32, 1137 n.14 (explaining the term "mechanisms" in the context of slippery slope arguments).

\textsuperscript{6} \textit{See} Recent Case: Constitutional Law – Fourth Amendment - Ninth Circuit Upholds Collection of DNA from Parolees.—United States v. Kincade, 379 F.3d 813 (9th Cir. 2004) (en banc)., 118 HARV. L. REV. 818, 818 (2004) [hereinafter Ninth Circuit Upholds] (suggesting that the rapid expansion of DNA databases "from minimal to gargantuan" warrants more public attention and doctrinal rigidity than it has received).
prior judicial decisions regarding DNA extraction and database storage. It calls for prohibiting the statutory farming of arrestees’ and suspects’ DNA into state and nationwide databases.

I. BACKGROUND

A. Law Enforcement DNA Sampling Procedures

DNA, or deoxyribonucleic acid, is a chemical present in the nucleus of every cell containing an individual’s genetic blueprint.7 Because of DNA’s uniqueness, and the accuracy with which it can identify the individual from which it came, it now serves as an essential crime-solving tool for law enforcement.8 After collecting DNA from crime scenes, police can attempt to locate an offender by searching for a matching DNA profile in state and national databases.9

Forensic lab technicians create the DNA profiles, or “fingerprints,” in the databases using unique variations found in an individual’s chromosomes.10 Technicians analyze a small portion of the original tissue sample, and most labs will then preserve and store the remaining tissue.11 The analysis is usually limited to 13 loci that reveal genotypes, or patterns containing certain non-coding alleles.12 These unique genotypes are translated into a numerical code, or profile, and then entered into the local and national databases.13

B. Creation and Expansion of DNA Databases

Four years ago, the federal government passed the DNA Analysis Backlog Elimination Act of 200014 ("DNA Act"), which authorized extraction of DNA from those convicted of “qualifying federal offenses,”15 and subsequent storage of the DNA profile in the Combined DNA Index System ("CODIS") absent individualized suspicion that the individual committed some other crime.16 The FBI maintains CODIS,17 which is a

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11. Kaye, supra note 9, at 461.
12. Id.
13. Id. at 462
15. See id. § 14135a (enumerating “qualified offenses” such as murder, offenses relating to sex abuse, kidnapping, any crimes of violence, and any attempt or conspiracy to commit these offenses).
16. Id.
three-tiered system of local, state, and national databases now containing more than 1.6 million DNA profiles.\textsuperscript{18}

Within the last fifteen years, all fifty states have passed some type of DNA collection statute requiring some or all convicted felons to submit DNA — through blood draw or a cheek-swab\textsuperscript{19} — for inclusion in their databases.\textsuperscript{20} States have embraced the role of DNA databases as powerful law enforcement tools and continue to enthusiastically expand the class of individuals subject to state DNA collection statutes.\textsuperscript{21} Every state currently requires samples from certain sex offenders, but beyond that, each state varies widely in classifying those subject to inclusion in the DNA databases.\textsuperscript{22} Some states even harvest DNA from juveniles, individuals guilty of certain misdemeanors, and suspects not yet convicted of a crime.\textsuperscript{23} Furthermore, a number of states have already enacted, or are now proposing controversial measures that require anyone arrested to submit a DNA sample.\textsuperscript{24}

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\item[17] CODIS stands for the Combined DNA Index System Database. United States v. Miles, 228 F. Supp. 2d 1130, 1132 (E.D. Cal. 2002). Its purpose is to match DNA samples from crime scenes where there is no suspect with the DNA of convicted offenders. \textit{Id.} at 1139. \textit{See} Sandra J. Carnahan, \textit{The Supreme Court's Primary Purpose Test: A Roadblock to the National Law Enforcement DNA Database}, 83 Neb. L. Rev. 1, 3 (2004) (explaining that CODIS is a software program enabling state, federal, and local forensic labs to electronically store and compare DNA profiles).


\item[19] While blood draw and cheek-swabbing are still used, more modern DNA sampling procedures include application of an adhesive patch to the skin on an individual's arm to remove a small layer of epidermal cells. Ben Quarmby, \textit{The Case For National DNA Identification Cards}, 2003 Duke L. & Tech. Rev. 0002, ¶ 20 (2003), http://www.law.duke.edu/journals/dltr/articles/2003dltr0002.html (last visited Dec. 29, 2005).


\item[21] \textit{See} Kincade, 379 F.3d at 819, n.9 (noting that many state DNA statutes reach beyond the federal legislation, some mandating the taking of DNA samples from non-violent offenders and certain arrestees); Carnahan, \textit{supra} note 17, at 4 (discussing the "clear trend" in state legislation "toward rapid expansion of the types of crimes requiring DNA inclusion in the database"); Mark A. Rothstein & Sandra Carnahan, \textit{Legal and Policy Issues in Expanding the Scope of the Law Enforcement Data Banks}, 67 Brook. L. Rev. 127, 128 (2001) (explaining that many states have recently amended their laws to expand the categories of crimes requiring DNA collection). \textit{See also} United States v. Riley, 906 F.2d 841, 854 (2d Cir. 1990) (predicting that growing databases will "ultimately permit DNA evidence to be used like a giant fingerprint file" linking one individual to other suspects in similar crimes).


C. Divided Courts and Controversy over the Constitutionality of DNA Statutes

Although the United States Supreme Court has yet to address the constitutional legitimacy of DNA collection statutes, state and federal courts across the nation are fast becoming unanimous in upholding mandatory DNA extraction for storage in government-run databases.\(^{25}\) While reviewing courts "agree on the result, they do not agree on how to get there."\(^{26}\) The various court decisions rely on one of two Fourth Amendment analyses.\(^{27}\) The first is the "totality of the circumstances" balancing test. Using this test, courts frequently find DNA sampling "reasonable" because a felon's severely reduced expectation of privacy is outweighed by an overwhelming government interest; namely, identifying criminals and preventing recidivism. The second justification takes advantage of the "special needs" exception. This exception disposes of the reasonable suspicion requirement if the intrusion serves special governmental needs beyond normal law enforcement. Few states (discussing the trend for "relentless expansion" of the scope of DNA databases); Dee McAree, *Push to Expand DNA Samples Spreads*, NAT'L L. J., April 26, 2004, Vol. 26, No. 34, at 4 (reporting that approval of an Illinois house bill would compel a tissue or saliva sample for DNA profiling from one suspected of committing a felony as standard police station arrest and booking procedures, and that passage of a California ballot initiative would require taking of DNA upon arrest); Bill Hughes & Richard Liebson, *High-tech DNA Raises Questions*, THE J. NEWS, April 2, 2004, *available at http://www.thejournalnews.com/newsroom/040204/a0102dnaside.html* (reporting on a proposed New York law that would require anyone arrested to submit a DNA sample).  


\(^{27}\) See *Peppers*, 817 N.E.2d at 1156 (discussing the two analytical routes taken by courts to justify forced DNA extraction from certain classes of convicted felons). Courts have taken two different approaches in their Fourth Amendment analyses: (1) the Fourth Amendment balancing test where the courts determine the reasonableness of a search by balancing the government's interest in carrying out the search, the extent to which the search furthers that interest, and the level of intrusion into an individual's privacy; and (2) the special needs exception, which permits governmental intrusion without a warrant or probable cause when the intrusion serves special governmental needs beyond the normal needs of law enforcement. *Id.* Some judges dispense with the argument that forced DNA collection from convicted individuals amounts to unconstitutional suspicionless search by labeling DNA analysis as merely an additional method of prisoner identification, similar to routine pre-arrest fingerprinting and photographing. Nason v. State of Alaska, 102 P.3d 962, 964 (Alaska Ct. App. 2004). *See also Padgett v. Ferrero*, 294 F. Supp.2d 1338, 1343 (N.D. Ga. 2003) (holding that convicted felons have only a minimal privacy right in their identification through DNA collection, if any, and that prisoner's felony conviction alone provides any individualized suspicion to justify DNA collection).
enforcement.\textsuperscript{28} Despite the inconsistencies in these two approaches, the decisions serve as green lights for states to continue expanding their DNA databases.\textsuperscript{29}

While many endorse expansion of DNA databases, excitedly hailing DNA as a potent crime-fighting weapon for the future,\textsuperscript{30} doubt and opposition regularly surface amongst the fervor.\textsuperscript{31} Much of the controversy stems from uncertainty surrounding DNA and what it might eventually reveal about individuals.\textsuperscript{32} Many fear the consequences of allowing their

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\textsuperscript{28} See Richard P. Shafer, \textit{Validity, Construction, and Application of DNA Analysis Backlog Elimination Act of 2000}, 42 U.S.C.A. §§ 14135 et. seq. and 10 U.S.C.A. § 1365, 187 A.L.R. Fed. 373, at 373-77 (2004) (discussing cases where courts held that collection of DNA samples under the DNA Act is not violative of the Fourth Amendment, finding it "reasonable" under the Fourth Amendment balancing test, or finding it valid under the "special needs" doctrine); Groceman v. U.S. Dept. of Justice, 354 F.3d 411-14 (5th Cir. 2004) (finding that collection of DNA from prisoners after conviction for inclusion in a database is reasonable because such prisoners no longer hold a privacy interest in their accurate identification).
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\textsuperscript{29} In addition to the Federal DNA Act, in the last fifteen years, state governments began to enact DNA statutes of their own. \textit{Raines}, 857 A.2d at 23. Currently all fifty states have some type of DNA collection statute requiring some or all convicted felons to submit either a blood, saliva, or other tissue sample, for DNA profile analysis and storage in a DNA data bank. \textit{Id. See}, e.g., United States v. Kimler, 335 F.3d 1132, 1146 (10th Cir. 2003) (justifying forced DNA extraction from a federal prisoner for inclusion in CODIS as a valid suspicionless search under the special needs doctrine). See generally Bonnie L. Taylor, \textit{Storing DNA Samples of Non-Convicted Persons & the Debate Over DNA Database Expansion}, 20 T.M. COOLEY L. REV. 509 (2003) (addressing the expansion of DNA databases). In the last 10 years states continue to broaden their DNA statutes, subjecting a greater number of people to mandatory DNA extraction in an effort to fill DNA databases. \textit{Id. See} Lawrence Hurley, \textit{Fractured Md. Court of Appeals Outlines Why DNA Collection Act is Constitutional}, THE DAILY REC. (Baltimore), August 27, 2004, at 1 (reporting on a recent decision by the Maryland Court of Appeals and how "the court’s decision gives the green light to law enforcement agencies seeking to take DNA samples from other people who, along with prison inmates, have a ‘diminished expectation of privacy,’ a class that could include those applying for driving licenses or passports”).
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\textsuperscript{31} See \textit{DNA Database Nears Two Million}, BBC NEWS, June 25, 2003, http://news.bbc.co.uk/1/hi/uk/3018504.stm (last visited Dec. 27, 2005) (describing DNA evidence as a “potent weapon against all categories of crime,” and discussing concerns that the government might be creating a national DNA database “by stealth”); Willing, \textit{supra} note 30 (reporting on proposed expansion of national DNA database to include juveniles and arrestees, and the arguments promoting and opposing the expansion); Sonia E. Miller, \textit{Converging Technologies}, 104 N.Y. L. J. 1, 5, (2001) [hereinafter \textit{Converging Technologies}] (discussing DNA’s potential for both use and misuse, and how “it has fueled enormous controversy”).
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\textsuperscript{32} Although law enforcement refers to the DNA profile as a genetic “fingerprint,” the analogy over-simplifies this relationship. Jeffrey S. Grand, \textit{Note, The Blooding of America: Privacy and the DNA Dragnet}, 23 CARDOZO L. REV. 2277, 2288 (2002). Even
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DNA to fall into the hands of insurance companies, employers, or other private institutions that may be tempted to use such unique personal information for discriminatory purposes. But what concerns many scholars is that decisions to broaden the scope of the DNA databases are driven purely by law enforcement concerns, which implement changes that bring “far-reaching consequences that none of us can anticipate.”

