

Constitutional Law—Diminished Expectations of Privacy and the Human Genome: Circuits Align on Mandatory DNA Profiling of Convicted Felons—*United States v. Weikert*, 504 F.3d 1 (1st Cir. 2007)

Pursuant to congressional mandate, individuals convicted of certain predicate offenses must submit to mandatory deoxyribonucleic acid (DNA) extraction.¹ Such an intrusion on personal autonomy implicates the Fourth Amendment, which affords all citizens the right to be free from “unreasonable searches and seizures.”² In *United States v. Weikert*,³ the United States Court of Appeals for the First Circuit, in a case of first impression, considered whether a forced DNA submission violates the Fourth Amendment.⁴ In reversing the district court’s decision to grant the defendant’s motion for preliminary injunction, the court joined eleven circuits and concluded that extracting and retaining DNA profiles of supervised releasees during their supervised terms did not violate the Fourth Amendment.⁵

In 1990, Leo Weikert pled guilty to conspiracy in the United States District Court for the Western District of Texas.⁶ After serving four years of the sentence, he escaped from prison but was apprehended and reincarcerated in Massachusetts five years later.⁷ After serving his original sentence for the conspiracy count and an additional eight-month term for escaping custody, Weikert began a court-ordered 24-month supervised release program.⁸

The probation office informed Weikert of its intention to secure a blood sample, pursuant to the DNA Analysis Backlog Elimination Act of 2000 (Act).⁹ In turn, Weikert filed a motion in the United States District Court for the

1. See 42 U.S.C. § 14135a (2006) (codifying majority of DNA Analysis Backlog Elimination Act of 2000); DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, 114 Stat. 2726 (codified as amended in scattered sections of 10, 18, and 42 U.S.C.); see also 18 U.S.C. § 3583(d) (2006) (penalizing refusal to submit to DNA extraction as violation of supervised release conditions).

2. See U.S. CONST. amend. IV; see also *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 616 (1989) (recognizing extraction of blood constitutes search for Fourth Amendment purposes); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (determining involuntary blood sample submission implicates Fourth Amendment); cf. *Winston v. Lee*, 470 U.S. 753, 766 (1985) (holding attempts to surgically remove bullets from defendant’s chest for evidentiary purposes violates Fourth Amendment).

3. 504 F.3d 1 (1st Cir. 2007).

4. *Id.* at 1 (examining issue in context of suspicionless DNA extractions of supervised releasees).

5. *Id.* at 15-18 (limiting holding by recognizing privacy interests may change once supervised release term ends).

6. *Id.* at 4 (reciting Weikert’s original conviction and sentence). Weikert pled guilty to conspiracy to possess and distribute cocaine and was sentenced to a 120-month incarceration term. *Id.*

7. 504 F.3d at 4 (noting Weikert subsequently pled guilty to one count of escape from custody).

8. *Id.* at 4-5 (describing Weikert’s incarceration schedule).

9. *Id.* (explaining probation office’s demands and Act’s requirements); see also 18 U.S.C. § 3583(d) (making DNA submission “an explicit condition of supervised release”).

District of Massachusetts to enjoin the extraction.¹⁰ The district court recognized at the outset of its opinion that eleven other circuits have concluded that some form of forced DNA submission is constitutional.¹¹ Despite the persuasive authority of eleven sister circuits, the district court reached a contrary conclusion by declaring the Act unconstitutional.¹²

The district court aptly recognized the circuit split over the applicable standard.¹³ After adopting a “special needs” approach, the lower court determined that DNA profiling serves merely to enhance general crime-solving ability.¹⁴ Consequently, the lower court issued the injunction, concluding that

10. 504 F.3d at 5 (recounting Weikert’s motion for preliminary injunction and request for hearing).

11. *United States v. Weikert*, 421 F. Supp. 2d 259, 261 (D. Mass. 2006) (acknowledging other circuit standards), *rev’d*, 504 F.3d 1 (1st Cir. 2007); *see United States v. Amerson*, 483 F.3d 73, 89 (2d Cir. 2007) (using special needs approach to validate Act); *United States v. Hook*, 471 F.3d 766, 773 (7th Cir. 2006) (holding Act constitutional under special needs test); *United States v. Conley*, 453 F.3d 674, 680-81 (6th Cir. 2006) (concluding Act complies with Fourth Amendment); *United States v. Kraklio*, 451 F.3d 922, 924-25 (8th Cir. 2006) (concluding Act’s requirements are constitutional); *Johnson v. Quander*, 440 F.3d 489, 496 (D.C. Cir. 2006) (upholding constitutionality of Act as applied to probationers); *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005) (declaring Act’s requirements reasonable as applied to supervised release based on totality of circumstances); *United States v. Kincade*, 379 F.3d 813, 832 (9th Cir. 2004) (en banc) (concluding no Fourth Amendment violation for suspicionless DNA submissions using totality of circumstances standard); *Groceman v. U.S. Dep’t of Justice*, 354 F.3d 411, 413-14 (5th Cir. 2004) (per curiam) (determining prisoners must submit to DNA extraction and that Act is constitutional); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003) (dismissing various constitutional attacks on Act); *cf. Padgett v. Donald*, 401 F.3d 1273, 1280 (11th Cir. 2005) (upholding constitutionality of a reciprocal Georgia state statute); *Jones v. Murray*, 962 F.2d 302, 306-07 (4th Cir. 1992) (upholding Virginia’s DNA extraction statute). *But see United States v. Weikert*, 421 F. Supp. 2d 259, 261 (D. Mass. 2006) (explaining non-circuit cases supply merely “persuasive authority”), *rev’d*, 504 F.3d 1 (1st Cir. 2007).