Despite the line of cases upholding statutes requiring DNA extraction from certain convicted felons, the judicial opinions reflect an undercurrent of controversy and uncertainty surrounding the permissible extent of government control over one’s genetic information. The media increasingly points to recent appellate court opinions upholding DNA collection statutes and databases, characterizing these courts as “fractured,” if current profiling methods use comparatively limited amounts of genetic information, with more advanced mapping of the human genome now underway, DNA analysis may well reveal an individual’s medical history, vulnerability to certain diseases, hereditary information such as race, physical and behavioral traits. Unlike a fingerprint, “information potentially contained in a DNA profile may subject an individual to embarrassment, humiliation, public hostility, and even financial harm.” Id. at 2289. Despite characterizations of DNA profiling as the modern version of fingerprinting, civil libertarians and other commentators fear “unfettered government-sponsored bioinvasion” and exposure to the government of “who I am, my biological potential, my health situation, my paternity, my race [and the] most profound personal secrets.”

33. See Barry Steinhardt, Should DNA Samples be Collected from Arreestees and Included in Law Enforcement Databases?, 9 CONG. Q. RESEARCHER, May 28, 1999, at 465 (debating against expansion of DNA databases by pointing out the country's long history of creating databases for one purpose but later employing them for additional functions, such as the census records used at first for the limited statistical purposes but later used to gather up and confine innocent Japanese-Americans during World War II); Gaia Bernstein, Accommodating Technological Innovation: Identity, Genetic Testing and the Internet, 57 VAND L. REV. 965, 991 (2004) (asserting that genetic information can serve as a powerful tool in the hands of those looking to discriminate and stigmatize because, unlike standard medical information, it portrays individuals as inherently different). Maryland's DNA collection statute provides an example of the ambiguity concerning the use of DNA information for research. Ralph Brave, A More Reasonable DNA Database, THE DAILY REC. (Baltimore), June 18, 2004.

34. Binny Miller, The Human Genome Project, DNA Science and the Law: The American Legal System's Response to Breakthroughs in Genetic Science, 51 AM. U.L. REV. 401, 416 (2001). See Porteus, supra note 4, at 1 (reporting on a Bush administration proposal to expand federal DNA databases by requiring practically every individual arrested to contribute DNA, and how this has “sparked debate between supporters who say it will solve more cases and critics who insist it is too intrusive”).

35. See Peppers, 817 N.E.2d at 1157-58 (admitting the court's “discomfort” with the abandonment of the individualized suspicion requirement in DNA-testing cases and asserting that “vigilance” is necessary to “ensure amorphous concepts of compelling state interest do not subsume our dearly won right to privacy”).
or "sharply divided."36 In fact, on August 18, 2004, the "bitterly divided" Ninth Circuit Court of Appeals actually reversed itself in an en banc decision, after a three-judge panel declared that a law requiring federal parolees to give blood samples for the FBI's DNA database violated the Fourth Amendment's protection against unreasonable search and seizure.37

Before overturning itself in the en banc decision, the Ninth Circuit created a stir when, after nearly a decade of decisions upholding statutes mandating DNA contribution from certain classes of felons, the court rejected the validity of such statutes.38 Judge Reinhardt, who authored the initial ruling, held that mandatory DNA extraction from a convict or parolee was unconstitutional because it constituted a suspicionless search conducted solely for law enforcement purposes.39 Judge Reinhardt condemned court approval of a "government's construction of a permanent governmental database built from general suspicionless searches and designed for use in the investigation and prosecution of criminal offenses."40 Judge Reinhardt, and those sharing his sentiment, continue to warn of the dangers inherent in permitting the government to store such information about its citizens in a centralized place and the risks associated with "having our DNA samples permanently placed on file in federal cyberspace."41

In a 6-5 reversal of the initial panel decision, the plurality in the en banc opinion42 realigned itself with prior judicial determinations declaring the constitutionality of DNA databases. However, the Ninth Circuit's 112-page divided opinion reinforces the serious ideological conflict within the judiciary, and individual judges themselves, regarding the permissible scope of governmental power over one's genetic code.43

36. Kravets, supra note 25, at 2. See Lisa Goldberg, Court, with reservations, Rules DNA Databank is Constitutional; 4-3 Margin, Opinions Show Concerns About Collection, THE BALT. SUN CO., Aug. 27, 2004, at 1B (reporting that "Maryland's DNA databank survived a constitutional challenge in the state's highest court" by a small margin and "left a majority of the judges troubled" by the consequences of "collecting genetic profiles"); Lawrence Hurley, Fractured Md. Court of Appeals Outlines why DNA Collection Act is Constitutional, THE DAILY REC. (Baltimore), August 27, 2004 (reporting on a recent court of appeals opinion upholding the Maryland DNA statute where the "seven-member court was sharply divided, with three judges dissenting and three separate opinions from the remaining four").


39. Kincade, 345 F.3d at 1113.

40. Kincade, 379 F.3d at 843.

41. Id.

42. The Kincade en banc decision held that paroled felons have only a limited right to privacy and can be forced to give DNA samples even without a specific reason to suspect they were involved, in or would be involved in, additional crimes. Id. at 834-35.

43. The Kincade decision went a step further than earlier cases upholding DNA collection because it expanded the population subject to DNA collection to include parolees, and it permitted a suspicionless search for purely law enforcement purposes.
Often utilized in legal debate, the slippery slope is merely a theoretical metaphor; a simple image often applied in an abstract manner in the civil liberties context. The metaphor’s overuse and superficial application, however, have drained its argumentative potency. Although the slippery slope argument has lost its bite, an in-depth look at the merits of the metaphor may provide a greater appreciation of what is at stake in the race to fill DNA databases.

II. USING A SLIPPERY SLOPE METAPHOR TO EXAMINE JUDICIAL OUTCOMES AND TO EXPOSE THE RISK OF A POPULATION-WIDE DNA DATABASE

The slippery slope metaphor describes all situations where one group’s support of a step eventually makes it easier, due to logical, psychological, or political forces, for others to implement a later step. This phenomenon stems from certain societal truths; namely, the circumscribed rationality that plagues decision makers on every level—with limited time to invest in political decision making, and the ways in which decision makers compensate for this. Thus, in a practical sense, slippery slopes pose a very real risk where, “[i]n the absence of absolute knowledge and consequently absolute control over the consequences of our actions and decisions, we cannot afford to ignore the possible misuses of proposed reforms.” To lend

Some call the Kincade opinion a “pit stop on the path to approval of far broader DNA collection.” Ninth Circuit Upholds, supra note 6, at 822.

44. Slippery slope arguments can also play a role in judicial decision making. Eric Lode, Comment, Slippery Slope Arguments and Legal Reasoning, 87 CAL. L. REV. 1469 (1999).


46. Although critics point to simplistic assumptions underlying slippery slope arguments, slippery slopes are closely related to complex, real-world phenomena like “bounded rationality”, “rational ignorance”, and the rules of thumb that people develop to compensate for their circumscribed rationality. Volokh, supra note 3, at 1035.

47. Even if its potency diminished with overuse, the slippery slope argument still plays a worthy role in legal reasoning. Lode, supra note 44, at 1542.

48. Perhaps the ignorance of the basic mechanics or processes at work behind the slippery slope theory explains the public’s lack of interest and the judicial lack of consistency when it comes to the very real danger of incremental loss of Fourth Amendment rights.


50. See Volokh, supra note 3, at 1035 (explaining the close relationship between slippery slopes and phenomena such as “bounded rationality, rational ignorance, heuristics that people develop to deal with their bounded rationality, irrational choice behaviors . . . and multi-peaked preferences,” which are “common in the real world of voters, legislators, and judges”).

more credibility to warnings such as this, and to the slippery slope metaphor itself, Eugene Volokh, in his recent article *Mechanisms of the Slippery Slope*, identifies a number of specific slippery slope mechanisms at work in judicial decision making, as well as legislative and voter decision making. This Comment attempts to make a slippery slope argument in the context of DNA database expansion by illustrating how these same mechanisms work to push the nation further down a slippery slope leading to judicial endorsement of a population-wide genetic database.

A. Surveying the Slopes - The Framework of a Slippery Slope Argument

To clarify the analytical framework, a slippery slope argument features several discernable characteristics, namely: (1) an original, presumably acceptable argument and decision, (2) a “danger case,” or the advancement of a later argument and a corresponding decision deemed clearly unacceptable, and (3) “mechanisms,” or the means by which acceptance of the original argument and the making of the original decision increase the likelihood of acceptance of, and a decision representative of, the “danger” case.

In the context of a slippery slope argument against an all-inclusive DNA database, one might identify the original acceptable argument as one advocating extraction of DNA for inclusion in a DNA database only from those convicted of heinous crimes, such as murder and rape. The original decision(s), then, would validate such a database by finding that the extraction of DNA and permanent storage of a DNA profile does not offend Fourth Amendment protections against unreasonable search and seizure. A subsequent argument would take the first argument several steps further by advocating the “danger case” – an all-inclusive, population-wide DNA database. The “danger case” becomes reality when a court decides that extracting DNA from the entire population for profiling and storage in a database would similarly comport with the requirements of the Fourth Amendment. This Comment focuses on what happens in between these two scenarios – the theoretical, legal, psychological, and social forces, or

validity of slippery slope arguments in today’s society where “rational explanations, justifications, or arguments are [n]ever spelled out in their entirety” and how this superficial reasoning permits important legal distinctions to go unmade).

52. See generally Volokh, supra note 3.

53. See generally id. (analyzing the political, social, and theoretical elements that influence decision making).

54. See id. at 1127-28 (describing how one can estimate the “risk of slippage” by identifying various slippery slope mechanisms and how this, in turn, helps us develop some general “presumptions” to govern our actions and decisions regarding a certain issue).

55. See Rizzo, supra note 49, at 546 (explaining that slippery slope arguments amount to predictions made by observers “about how acceptance of some ideas – and resulting actions – can lead to acceptance of other ideas – and resulting actions).

56. Id. at 544 (listing and describing the “key components” of a slippery slope argument).
Judicial Endorsement of DNA Databases

"mechanisms,"\textsuperscript{57} that make acceptance of the first, seemingly tolerable, proposal lead to implementation of a more offensive, not to mention unconstitutional, "danger case."

\textbf{B. Why Judicial Endorsement of DNA Databases Lends Itself to Slippery Slope Analysis}

Some legal issues prove more amenable to slippery slope arguments than others.\textsuperscript{58} Slippery slope issues, then, share a number of common traits indicating a risk of "slippage," such as: disagreement among decision makers,\textsuperscript{59} multiple theories advanced to support a common conclusion,\textsuperscript{60} vagueness surrounding the accepted theories,\textsuperscript{61} and the decision makers' use of analogous reasoning.\textsuperscript{62} Nonetheless, the judicial endorsement of law enforcement's collection of genetic information lends itself well to slippery slope analysis because it waives a number of the aforementioned "red flags."

For example, more often than not, court decisions addressing the constitutionality of statutes authorizing law enforcement to take and store DNA contain concurring and/or dissenting opinions.\textsuperscript{63} Some judges concur in the result, but advance a different theory to reach that result.\textsuperscript{64} Others dissent from the majority, finding that the practice does offend the Fourth

\textsuperscript{57} See \textit{id.} at 544 (explaining that there exists many mechanisms or "processes" linking the initial case and the danger case).

\textsuperscript{58} See \textit{id.} at 574 (listing certain factors increasing the likelihood of slipping down a slope, such as the "degree of disagreement among decisionmakers" and the "degree of vagueness in the generally accepted theory").

\textsuperscript{59} \textit{id.} at 574-75

\textsuperscript{60} \textit{id.}

\textsuperscript{61} \textit{id.} at 574-76. \textit{See also} \textit{Lode, supra} note 44, at 1507 (discussing how "[j]udges' use of vague terms" can increase the likelihood of sliding down a slippery slope).

\textsuperscript{62} \textit{Rizzo, supra} note 49 at 574-75.

\textsuperscript{63} \textit{See} \textit{Goldberg, supra} note 36 at 1B (reporting on the "sharp division in opinion not only in the result but in the basis for the result" when it comes to the constitutional questions surrounding DNA databases).

\textsuperscript{64} Some judges find DNA extraction and database entry constitutional under the "special needs" exception to the Fourth Amendment requirement of probable cause or reasonable suspicion (which requires that the government intrusion serve a "special need" beyond the normal needs of law enforcement). \textit{See Green,} 354 F.3d at 678 (finding that collecting and storing DNA serves a "special need" beyond the normal needs of law enforcement because storing the primary purpose of the DNA law "is not to search for 'evidence' of criminal wrongdoing" but is to "obtain reliable proof of a felon's identity"). Other judges, conceding that the DNA statute(s) cannot qualify under the special needs exception because it advances primarily law enforcement objectives, find such statutes constitutional under the traditional Fourth Amendment balancing test (which assesses the reasonableness of a search by balancing the degree of the government intrusion against an individual's expectation of privacy against the government's legitimate interests). \textit{See} \textit{Rise v. Oregon,} 59 F.3d 1556, 1562 (9th Cir. 1995) (holding that the search satisfied Fourth Amendment reasonableness after weighing a convict's substantially diminished expectation of privacy and the minimal intrusiveness of the DNA extraction against the government's strong interest in maintaining DNA data bases of convicted murderers and sex offenders). \textit{See also} \textit{Miles,} 228 F. Supp. 2d at 1139 n.6 (declining to apply the special needs test, asserting: "It is intellectually dishonest to decouple the collection of information . . . from the law enforcement purpose for which [the database] was created").
Amendment. Further, although all courts have ultimately upheld such statutes, different courts and different circuits disagree on the proper constitutional rationale. The substantial measure of disagreement and inconsistency within and among the different courts increases the likelihood of "slippage" towards the "danger case" because "decisionmakers looking for an excuse to decide in a particular way are more likely to find a justification when multiple (and potentially contradictory) justifications exist." So, the existence of multiple and potentially contradictory theories creates a theoretical escape hatch — making it easier to legitimize the inclusion of a larger class of individuals in DNA databases.

This phenomenon, coupled with the Supreme Court's historically murky and "porous" Fourth Amendment jurisprudence, further increases

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65. See Raines, 857 A.2d at 63 n.13 (Bell, J., dissenting) (dissenting with two other justices on the grounds that the majority's decision to uphold the DNA collection statute was "reminiscent of a general warrant . . . authorizing a random or blanket search"); Rise, 59 F.3d at 1571 (Nelson, J., dissenting) (lamenting that the "majority has sacrificed a precious constitutional protection in the name of greater police efficiency").

66. See Kincade, 379 F.3d at 842 (Reinhardt, J., dissenting) (asserting that, although the majority approved the government's latest "effort to construct a comprehensive national database . . . no majority exists with respect to the legal justification for this conclusion").

We decline to choose between the special needs and balancing approaches. This is an issue that remains in search of a principled analysis. Either way, the result is the same. The statute survives a Fourth Amendment challenge. We simply observe vigilance is required to ensure amorphous concepts of compelling state interest do not subsume our dearly won right to privacy.

Peppers, 817 N.E.2d at 1158.

As Justice Theis wrote in a recent concurring opinion, "While these courts have uniformly reached the same constitutional result, they contain no uniform analysis and frequently include numerous dissents and concurrences." Ramos, 817 N.E.2d at 1130 (Theis, J., concurring). Another judge admitted that, although courts uphold DNA collection statutes under the Constitution, "precedent is not consistent in the analysis used to justify this conclusion." Miller v. U.S. Parole Comm'n, 259 F. Supp. 2d 1166, 1174 (D. Kan. 2003).

The Alaska Court of Appeals, in a recent decision upholding its DNA collection statute, expressly declined to address the merits of possible future Fourth Amendment privacy attacks against the statute. Nason, 102 P.3d at 963. After noting that "appellate courts in this country are virtually unanimous" in finding the DNA collection statutes valid as applied to identical factual situations, the court expressed great concern when it came to the lack of a unanimous and precise constitutional basis for doing so. Id. at 964-65. The court cited the Kincade en banc decision among other opinions to illustrate of the division among and within the courts regarding the proper constitutional analysis of DNA collection statutes. Id. The court viewed this as "no small problem, because each different rationale for upholding DNA collection leads down a separate constitutional path in the future litigation of related Fourth Amendment and privacy issues" and each justification for DNA collection "holds the potential for government abuses and infringement on citizen privacy." Id. at 965.

67. Rizzo, supra note 49, at 575. See Ronald J. Bacigal, Putting the People Back into the Fourth Amendment, 62 GEO. WASH. L. REV. 359, 396 (1994) (describing how courts allow themselves "alternative expressions of a single determination" when it comes to Fourth Amendment analyses); Ninth Circuit Upholds, supra note 6, at 823 (attributing the expansion of DNA collection to the growing number of permissible rationales for suspicionless searches available to judges).

the risk of "slippage" towards a more expansive DNA database. Accordingly, inconsistency and ambiguity abound within two legal theories used to justify the government's DNA harvesting in the name of crime control under the Fourth Amendment. One can classify the main theories advanced by the courts, the "special needs" doctrine and the "totality of the circumstances" balancing test, as inherently imprecise. These two approaches are the product of what scholars refer to as the Fourth Amendment's "interpretive mess," where "each doctrine is more duct tape on the Amendment's frame and a step closer to the junkyard."

For example, many claim that "special needs" beyond the normal needs of law enforcement means whatever the government wants it to mean, which will quickly work to extinguish any fundamental right to privacy enjoyed by average citizens. Others characterize the Fourth Amendment "totality of the circumstances" balancing approach (used by many courts to justify DNA collection from convicts) as a "malleable and boundless standard."

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69. In Jones v. Murray, the court upheld a statute requiring all felons (including non-violent felons) to contribute to a DNA database for administrative convenience, rather than to further law enforcement. A dissenting judge said that the case lead him to a "deep, disturbing, and overriding concern that, without a proper and compelling justification, the Commonwealth may be successful in taking significant strides toward establishment of a future police state, in which broad and vague concerns for administrative efficiency will serve to support substantial intrusions into the privacy of citizens." Jones v. Murray, 962 F.2d 302, 315 (4th Cir. 1992) (Murnaghan, J., concurring in part and dissenting in part).

70. See e.g., Nicholas v. Goord, No. 01 Civ. 7891, 2004 U.S. Dist. LEXIS 11708, at *16 (S.D.N.Y. 2004) (noting that, although the court considers a number of factors, the Fourth Amendment balancing test used to assess the reasonableness of a government search is "incapable of precise definition or application"); State v. Olivas, 856 P.2d 1076, 1090 (Wash. 1993) (Utter, J., concurring) (noting that the rationale for the "special needs" doctrine has not been fully explained by the Supreme Court); Puri, supra note 22, at 9 (noting that "[v]ague phrases such as 'law enforcement purposes'” allow for a very expansive interpretation or a very narrow one); Donald R.C. Pongrace, A Symposium of Critical Legal Study: Stereotypification of the Fourth Amendment's Public/Private Distinction: An Opportunity for Clarity, 34 AM. U.L. REv. 1191, 1192, 1198 (1985) (asserting that "both the rhetoric and substance" of Fourth Amendment doctrine illustrates its "inherent manipulability").