12. *United States v. Weikert*, 421 F. Supp. 2d 259, 270-72 (D. Mass. 2006) (granting injunction and predicting Act’s constitutionality), *rev’d*, 504 F.3d 1 (1st Cir. 2007). The First Circuit utilizes a four-part balancing test to motions for preliminary injunction. *See Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 11 (1st Cir. 2004) (outlining circuit’s standard for evaluating motions for preliminary injunction). The four factors are: “(1) the likelihood of success on the merits; (2) the potential for irreparable harm if the injunction is denied; (3) the balance of relevant impositions . . . ; and (4) the effect (if any) of the court’s ruling on the public interest.” *Id.* (internal citations omitted). The first factor, requiring the moving litigant to demonstrate the likelihood of success on the merits, carries dispositive weight and thereby dominates the analysis. *See New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002) (noting if plaintiff prevails on first, “the remaining factors become matters of idle curiosity”); *see also United States v. Weikert*, 421 F. Supp. 2d 259, 261 (D. Mass. 2006) (characterizing first factor as “sine quo non” in the First Circuit), *rev’d*, 504 F.3d 1 (1st Cir. 2007). Accordingly, both the lower and appellate courts in *Weikert* focused on Weikert’s likelihood of success as a means to determine the constitutionality of the Act’s requirements. *See* 504 F.3d at 5; *United States v. Weikert*, 421 F. Supp. 2d, 259, 261-62 (D. Mass. 2006), *rev’d*, 504 F.3d 1 (1st Cir. 2007).

13. *See United States v. Weikert*, 421 F. Supp. 2d 259, 263 (D. Mass. 2006) (applying “special needs” standard despite its minority application in other circuits), *rev’d*, 504 F.3d 1 (1st Cir. 2007). The other available standard, the general balancing test, balances governmental interests against individual privacy concerns. *Id.* (describing dichotomy among circuit standards).

14. *See United States v. Weikert*, 421 F. Supp. 2d 259, 265 (D. Mass. 2006) (reasoning recent Supreme Court precedent favors application of special needs test), *rev’d*, 504 F.3d 1 (1st Cir. 2007). The special needs test examines “whether the statute serves a special need distinct from traditional law enforcement, and, if the search does serve a special need, weighs the government’s special need against the intrusion on the individual’s privacy interest.” *Id.* at 264 (citing *Nicholas v. Goord*, 430 F.3d 652, 664 n.22 (2d Cir. 2005)). The district court dismissed the argument that recidivism prevention qualifies as a requisite special need, even though all

the Act fails to serve a requisite special need beyond the general needs of law enforcement.¹⁵ On appeal, however, the First Circuit reversed and remanded the case after concluding, based on a different standard, that a forced extraction of DNA from supervised releasees complies with the Fourth Amendment.¹⁶

DNA profiling involves examining thirteen predetermined locations (loci) inherent to every DNA molecule.¹⁷ The probability of two different DNA molecules displaying identical traits at these thirteen points is less than one in one trillion.¹⁸ Although an entire DNA molecule can provide extensive personal genetic information, these specific loci are allegedly void of such information, thereby warranting the title “junk DNA.”¹⁹ Debate exists, however, as to the legitimacy of that characterization.²⁰ Since DNA evidence reportedly entered the criminal justice system in 1987, the federal government and all fifty states now require some form of forced DNA extraction for certain criminal offenders.²¹ The collected samples are stored in centralized databases,

other circuits applying the test to this issue accepted such an argument. *Id.* at 265 (recognizing departure from other circuits using special needs test and rejecting recidivism argument).

15. See *United States v. Weikert*, 421 F. Supp. 2d 259, 265 (D. Mass. 2006) (explaining “government’s immediate purpose in collecting DNA samples is to solve crimes”), *rev’d*, 504 F.3d 1 (1st Cir. 2007). The district court explained, in dicta, that an injunction is still warranted even upon a finding that a special need exists. See *id.* at 265-70 (explaining second part of analysis also weighs in favor of injunctive relief).