73. Kincaide, 379 F.3d at 860 (Reinhardt, J., dissenting). The traditional Fourth Amendment balancing approach has also been characterized as a "nebulous" balancing act performed without a meaningful articulation of actual valuation standards, or "degrees of
The use of analogy as a decision-making tool represents another slippery slope factor. For example, nearly every court justifies its outcome, in part, by comparing DNA extraction and database entry to employee drug testing, or, more often, the police practice of fingerprinting. Drawing on such comparisons to justify application of an existing theory to a new set of facts increases the likelihood of slippage from a decision validating DNA databases including only felons, to a decision validating a population-wide database. This is because a judge who reasons by analogy can conceal inconsistencies in the theoretical backdrop.

For example, although courts continue to view regular fingerprints and "DNA fingerprints" as analogous because they both serve as identification markers, they differ in many ways. For instance, the usefulness of analyzing one's fingerprints begins and ends with their function as identifiers. A look into DNA, on the other hand, reveals a person's physiological memoirs. Although courts continue to accept law enforcement's defense of the fingerprint analogy, which claims that they store only "junk DNA" that uses identifiers containing no indication of genetic traits, this defense is losing validity among scientists. Once considered a "genetic wasteland," the

"importance." Bacigal, supra note 67, at 402. See Ninth Circuit Upholds, supra note 6, at 824 (noting that unlike the more restrictive special needs rationale, the totality of the circumstances analysis is "mushy" and "unconstrained by Fourth Amendment precedent," leaving courts free to adopt a sprawling rationale that might apply to anyone classified as having a reduced expectation of privacy). See also Sally E. Renskers, Comment, Trial by Certainty: Implications of Genetic "DNA Fingerprints", 39 EMORY L.J. 309, 324, 328 (1990) (noting that increased application of balancing tests to Fourth Amendment rights spells danger for individual privacy interests and broadens the scope of permissible government intrusions); Alexander Aleinkoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943, 976 (1987) (stating that the balancing test "takes place inside a black box").

74. See Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602 (1989) (upholding suspicionless drug testing of railroad employees and deeming the drug test a "minimal intrusion").

75. See Ramos, 817 N.E.2d at 1122-23 (explaining that DNA has been likened to fingerprints because, despite some differences, they both serve as identity markers); Colorado v. Shreck, 107 P.3d 1048, 1053 (Colo. Ct. App. 2004) (noting that other cases have recognized DNA samples as analogous to fingerprints in that they function as generic identification tools).

76. See Rizzo, supra note 49, at 575 (explaining why reasoning through analogy exacerbates the probability of slippage because "[f]or any characteristic a of an established case, there is a greater chance it will be found similar to another characteristic b of a newly arisen case") (emphasis added).

77. In other words, "statements of similarity may be made without recognition of their conflicting bases." Thus, "like cases will be treated alike" may not be truly alike according to a consistent principle or theory." Id.

78. See Bill Hughes and Richard Liebson, High-Tech DNA Raises Questions, THE J. NEWS, Apr. 2, 2004, available at http://www.thejournalnews.com/newsroom/040204/a0102dnaside.html (reporting that "junk DNA" is becoming more revealing every year as scientists discover more and more genetic markers). Also, many states preserve the original tissue or blood samples indefinitely. Consequently, when technology eventually reveals more about the human genome and "junk DNA," the samples will likely be used for additional purposes.
information contained in so-called “junk DNA” becomes more and more revealing every year and may well turn out to be “the very basis of human complexity.”

Through equating DNA collection statutes to the commonly accepted practice of fingerprinting, judges can simplify the constitutional analysis and conceal any theoretical “gaps” in their justifications. Judge Nelson’s dissenting opinion in *Rise v. Oregon*, poignantly points out how courts’ reasoning by analogy tends to over-simplify justifications advanced for DNA databases:

Relying on the glib linguistic ease with which various commentators categorize DNA genetic pattern analysis as a kind of genetic “fingerprinting,” the majority simply asserts that the purpose of identifying future criminal perpetrators makes it possible constitutionally to equate a forced blood extraction with a forced fingerprinting.

Thus, by reasoning through analogy, courts gloss over the crucial differences between fingerprints and DNA, which warrants a separate and more thoughtful legal analysis.

Additionally, courts often analogize a class of people characterized as violent felons with other classes of people such as: non-violent felons, prisoners in general, parolees, and felons whose terms have expired. Apparently, these individuals all share a reduced expectation of privacy that allows the government to keep their DNA on file, yet states are now adding misdemeanants, juveniles, and arrestees to this list. Consequently, the number of people now experiencing a reduced expectation of privacy is

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79. *See* Clive Cookson, *Regulatory Genes Found in ‘Junk DNA’*, FIN. TIMES (LONDON), June 4, 2004, at 11 (reporting that biologists are now finding that parts of the genome previously “dismissed as a genetic wasteland” actually carry out essential functions); W. Wayt Gibbs, *The Unseen Genome: Gems Among the Junk*, SCI. AM., Nov. 2003, available at http://www.mindfully.org/GE/2003/Junk-GenomeNov03.htm.; (discussing new scientific evidence revealing the unique and important functions of what was once “damed as junk because it was not understood . . .”); Jill C. Schaefer, *Comment, Profiling at the Cellular Level*, 14 ALB. L.J. SCI. & TECH. 559, 577-78 (2004) (asserting that scientists have already confirmed the presence of markers showing an individual’s susceptibility to type-one diabetes in “junk DNA”). *See generally*, John Cook, *Junk May Hold the Key to the Genome Puzzle*, THE SEATTLE POST INTELLIGENCER, Oct. 10, 2003, at D1 (discussing recent scientific endeavors to uncover “valuable pieces of genetic material” buried in what was once thought of as junk DNA).

80. *See* 59 F.3d 1556, 1564-70 (9th Cir. 1995) (arguing that the majority’s analysis fails to recognize the “critical constitutional distinction between coerced fingerprinting and blood extraction for DNA genetic pattern analysis”).

81. Id. at 1569.

82. *See infra* Part II. C. 1. (describing fingerprint analogy in the context of judicial extensions of precedent).

83. *Green*, 354 F.3d at 679 (Easterbrook, J., concurring).

84. Schaefer, *supra* note 79, at 578.

85. For example, in 2003 the state of Louisiana went from collecting DNA from anyone convicted of a felony or certain misdemeanors, to a law that now takes DNA from mere arrestees for inclusion in the state and the national database. Josh Noel, *La. Leader in Database of DNA: Collection Laws Most Liberal in U.S.*, THE ADVOC. (Baton Rouge), Dec. 4, 2004, at 1-B.
increasing exponentially. Most courts avoid articulating the degrees of privacy expectation required to hold on to one's DNA, but at least one judge points out the need for some differentiation. According to Judge Easterbrook, "Courts that have dealt with constitutional challenges to DNA-collection statutes frequently have lumped together all persons subject to these laws. Yet there are ... categories potentially subject to differing legal analysis." This represents yet another analytical shortcut often taken in the judicial justifications of DNA databases. Such shortcuts, however, work only to expedite the trip to the bottom of the slope.

C. Bunny Hills and Black Diamonds – The Types of Slippery Slopes Driving DNA Database Expansion

Although many complex forces yield the required momentum for sliding the acceptable initial proposal down to the unacceptable “danger case,” scholars such as Eugene Volokh have identified some specific slippery slopes. This Comment focuses on several types of slippery slopes most applicable to DNA database expansion: (1) judicial extension of precedent; (2) cost-lowering; (3) attitude-altering; and (4) small change tolerance. Evaluating these slopes will help to reveal the theoretical journey from an original proposal/decision (forcing sex offenders and murderers to contribute to a DNA database used for tracking and crime solving) to a “danger case” proposal/decision (forcing every citizen to contribute to a DNA database used for law enforcement and non-law enforcement purposes).

1. Extension of Precedent

The Fourth Amendment guarantees: “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no [w]arrants shall issue, but upon probable cause . . . .”

Although this amendment contains a reasonableness clause and a warrant clause, modern Fourth Amendment jurisprudence has merged these two clauses by permitting certain government searches conducted without a warrant or probable cause on a finding that a particular search is reasonable. The court assesses the reasonableness of a search using a “totality of the circumstances” analysis where it balances the government

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86. Green, 354 F.3d at 679 (Easterbrook, J., concurring).
87. See generally Volokh, supra note 3 (analyzing several different types of slippery slopes).
88. Id. at 1064.
89. Id. at 1039-50.
90. Id. at 1077-104.
91. Id. at 1105-15.
92. U.S. CONST. amend. IV.
93. See United States v. Knights, 534 U.S. 112, 122 (2001) (upholding a warrantless search of a probationer’s home finding it was reasonable in light of the government’s strong interest in rehabilitating probationers and protecting society from future criminal violations and the probationer’s diminished expectation of privacy).
interest against the individual’s expectation of privacy.\textsuperscript{94} The Supreme Court has also created express exceptions to the warrant and probable cause requirement, including the “special needs” doctrine that permits government intrusions serving special needs beyond the normal needs of law enforcement when the special needs outweigh the intrusion on individual privacy rights. Despite the lack of any consensus, courts have recently managed to stretch both of these Fourth Amendment analyses (“totality of the circumstances” and “special needs”) to cover the DNA collection statutes.\textsuperscript{95} The extension of precedent slippery slope analysis reveals how the practice of treating like cases alike can somehow lead to the invalid or “undesirable conclusion that unlike cases should be treated alike.”\textsuperscript{96}

For example, when weighing the government interest in collecting DNA from felons for storage in the database, nearly every court places great emphasis on the finding that DNA testing constitutes a “minimal intrusion.” In justifying this characterization courts often cite \textit{Skinner v. Ry. Labor Executive Ass’n}, where the Supreme Court held that the collection and analysis of urine samples from railroad employees constituted a search, but amounted to only a minimal intrusion.\textsuperscript{97} But, “unlike a test for drugs and alcohol – a measurement of a concentration that exists \textit{at a particular point in time} – DNA analysis maps immutable, lifelong characteristics of an individual.”\textsuperscript{98} Furthermore, in the urine collection at issue in \textit{Skinner}, the analysis performed revealed information describing only the particular employee donor (whether they were intoxicated or not), whereas DNA analysis provides information regarding a donor’s genome and “reveals the private concerns of the donor’s parents, children, and siblings.”\textsuperscript{99}

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\textsuperscript{94} \textit{Id.} Whether a search is reasonable “depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself,” and the propriety of a search is “judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.” \textit{Skinner}, 489 U.S. at 619.

\textsuperscript{95} However, not all the corners are fitting and according to Judge Reinhardt, “Neither Supreme Court precedent nor any established rule of Fourth Amendment law” supports programmatic searches used to detect evidence of “ordinary criminal wrongdoing” absent individualized suspicion. \textit{Kincade}, 379 F.3d at 843 (Reinhardt, J., dissenting).

\textsuperscript{96} See \textit{Rizzo}, supra note 49, at 558 (describing how, in systems where precedent controls the decision-making process, a “series of logical steps can link highly disparate cases” if the cases being decided are “distributed along a spectrum according to some relevant factor”).

\textsuperscript{97} \textit{Skinner}, 489 U.S. at 625. See \textit{Schmerber v. California}, 384 U.S. 757, 760-70 (1966) (finding that a blood test represented only a minimal intrusion and that it was reasonable under the Fourth Amendment to force a drunk driver to give blood at the emergency room). However, in \textit{Schmerber}, unlike the DNA cases, there was probable cause to suspect that the arrestee committed a crime and the police sought direct evidence of that crime in taking the blood. \textit{Id.} The court even recognized that, “the interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance desired evidence might be obtained.”


\textsuperscript{99} \textit{Id.} at 2021. See Recent Case, Icelandic Supreme Court Holds That Inclusion of an Individual’s Genetic Information in a National Database Infringes on the Privacy Interests
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Additionally, in *Skinner*, the search ended after the initial focused and immediate chemical analysis. With DNA extraction, however, "the 4th Amendment intrusion [...] is not primarily the taking of blood, but seizure of the DNA fingerprint and its inclusion in a searchable database." So, by citing *Skinner* as precedent for the minimal intrusion occasioned by DNA extraction and database entry, courts make it easier to find such a search reasonable under the Fourth Amendment, whether performed on felons or normal citizens. One court even admitted to feeling "discomfort with the seeming abandonment of... individualized suspicion" in the DNA cases, but was consoled by pointing to the drug testing in *Skinner* and observing that "there is nothing new about it."

Courts also engage in extending precedent when they cite *United States v. Knights*, to support a decision permitting law enforcement searches in the absence of individualized suspicion. The *Knights* court, applying the "totality of the circumstances" balancing test, found the warrantless search of a probationer's home reasonable. However, in *Knights*, the search was supported by reasonable suspicion and was specifically authorized by a condition of his probation. In fact, the *Knights* court made a point of saying, "we need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion." Nonetheless, courts use the holding in *Knights* to justify DNA searches, which, on the other hand, involve no modicum of reasonable suspicion that the individual has committed a specific crime. Courts dodge this distinction by focusing their justification on the similarities, e.g., probationers, felons, and all those convicted of a crime share diminished expectations of privacy, and the government holds a "monumental" interest in preventing recidivism, and reducing crime. In light of this, it comes as no surprise when the balancing test in the DNA cases yields the same result as the *Knights* case – a reasonable search.


100. *Kincade*, 379 F.3d at 873 (Kozinski, J., dissenting).
101. See Rothstein & Carnahan, supra note 21, at 142 (recognizing that if courts balance only the minimal intrusiveness of the physical blood extraction against the governmental interest, then further expansion of DNA testing for law enforcement will surely be upheld).
104. *Id.* at 122.
105. *Id.*
106. *Id.* at 120 n.6.
108. Whether courts upholding DNA database statutes focus their justifications on a diminished expectation of privacy or the "special needs" exception, all of them rely to some degree on recidivism rates. Consequently, as DNA databases continue to expand to include "all convicted offenders, non-convicted arrestees, or everyone at birth, critics have and will become more dubious of the recidivism argument." Puri, supra note 22, at 8.
Judge Reinhardt justifiably fears that using the *Knights* case as precedent starts courts down a "dangerous path" because it results in application of the "totality of the circumstances" approach simply because probationers have reduced expectations of privacy. In his dissenting opinion, Judge Reinhardt identifies some of the "countless groups of individuals" also legally recognized as holding reduced expectations of privacy. Through the extension of *Knights* and the failure to draw any clear lines when it comes to privacy expectations, courts have created a huge potential for slippage. The "totality of the circumstances" approach used in the DNA cases, stripped down to a balancing of interests—consistently situating a feather-light expectation of privacy opposite an elephant of a government interest—will undoubtedly apply again when courts review the inclusion of arrestees in DNA databases.

Courts upholding DNA collection statutes under the "special needs" doctrine also extend Supreme Court precedent. Two recent Supreme Court cases, *City of Indianapolis v. Edmond* and *Ferguson v. City of*
make it clear that the "special needs" exception to the rule that
searches must be based on some modicum of individualized suspicion only
applies when the government shows a special need "divorced" from its
general interest in law enforcement.\textsuperscript{116} If the court finds such a special need,
it then weighs the severity of the intrusion and the individual's privacy
interest against the government's articulated special need(s).\textsuperscript{117} Thus, courts
applying the "special needs" analysis to DNA cases distinguish law
enforcement's efforts to build a DNA database from the general efforts of
law enforcement to gather evidence of criminal wrongdoing.\textsuperscript{118} They
identify the purpose of the statutes as furthering several "special needs," such
as identification of criminals, deterrence of recidivism, and solving crimes.\textsuperscript{119}

A number of judges, however, "prefer to be more honest about the
matter" by pointing out that DNA databases are clearly designed for
providing evidence of criminality.\textsuperscript{120} One court, declining to apply the
"special needs" doctrine to a DNA collection statute, called it "intellectually
dishonest to decouple the collection of information... from the law
enforcement purpose for which the database was created."\textsuperscript{121} Nonetheless,
recent court decisions continue to cite "special needs" precedent to legitimize
DNA databases. In \textit{Griffin v. Wisconsin},\textsuperscript{122} for example, the Supreme Court
upheld the warrantless search of a probationer's home justified by existence
of "reasonable grounds" for a probation officer to believe that a search would
uncover contraband. The \textit{Griffin} court held that the state's operation of a
probation program qualified as a "special need."\textsuperscript{123} However, as Judge
Reinhardt pointed out, although \textit{Griffin} dealt with probationers, "the
similarities end there."\textsuperscript{124} In \textit{Griffin}, the search regime was designed to
facilitate the supervision of probationers during the limited term of
probation.\textsuperscript{125} The DNA statutes, on the other hand, are designed to monitor

\textsuperscript{115} See generally \textit{Ferguson v. City of Charleston}, 532 U.S. 67 (2001) (holding that a
hospital policy of testing pregnant women for drugs and giving over positive results to
prosecutors was clearly to generate evidence to assist in prosecution).
\textsuperscript{116} \textit{Id.} at 79; \textit{Edmond}, 531 U.S. at 37.
\textsuperscript{118} \textit{United States v. Kimler}, 335 F.3d 1132, 1146 (10th Cir. 2003); \textit{Hall}, 816 N.E.2d at
712.
\textsuperscript{119} See \textit{Roe v. Marcotte}, 193 F.3d 72 (2d Cir. 1999) (applying the "special needs"
doctrine and citing law enforcement's special need in deterring and solving crimes). See
generally \textit{Olivas}, 856 P.2d at 1076 (applying the "special needs" doctrine and emphasizing
the special needs of deterring recidivism).
\textsuperscript{120} \textit{Raines}, 857 A.2d at 49. See \textit{Velasquez}, 329 F.3d at 1176 (asserting that "there is
no question" that the primary purpose of the DNA collection statutes was one of law
enforcement given that its primary goal was to help solve past and future crimes); Kaye,
\textit{supra} note, 32 at 203 (arguing that, contrary to what some courts hold, the motive behind
the DNA database legislation has not been to replace fingerprints as identity markers but
"has always been to generate investigative leads").
\textsuperscript{121} \textit{Nicholas}, 2004 U.S. Dist. LEXIS 11708, at *15 (quoting \textit{United States v. Miles},
228 F. Supp. 2d 1130, n.6 (E.D. Cal. 2002)).
\textsuperscript{122} 483 U.S. 868 (1987).
\textsuperscript{123} \textit{Griffin}, 483 U.S. at 870-75.
\textsuperscript{124} \textit{Kincade}, 379 F.3d at 857 (Reinhardt, J., dissenting).
\textsuperscript{125} \textit{Id}. 
individuals for a period of time extending far beyond a conditional release’s period of supervision (i.e., for the rest of their lives), “even if all their civil rights are legally restored.” Moreover, courts using the “special needs” analysis conveniently avoid addressing the legitimacy of a “special need” to identify, monitor, supervise, and deter from recidivism an individual who committed a felony by “defacing” a government building when they were eighteen for the rest of their lives and beyond. Further, unlike Griffin, the forced extraction of blood mandated by state and federal DNA collection statutes is clearly not designed to rehabilitate probationers, but rather to promote the construction of a national DNA database to aid law enforcement in solving past and future crimes. Yet again, judges attempt to stretch the Supreme Court precedent to fit the contours of suspicionless DNA searches and DNA databases. In light of this, it seems that nothing stands in the way of a court’s stretching the “special needs” precedent to cover arrestees and, eventually, an all-inclusive DNA database. After all, isn’t ensuring a safer, more secure society a “special need?”

Through an extension of existing Fourth Amendment precedent to justify the initial decision (databases storing the DNA of convicted violent felons), courts have actually set a new precedent based on new justifications that lower courts, and even coordinate courts, will feel bound to apply.

126. Id. See also Jim Edwards, N.J.’s ‘Weedman’ Takes on DNA Sampling Law: All Convicted Criminals Must Give Samples, NAT’L L. J., November 17, 2003, Vol. 26, No. 12, Pg. 5 (reporting that sheriffs’ departments and intensive supervision programs officials are “[gearing] up to take cheek swabs from people who thought they’d paid their debt to society”).