16. 504 F.3d at 18 (determining Weikert “is unlikely to succeed on the merits of his claim”).

17. See Paul M. Monteleoni, Note, *DNA Databases, Universality, and the Fourth Amendment*, 82 N.Y.U. L. REV. 247, 250-51 (2007) (describing profiling process). The particular thirteen loci used reveal repeating sequences known as short tandem repeats. *Id.* at 251. The composite number of repeats at each locus point forms an individual’s DNA profile. *Id.*

18. See Peter Gill, *DNA as Evidence—The Technology of Identification*, 352 NEW ENG. J. MED. 2669, 2669-70 (2005) (explaining probability of matching DNA profiles). The global human population is approximately 6.6 billion. See U.S. Census Bureau, World POPClock Projection, <http://www.census.gov/ipc/www/popclockworld.html> (last visited Jan. 28, 2008).

19. See, e.g., 504 F.3d at 3-4 (characterizing DNA loci points used in profile as “junk DNA”); Patrick Haines, Comment, *Embracing the DNA Fingerprint Act*, 5 J. TELECOMM. & HIGH TECH. L. 629, 637-38 (2007) (acknowledging broad acceptance of term “junk DNA”); Monteleoni, *supra* note 17, at 251 (recognizing notion of “junk DNA”).

20. Compare H.R. REP. No. 106-900, pt. 1, at 27 (2000) (claiming loci points used in genetic profiling are noninformative and nonpredictive), and D.H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413, 431 (2003) (equating this type of genetic profile to social security number), with Meghan Riley, *American Courts Are Drowning in the “Gene Pool”: Excavating the Slippery Slope Mechanisms Behind Judicial Endorsement of DNA Databases*, 39 J. MARSHALL L. REV. 115, 128-29 (2005) (casting doubt on scientific acceptance of “junk DNA” rationale), and Justin Gillis, *Genetic Code of Mouse Published: Comparison with Human Genome Indicates “Junk DNA” May Be Vital*, WASH. POST, Dec. 5, 2002, at A1 (reporting “new discoveries [are] likely to force [scientists] to abandon the term ‘junk DNA’”).

21. See *Andrews v. State*, 533 So. 2d 841 (Fla. Dist. Ct. App. 1988) (admitting, for the first time, DNA evidence to link defendant to brutal rape scene); Debra Herlica, Note, *DNA Databanks: When Has A Good Thing Gone Too Far?*, 52 SYRACUSE L. REV. 951, 952 (2002) (characterizing *Andrews* as first case in which DNA evidence entered criminal trial). Now, the federal government and all fifty states require DNA extractions in one form or another. See generally SETH AXELRAD, AMERICAN SOCIETY OF LAW, MEDICINE AND ETHICS, *SURVEY OF STATE DNA DATABASE STATUTES* (2005), available at http://www.aslme.org/dna_04/grid/guide.pdf (compiling comprehensive data examining differences between state statutes).

thereby enabling law enforcement to take DNA evidence recovered from crime scenes and run electronic comparative searches against all collected DNA profiles in the country.²²

Circuits addressing the constitutionality of DNA profiling of convicted offenders disagree over the applicable evaluative standard, yet unanimously align over the end result.²³ While the Supreme Court has yet to approach this precise issue, it has provided guidance within the general umbrella of search and seizure jurisprudence.²⁴ Recently, in *Samson v. California*,²⁵ the Court upheld a parole scheme allowing random searches of parolees at any time without individualized suspicion.²⁶ Post-*Samson*, suspicionless searches of

22. See Daniel J. Grimm, *The Demographics of Genetic Surveillance: Familial DNA Testing and the Hispanic Community*, 107 COLUM. L. REV. 1164, 1167 (2007) (explaining individual state databases accessible to other states, creating “interlinked” indexing system). Under the federal regulatory scheme, DNA profiles are stored in the FBI’s Combined DNA Index System (CODIS). *Id.* at 1167-68 (noting CODIS combines all state and federal DNA data in one centralized database). CODIS originally began as a pilot project in 1990; however, today its use is mandated by the Act. *Id.* at 1167-68. Currently, CODIS contains over five million profiles. *Id.* at 1168 (citing FBI, NDIS Statistics, <http://www.fbi.gov/hq/lab/codis/clickmap.htm> (last visited Jan. 28, 2008)) (indicating statistic includes both forensic profiles and convicted offender profiles); see also FBI, CODIS Mission Statement and Background, <http://www.fbi.gov/hq/lab/html/codis1.htm> (last visited Jan. 28, 2008) (touting effectiveness of interlocking systems).