128. In his dissenting opinion, Judge Reinhardt provides an updated list of crimes that subject an individual to permanent inclusion in the national DNA database, which includes offenses such as tearing a one-dollar bill in half, or interfering with a mailman in the course of his duties. Kincade, 379 F.3d at 846-47 (Reinhart, J., dissenting).

129. Id. at 857-58.

130. See Kaye, supra note 4 at 498 (analyzing the special needs line of cases and concluding that “the outcomes of but-for tests and mixed-motive inquiries . . . and there is room for states intent on including arrestees in their DNA databases to engage in strategic manipulation”); Legal Evolution, ST. PETERSBURG TIMES, Dec. 1, 2003, available at http://www.sptimes.com/2003/12/01/Opinion/Legal_evolution.shtml (“If the FBI can maintain DNA profiles on arrestees, then why not on all Americans?”).

131. See John P. Cronan, The Next Frontier of Law Enforcement: A Proposal for Complete DNA Databanks, 28 AM. J. CRIM. L. 119, 156 (2000) (asserting that DNA databases serve “special needs” such as making society safer). See generally Quarmby, supra note 19, ¶ 24-25 (advocating a population-wide DNA database and asserting that a safer society is a “special need”). Some argue that after September 11th, a “present need for foolproof identification and the increased level of national security it entails, would no doubt qualify as [a special need] too.” Id. at ¶ 25.

132. Volokh, supra note 3, at 1065-66. See United States v. Meier, No. CR97-72HA, 2002 U.S. Dist. LEXIS 25755 (D. Or. 2002) (“While the DNA Act covers a wider category of criminals, there is no reason to depart from the result in Rise.”).
Because this new precedent embodies vague\textsuperscript{133} and flexible justifications, lower courts can effortlessly stretch it to cover future proposals to expand databases to include arrestees, and eventually the entire population.\textsuperscript{134} Needless to say, courts have successfully used precedent as a ski lift, dropping us on the crest of the slope.

2. \textit{Cost-lowering}

Another slippery slope arises when a first decision upholds a proposal that lowers the costs of enacting a second proposal, which helps justify upholding the second proposal in the eyes of the decision makers.\textsuperscript{135} The cost-lowering slippery slope refers not only to quantifiable dollar savings, but also administrative, legal, and political considerations. To illustrate, judicial endorsement of law enforcement’s extraction and storage of DNA from convicted felons distributes more power to law enforcement; making arrests, prosecutions, and crime-control easier; increasing the amount of information accessible to the government,\textsuperscript{136} making it easier to identify and locate people; and providing law enforcement and forensic labs with more experience, making expansion of the databases seem less risky and more acceptable to the public, etc.

More specifically, judicial decisions upholding DNA databases for convicted felons in order to help deter and solve crime will effectively lower the cost of expanding the databases to cover arrestees, and then the entire population. Although opponents argue that expanding the databases is too expensive, others point out that the increased efficiency in crime solving would offset these additional costs.\textsuperscript{137} As the judicial justifications for including felons have already indicated, “DNA Database and Data Bank laws facilitate identification, prosecution, and exoneration of suspects...” Consequently, money spent on database expansion is viewed as an investment. For example, it will decrease the delay between issuing the

\begin{itemize}
  \item \textsuperscript{133} \textit{See Ninth Circuit Upholds, supra} note 6, at 824 n.52 (noting that, although a number of courts have upheld the DNA Act under a totality of the circumstances test, many of the opinions feature a "cursory or vague" legal analysis).
  \item \textsuperscript{134} According to Judge Kozinski: “If collecting DNA fingerprints can be justified on the basis of the plurality’s multifactor, gestalt high-wire act, then it’s hard to see how we can keep the database from expanding to include everybody.” \textit{Kincade}, 379 F.3d at 872 (Kozinski J., dissenting). \textit{See Ninth Circuit Upholds, supra} note 6, at 818 (explaining that the \textit{Kincade} majority’s use of a broad reasonableness standard to justify subjecting parolees to DNA database inclusion “opened a window” that the Supreme Court might close in order to protect Fourth Amendment rights of those never convicted of a felony).
  \item \textsuperscript{135} Volokh, \textit{supra} note 3, at 1041.
  \item \textsuperscript{136} \textit{See} Mark G. Young, Note, \textit{What Big Eyes and Ears You Have!: A New Regime For Covert Governmental Surveillance}, 70 \textit{FORDHAM L. REV.} 1017, 1023 (2001) (discussing the “allure of... crime-fighting” technologies and how it is “predictably and justifiably very strong” given that “‘information is power’... [i]n the context of criminal prosecutions”).
  \item \textsuperscript{137} “Although expanding the DNA Data Base is expensive, the additional cost will likely result in a greater ability of investigators to solve crimes” because it would “facilitate identification, prosecution, and exoneration of suspects...saving on Federal, State and Local funds expended in resolving those cases.” \textit{Manuel, supra} note 8, at 363.
\end{itemize}
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arrest warrant and the prosecution of a crime for individuals whose information has already been stored and eventually decrease the number of cases that go to trial and the duration of trials.\textsuperscript{138} Under this efficiency argument, expansion seems both economically sound and socially desirable, making a proposal to include arrestees seem more legitimate to decision makers.

Further, in response to recent judicial endorsements of criminal DNA databases, legislators are approving bills allocating huge sums of money to help improve the federal and state databases.\textsuperscript{139} The funds will not only help the federal and state governments to clear up DNA backlogs,\textsuperscript{140} but will provide better tools to analyze old DNA evidence and to collect more DNA samples from possible offenders. This, in turn, will gradually reduce operational burdens and lessen the fiscal and political impact of a decision to expand the databases. In other words, the infrastructure is already in place, the national CODIS database holds over 1.6 million profiles, and funds have already been allocated for improvement and future elaboration.\textsuperscript{141} The result is that decision-makers will have even fewer justifications for not deciding in favor of proposals to expand databases to include arrestees. Critics of expansion proposals assert that the “likely reach of an arrest-based database should give pause to anyone hoping to limit database coverage to a small fraction of the population.”\textsuperscript{142} They accurately note that “[i]nclusion in a DNA identification database of half or more of the male population and nearly all African American men is an odd result for a policy intended to limit government’s control of samples and profiles of our DNA...”\textsuperscript{143} So, the population’s arrest rate\textsuperscript{144} practically dispenses a major argument.

\textsuperscript{138} Schaefer, supra note 79, at 574.

\textsuperscript{139} “The White House is pushing to make DNA a more effective law enforcement tool. Last month, it announced a plan to spend about $1 billion over five years to improve the national database.” Willing, supra note 30, at 1. See Porteus, supra note 4 at 1 (reporting that a justice department funding proposal would allocate at least one billion dollars over the next five years, towards enhancing DNA databases on all levels of the criminal justice system).

\textsuperscript{140} DNA’s Double Standard, supra note 18, at 1 (reporting that over the next five years the Bush administration intends to spend $800 million in upgrading DNA analysis systems to identify suspects in old unsolved crimes).

\textsuperscript{141} See James Herbie DiFonzo, In Praise of Statutes of Limitations in Sex Offense Cases, 41 HOUS. L. REV. 1205, 1240 (2004) (noting the Bush Administration’s proposed allocation of one billion dollars to improve the national DNA database and to train law enforcement personnel in DNA use).

\textsuperscript{142} Kaye & Smith, supra note 24, at 458.

\textsuperscript{143} Id.

\textsuperscript{144} Today “American police enjoy unprecedented power to arrest” and, therefore, search individuals for a whole host of minor offenses under local, state and federal laws. Wayne A. Logan, The Court Affords Police Constitutional Carte Blanche, 77 IND. L.J. 419, 436 (2002). For example, after Atwater v. City of Lago Vista, Texas, where police arrested a soccer mom for a seat belt violation, police can now arrest an individual on the spot if there is probable cause that a very minor offense was committed. Id. at 419-20. Further, legislative and judicial officials seem to openly acknowledge the government’s efforts to utilize these low-level offenses to serve greater law enforcement ends. Id. at 466. It is feared, however, that this “unfettered authority” to arrest not only strips the
advanced in opposition of an all inclusive database: "that it is financially and logistically feasible to sample DNA on arrest, but not feasible to sample everyone."¹⁴⁵

So, although decision-makers play a more passive role in creation of the cost-lowering slippery slope than in a precedent-extension slippery slope, it is a natural effect of the initial decision that makes a later decision, the "danger case," easier to justify.

The courts play the more inactive role of ignoring the ways in which judicial justifications change people's perceptions by "defining as benefits what we once deemed costs."¹⁴⁶

3. Attitude-Altering

According to scholar Eugene Volokh, the attitude-altering slippery slope occurs "when the expressive power of law changes people’s political behavior as well as their own behavior, by leading them to accept proposals that they would have rejected before."¹⁴⁷ Although the attitude-altering slippery slope seems more applicable to the average voter, in many ways judges face the same decisions and fall subject to the same external influences. Today, judges juggle substantial case loads and enjoy little more time to devote to researching a political issue than the average citizen. For this reason, all decision-makers, voters and judges alike, operate under a limited scope of rationality.¹⁴⁸ Consequently, decision-makers tend to defer to the existing state of the law and its well-researched and well-grounded justifications to guide their factual decisions on future proposals.¹⁴⁹

The attitude-altering slippery slope, then, describes how the initial decision, and similar decisions, gradually changes the public’s mind to make it more accepting of a later decision representing the "danger case."

Fourth Amendment of its reasonableness requirement, leaving the privacy and liberty it guarantees to citizens by the wayside, but also grants police even greater discretion and capacity to carry out discriminatory motives in enforcing the laws. Id. at 422, 466.

¹⁴⁵. Kaye & Smith, supra note 24, at 458.
¹⁴⁶. Scholar Laurence Tribe discusses the effects of judicial decisions on perceptions of cost:

[T]he Court, to the extent we heed its voice or allow it to speak for us, reorders our constitutional priorities and reshapes who we are – a people more interested in punishment of private wrongdoers than in security against unlawful intrusions by public officials, and a society in which we would rather deceive ourselves than confront life’s, and the Constitution’s, sometimes tragic choices. Yet the Court’s calculus, like any comparative calculation of costs and benefits, blithely ignores the way in which the decision at hand itself transforms us all by defining as benefits what we once deemed costs.


¹⁴⁷. Volokh, supra note 3, at 1036
¹⁴⁸. Id. at 1079-80. See Frank B. Cross, Decisionmaking in the U.S. Circuit Court of Appeals, 91 CAL. L. REV. 1457, 1477 (2003) (pointing to a study of district courts concluding that judges use "cognitive shortcuts to process imperfect information"); Id. at 1478 (quoting Justice Frankfurter: "[H]ow powerful is the pull of the unconscious and how treacherous the rationale process").

¹⁴⁹. Volokh, supra note 3, at 1079-80.
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Scholars refer to this attitude changing effect as the "is-ought fallacy." The erroneous assumption that simply because the law permits some government action, that action and similar ones must be proper. If the is-ought mindset truly influences decision makers, one can easily envision how "slippage" might occur. Implementation of the initial decision upholding databases, including DNA profiles only from felons, would lead people to assume the propriety of this decision and its justifications, making implementation of the "danger case," a database including DNA profiles from everyone, easier. In essence, "what starts off as using exceptional methods in exceptional circumstances may, with time, be internalized and applied in a growing number of cases." The risk of the attitude-altering effect increases when decision makers face a complex issue, e.g., whether the Fourth Amendment permits suspicionless searches of an individual's genetic makeup. Hence, the majority of these decision-makers will lack a "well-developed, comprehensive philosoph[y]" on the subject, making them more likely to defer to the expert judgment of prior courts and the legislature.

For example, recent judicial decisions upholding suspicionless searches in the context of criminal DNA databases almost always refer to past decisions made by lower courts or sister circuits, and also to the fact that every state and the federal legislature has enacted DNA collection statutes, to bolster the legitimacy of their decision. Moreover, the fact that legal challenges to state DNA collection statutes, even the broader laws encompassing anyone ever convicted of a non-violent felony, have been

150. Id.
151. Id.
152. Id. See also THE CONG. Q. RESEARCHER, supra note 4, at 457 (discussing predictions that the public sentiment toward DNA databases will change as a result of their "creeping expansion").
153. See Gross, supra note 112, at 1508-09 (discussing slippery slope theory and the use of interrogational torture).
154. One court, asserting that "DNA collection statutes present very difficult legal issues," declined to address certain "important" Fourth Amendment privacy issues in the absence of "meaningful adversarial briefing." Nason, 102 P.3d at 965.
155. See Volokh, supra note 3, at 1080-81 (asserting that the attitude-altering effect applies to "less empirical judgments" regarding complex issues like the permissible scope of police searches).
156. Id. at 1079-80, 1083. See Gross, supra note 112, at 1555 n.218 (observing that times of crisis cause judges to increase their "reliance on cognitive heuristics as a means of countering the lack of sufficient time to properly evaluate the situation"). Although Volokh focuses more on how the slippery slope influences the average voter, the same concepts apply to judicial decision makers because, albeit to a lesser degree, judges suffer from the same "rational ignorance" and also tend to defer to the first batch of judicial decisions (binding or not) on the issue and also to the well-informed and "expert" judgments of the legislature. Volokh, supra note 3, at 1082-83.
157. See Miller v. United States, 259 F. Supp. 2d 1166, 1174 (D. Kan. 2003) ("Nearly all courts have found DNA collection statutes to be reasonable searches under the Fourth Amendment and thus, constitutional ... "); Boling v. Romer, 101 F.3d 1336, 1340 (10th Cir. 1996) (asserting, "[w]e are persuaded to reach the same result, with respect to the statute at issue here, as our sister circuits"); Garvin, 812 N.E.2d at 781 (beginning its analysis by noting that all fifty states have enacted similar DNA collection statutes that have been found constitutional).
"uniformly successful," advances the notion that a more comprehensive database is legally and socially permissible. Because the existing state of the law calls for weighing a given individual's expectation of privacy against what will always be a "monumental" government interest in crime solving and crime-prevention, future decision makers will defer to what has become a familiar legal mantra because it is proper. And, as previously noted, the balance inevitably strikes in favor of the government under this legal reasoning.

Perhaps recognizing the generalities afflicting the applied legal rules, some judges attempt to limit the scope of their justification to only individuals convicted of violent felonies like rape and murder. Others insert collateral justifications, citing to the fact that the only individuals subject to inclusion in the database have been legally adjudicated as major threats to society after receiving adequate due process. These limitations, however, will not be enough to "notch" the slope and prevent judicial endorsement and implementation of a population-wide database down the road. As time passes, the details of the reasoning and the debates over the legitimacy of databases will be forgotten—"only the law itself will endure; and then advocates for future law B may cite law A as endorsing quite a different justification." In other words, soon the collateral details of the DNA cases will fall by the wayside; the dissents and concurrences will blur. We will be left with a governmental interest in crime solving that swallows every individual's right to privacy; and a society made up of individuals who

158. Rothstein & Carnahan, supra note 21, at 128-29.
159. The "existing state of the law" refers to application of the "special needs" exception and the traditional totality of the circumstances approach, which both involve a balancing of the privacy interests against the government interests at stake.
160. See Kincade, 379 F.3d at 838 (asserting that the government/public interests advanced by the DNA Act are "undeniably compelling" and "overwhelming"); Marcotte, 193 F.3d at 79 (finding that the DNA statute passes the balancing test because sex offenders have a high rate of recidivism and because "DNA evidence is particularly useful" in solving crime); Shaffer v. Suffle, 148 F.3d 1180, 1181 (10th Cir. 1998) (citing two cases for its assertion that the compelled collection of a DNA sample pursuant to state statute does not violate the Fourth Amendment); Rise, 59 F.3d at 1561 (stressing the government and public interest in crime prevention).
161. For both appellate courts and courts of last resort, the existence of positive horizontal precedent has a "statistically and substantively significant effect on judicial decisionmaking." Cross, supra note 148, at 1469-71. The existence of negative decisions, however, had relatively little impact on the outcome of future decisions. Id. at 1471.
162. See Raines, 857 A.2d at 48-49 (Wilner, J., concurring) (agreeing with the majority on the constitutionality of searches under the DNA collection statutes but finding the issue to be "a much closer one" for him, and consoling himself with the idea that criminals, "as a group defined by their own judicially-determined conduct," pose a special threat to public safety).
163. See Kincade, 379 F.3d at 843 (Reinhardt, J., dissenting) (asserting that, although his "colleagues claim to authorize merely the 'compulsory DNA profiling of certain conditionally-released federal offenders' . . . [w]e would be lucky indeed if it were possible to so limit the effect of their opinions").
164. Volokh, supra note 3, at 1089.
cannot even identify a problem with it.\textsuperscript{165}

4. \textit{Small Change Tolerance}

Civil libertarians often remind us that "\textit{p}eople will let their liberty be taken away slowly, though they would have resisted the changes to their freedom had they been proposed all at once."\textsuperscript{166} So, unlike the attitude-altering slippery slope, this type of slippery slope does not persuade decision makers to eventually support a next step.\textsuperscript{167} Rather, a series of steps warrants less attention and, therefore, less opposition.\textsuperscript{168} This happens because experience teaches us to view gradual change as less worrisome.\textsuperscript{169} One can also attribute tolerance of small changes to the natural attempts of a decision maker to avoid seeming petty or fanatical, preferring that others view them as "moderate."\textsuperscript{170} Small change tolerance, then, intermingles with the extension of precedent slippery slope. When courts apply rules that are inherently vague, or even those seeming relatively clear but vague at the margins, there is "uncertainty on the border between the covered and the uncovered."\textsuperscript{171}

Because existing precedent and the terms associated with the applicable legal tests leave a realm of "moderate" possible decisions, seemingly reasonable to most observers, judges deciding on a subsequent broader proposal, such as the inclusion of all arrestees in DNA databases, will enjoy considerable flexibility in where to draw the line.\textsuperscript{172} In other words, "if the
distance between this case and the precedents is small enough,” the general public, lawyers, and other judges will defer to that decision whether or not they would fully agree after reviewing the issue de novo. \(^{173}\) Therefore, if the judge chooses to draw the line between arrestees and regular citizens, it would not grab enough attention to generate opposition. Instead of taking the time to perform a thorough examination of the legitimacy of where to draw the line, judges and voters considering the issue will defer to the prior judgment because it represents only a small change within the realm of “moderate” decisions. \(^{174}\) Consequently, the nation can slip further and further down the slope without any barriers, until it is too late. Hitting the bottom becomes inevitable and the “danger case” becomes a reality. \(^{175}\)

For example, once a court validates recent state legislation calling for collection of DNA from all arrestees, the “small change” mandating DNA collection from everyone will seem to logically and naturally follow. This is especially true when considering arrest statistics indicating that roughly 90% of urban black males and 50% of all white males will be arrested at some time for either a felony or a misdemeanor. \(^{176}\) Further, if legislation were to mandate DNA sampling for traffic offenses as well, nearly every American would eventually find their way into the database. \(^{177}\) Soon, people will no longer associate genetic “harvesting” and government monitoring with hardened criminals newly released from federal prisons – it will be a neighbor, a family member, their 17-year-old child, or themselves. Judge Kozinski, in his dissenting opinion, fears this type of slippery slope the most:

Later, when further expansions of CODIS are proposed, information from the database will have been credited with solving hundreds or thousands of crimes, and we will have become inured to the idea that the government is entitled to hold large databases of DNA fingerprints. . . . And when the inevitable expansion comes, we will look to the regime we approved today as the new baseline and say, this too must be OK because it's just one small step beyond the last thing we approved . . . . The fishbowl will look like home. \(^{178}\)

\(^{173}\) Volokh, supra note 3, at 1112-14.

\(^{174}\) Scholar Eugene Volokh suggests that judges find it both politically and normatively tempting to defer to judicial decisions because they can avoid offending the majority view and because it allows them to shift the “burden of drawing and defending distinctions that don’t rest on any crisp rules.” Eugene Volokh, Crime Severity and Constitutional Line-Drawing, 90 VA. L. REV. 1957, 1981-82 (2004).

\(^{175}\) See Recent Case, Tenth Circuit Applies Reasonable Suspicion Standard to Stops for Minor Traffic Infractions, United States v. Callarman, 273 F.3d 1284 (10th Cir. 2001), cert. denied, 122 S. Ct. 1950 (2002), 116 HARV. L. REV. 697, 704 (2002) (observing that recent Fourth Amendment jurisprudence reflects an erosion of Fourth Amendment protections and the requisite levels of suspicion preceding government searches and warning that “[s]mall doctrinal changes can be and have been used over time to create substantial revision in the law”).

\(^{176}\) Kaye & Smith, supra note 24, at 455-56.

\(^{177}\) Id. at 456. Taking a DNA sample from anyone stopped for a traffic violation seems much more feasible in light of new DNA sampling techniques that simply apply a sticky patch to the arm to lift cells. Quarmby, supra note 19, ¶ 20.

\(^{178}\) Kincade, 379 F.3d at 873 (Kozinski, J., dissenting).
III. SUPREME COURT MUST PROTECT FOURTH AMENDMENT RIGHTS BY “NOTCHING” THE SLIPPERY SLOPE AND SENDING STATES TO THE TOW ROPE

By describing the characteristics of a slippery slope and exposing the subtle and interrelated forces causing the “slippage” toward a population-wide DNA database, this Comment attempts to revive a tired metaphor in order to reveal the risk of an undesirable future. One goal of this theoretical journey down the slope from the original proposition to the “danger case,” is to increase the potency of Judge Kozinski’s warning that “[t]his isn’t an issue we can leave for another day.”

Now, after making the “mechanisms” pushing us down the slope towards a population-wide database more visible, it is time to call for rescue. Although recent judicial decisions seem to have cleared the steep path ahead by brushing aside Fourth Amendment protections, it is not too late.

Instead of permitting lower courts and state legislatures to expedite the trip to the bottom, the United States Supreme Court must safeguard what remains of Fourth Amendment privacy rights by notching the slippery slope enhanced by prior justifications of DNA extraction and database entry. It must reject the statutory farming of arrestees’ and suspects’ DNA into state and nationwide databases. This requires erecting a constitutional “barrier” preventing the expansion of DNA databases beyond inclusion of convicted felons through a declaration that all other categories of society enjoy a measure of genetic privacy that outweighs any government interest in forced DNA collection, whether related to law enforcement or some other special need. By taking a stand on DNA database expansion, the Court can safeguard a modern definition of privacy from legal analyses leaving privacy vulnerable to complete extinction in the age of technology.

The Supreme Court must “notch” the DNA database slippery slope because the present judicial reasoning and legal theories used to legitimize law enforcement’s harvesting of DNA from convicted felons fail to protect the general citizenry from inclusion in a government-run database. This

179. Id.
180. According to Judge Kozinski, however, “[t]he time to put the cork back in the brass bottle is now – before the genie escapes.” Id. at 875.
181. See Volokh, supra note 3, at 1131 (asserting that “strong constitutional protection of substantive rights” is one method of notching the slippery slope).
182. The modern definition of legal privacy is characterized by “openly subjective, relativistic, and indeterminate premises,” leaving it vulnerable to further encroachments in the future. See Pongrace, supra note 70, at 1203 (criticizing the modern definition of privacy and the decline of the distinction between the public and the private realms of human activity).
entails mandating states that have enacted, or plan to enact, DNA collection statutes applicable to individuals outside the category of convicted felons to "climb back up" the slope. The Court must also steer the federal government toward the tow rope, because the Bush administration has pushed for FBI access to the entire range of samples included in state DNA databases, which contain samples from arrestees, misdemeanants, and other individuals not included under the Federal DNA Act.

First, however, the Supreme Court must further clarify the "special needs" doctrine by declaring it inapplicable to DNA databases. This is because DNA harvesting is undeniably entangled with the normal needs of law enforcement; namely, efforts to solve past and future crimes. Second, the Court must impose limits on the judicial balancing act that permits DNA harvesting by creating an absolute category "that would objectively establish [an] inviolable zone[] of privacy." For example, unless one has committed a felony involving a deadly weapon or a crime against humanity, then the individual's expectation of genetic privacy should withstand whatever interest the government advances in its effort to fill the databases. Only by definitively quantifying the individual privacy expectation in this way can the Court protect free citizens from the crushing weight of the

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187. *See Kincade*, 379 F.3d at 855 (Reinhardt, J., dissenting) (asserting that the "government maintained from the outset of this litigation that the purpose of the searches authorized by the DNA Act is to 'help law enforcement solve unresolved and future cases'”).

188. The court’s balancing of an individual’s privacy rights against the government’s substantial interests in DNA collection makes database expansion efforts easier to justify. For example, according to Charles Black, "as a matter of attitude, the language of ‘balancing’ is apt language, easily conformable language, for the job of cutting down to what somebody thinks is comfortable size the claims to sometimes awkward human freedom which the Bill of Rights sets out to protect." *See Gross, supra* note 112, at 1507 (quoting Charles Black to support the assertion that “it is easier to justify the use of torture when engaging in ‘balancing’").

189. Pongrace, *supra* note 70, at 1211.
government interest in DNA collection under the Fourth Amendment balancing test. The Supreme Court must take these affirmative steps because the privacy loss that comes with DNA database expansion goes beyond other infringements society is willing to tolerate.

First, the risk of abuse associated with DNA collection is both unprecedented and substantial. DNA holds more biological, and possibly even psychological, information about a particular individual than anything the government has ever demanded access to. This opens the door to a whole new world of government surveillance capabilities and discriminatory behavior. For example, both "employers and insurers have struggled intensely during the era of the human genome against laws which would restrict them from accessing or using genetic information." Second, the knowledge, and potential knowledge, the government amasses about its citizens in DNA databases disrupts the delicate power balance and the unique relationship between the American government and its citizens. Because DNA "will be used to solve crimes that have not yet been committed... it requires searches of people who are not yet suspects." Consequently, Americans will come to feel as if they really do reside in a "nation of suspects." This type of governmental intrusion goes to the very "core" of national identity and human dignity. Thus, the unique treachery

190. Law enforcement consistently argues that DNA collection furthers the government interest in crime solving and prevention, that DNA searches are reasonable, and that "the need to find and prosecute the right offenders trumps the privacy concerns of individuals." McAree, supra note 24, at 4.
191. When it comes to Fourth Amendment privacy concerns arising in the context of new technology and government surveillance capabilities, legal scholars have suggested that courts should preserve Fourth Amendment protections by conducting a more substantive analysis of a citizen's privacy expectations, which would result in finding more areas of government intrusion violative of the "reasonable expectation of privacy" test. Peter P. Swire, Correspondence: Katz is Dead. Long Live Katz, 102 MICH. L. REV. 904, 923 (2004).
192. For instance, society tolerates the loss of anonymity associated with fingerprint databases and the use of social security numbers.
193. For example, privacy advocates note that researchers are now identifying genetic markers for hair color, height, and other identifying features that authorities will soon want to search DNA samples for. Willing, supra note 30, at 1. This will provide government with an even greater ability to monitor its citizens.
194. See Brave, supra note 33 (asserting that researchers might attempt to "gain access to the DNA collection from a variety of felons, such as serial killers or pedophiles, to determine whether or not there is any genetic contribution").
195. Id.
196. Kincade, 379 F.3d at 843 (Reinhardt, J., dissenting). For example, allowing the government to collect and centralize large amounts of private information about its free citizens permitted "[o]ur government's surveillance and shameful harassment" of suspected communists in the middle of the twentieth century. It also assisted the government in rounding up Japanese Americans during the Palmer Raids of World War II. Id. at 843.
197. Edwards, supra note 1276, at 5.
198. Kaye, supra note 4, at 456-57
199. See Urbonya, supra note 68, at 162 (describing the importance of privacy to human
of the DNA slippery slope making it worthy of Supreme Court attention comes from the increase in government power, genetic discrimination, and the distortion of national identity that it leads to.

Accepting the trade-off is not the answer to the issue of DNA database expansion. A number of proposals attempt to legitimate population-wide databases on the justification that national security trumps any privacy interest one holds in their genetic profile. Perhaps this solution appears more appealing than ever before in light of America's post-September 11th insecurities, the ongoing War on Terror, and the impact of the Patriot Act on privacy expectations. Such proposals, however, view the Fourth Amendment as a "mere technicality," a "pointless annoyance" – obstructing the path to more efficient crime fighting and greater national security. Such a sentiment strips the Fourth Amendment from its substantive value to our republic.

We do not know what the future holds – when it comes to crime rates, terrorist threats, or the mapping of the human genome – but we do know our past. We know why the Constitution's framers included a Bill of Rights – because it is the only notch preventing that unique, but frail concept we call liberty, from speeding down the icy slopes of government power. More than any other provision, the Fourth Amendment's protection against search and seizure has been labeled "profoundly antigovernment." Perhaps because it is an area where citizens' relationship with their government "achieves its most stark and physical form." This is true because the amendment protects "core interests essential to human flourishing, interests in privacy, property, and freedom of movement." If the Supreme Court and American citizens don't acknowledge the realities of the slippery slope metaphor, then a population-wide DNA database may well plant the seed for a future police state, and will surely spell the death of Fourth Amendment privacy.

dignity); Kincade, 379 F.3d at 851 (Reinhardt, J., dissenting) (asserting that government control over its citizens' DNA affords it "monumental powers to intrude into the core of those intimate concerns which lie at the heart of the right to privacy").

200. Rizzo, supra note 49, at 579 (explaining that "accepting the trade-off" represents one method of coping with slippery slope issues).


202. See id. at 16 (discussing the early roots of the Fourth Amendment).

203. Id. at 29 (discussing the treatment of the Fourth Amendment as a mere technicality). One court solemnly noted that the increased pressure on law enforcement officers and advances in forensic science have caused a "fateful confluence of decreased concern for private constitutional rights" and a pronounced denigration of this country's once internationally esteemed legal protections. Riley, 906 F.2d at 855. Thus, more than ever, "[s]ensitivity to the dangers to civil rights" is vital. Id.

204. Bacigal, supra note 67, at 362. One scholar defined the Fourth Amendment as "the part of that venerable document that comes most into play when evaluating the boundaries, if any, of the government's prerogatives of searching and seizing in the name of maintaining order and safety." Young, supra note 136, at 1020.

205. Bacigal, supra note 67, at 362.

206. Taslitz, supra note 201, at 23.
However narrow the first opening, there will never be wanting hands to push it wide, and those will be the hands of the strong, the sagacious, and the interested... Something peculiar may be found in every case, and the future judges will look to the [newly adopted] principle alone, and lay aside the guards and qualifications. The people will not comprehend such subtleties.\textsuperscript{207}

\textsuperscript{207} See Volokh, \textit{supra} note 3, at 1088 (quoting Harrington v. Comm'r, 13 S.C.L. (2 McCord) 400, 406 (1823)).