23. See 504 F.3d at 8-11 (outlining two competing standards). While all circuits agree that forced DNA extractions are constitutional, some uphold it based on a “special needs” standard. See *United States v. Amerson*, 483 F.3d 73, 79 (2d Cir. 2007) (holding special needs test applies to suspicionless searches of probationers); *United States v. Hook*, 471 F.3d 766, 773 (7th Cir. 2006) (concluding special needs analysis applies to evaluation of DNA extraction); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003) (relying on special needs analysis because DNA profiling exceeds general law enforcement needs). Other circuits, however, apply a traditional balancing approach by weighing the governmental and individual interests based on the totality of the circumstances. See *United States v. Kraklio*, 451 F.3d 922, 924 (8th Cir. 2006) (determining special needs analysis inapplicable); *Johnson v. Quander*, 440 F.3d 489, 496 (D.C. Cir. 2006) (balancing the interests at stake under general totality of the circumstances standard); *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005) (concluding general balancing test applies); *Padgett v. Donald*, 401 F.3d 1273, 1280 (11th Cir. 2005) (basing conclusions on totality standard); *United States v. Kincade*, 379 F.3d 813, 832 (9th Cir. 2004) (en banc) (upholding the DNA extraction on totality grounds); *Groceman v. U.S. Dep’t of Justice*, 354 F.3d 411, 414 (5th Cir. 2004) (per curiam) (declining adoption of special needs to DNA profiling in favor of totality of circumstances test); *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992) (relying on general balancing approach). The Sixth Circuit upheld the statute based on either standard, electing not to favor one over the other. See *United States v. Conley*, 453 F.3d 674, 679-81 (6th Cir. 2006) (remaining neutral by satisfying both constitutional standards).

24. See, e.g., *Illinois v. Lidster*, 540 U.S. 419, 428 (2004) (validating suspicionless highway checkpoint intended to collect information regarding recent crime); *United States v. Knights*, 534 U.S. 112, 122 (2001) (endorsing, based on “totality of the circumstances” rationale, warrantless searches of probationers supported by reasonable suspicion); *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987) (upholding, based on special needs analysis, warrantless search of probationers if “reasonable grounds” exist). In *Knights*, the Court referenced the defendant’s signed probation order (essentially a signed agreement), in which he agreed to subject himself to searches “at anytime, with or without a search warrant, warrant of arrest or reasonable cause” *United States v. Knights*, 534 U.S. 112, 114 (2001). Additionally, the Court explained that probation inherently limits an offender’s expectation of privacy. *Id.* at 119.

25. 126 S. Ct. 2193 (2006).

26. *Samson v. California*, 126 S. Ct. 2193, 2197 (2006) (reiterating parolees have reduced expectations of privacy, as explained in *Knights*). The Court in *Samson* considered the constitutionality of a California law subjecting parolees, as a condition of release, to searches or seizures by parole officers without a search warrant

parolees necessitate a traditional Fourth Amendment balancing test, rather than a more exacting “special needs” test.²⁷ *Samson*, coupled with congruous inter-circuit precedent, is prompting at least one state to test the limits of its newly validated constitutional authority.²⁸

An individual’s status as a criminal offender directly impacts any corresponding expectations of privacy because criminal offenders generally receive less Fourth Amendment protection than law-abiding citizens.²⁹ Further, within the broad ambit of “criminal offenders,” some offenders are entitled to greater privacy expectations than others, depending on the nature of the underlying crime and the subsequent punishment imposed.³⁰ In theory, punishment schemes that are more “akin to imprisonment”—e.g., parole—beget fewer privacy expectations than others farther removed from imprisonment—e.g., probation.³¹ Notably, in 1984, Congress set out to abolish most forms of parole in favor of supervised release—a new type of post-incarceration monitoring system overseen by the sentencing court rather than the Parole Commission.³²

or cause. *See id.* at 2196. Again, the Court deferred to the governmental interest of preventing recidivism. *See id.* at 2200 (regarding governmental interests as “substantial”).

27. *Samson v. California*, 126 S. Ct. 2193, 2197-2201 (2006) (reasoning “[t]he touchstone of the Fourth Amendment is reasonableness, not individualized suspicion”).

28. *See* CAL. PENAL CODE § 296(a)(2) (West 2004) (requiring DNA submission merely upon arrest for enumerated felony offenses). Consequently, thousands of arrestees, although never charged, must submit to mandatory DNA extraction. *See* Gilbert J. Villafior, Comment, *Capping the Government’s Needle: The Need to Protect Parolees’ Fourth Amendment Privacy Interests from Suspicionless DNA Searches in United States v. Kincaide*, 38 LOY. L.A. L. REV. 2347, 2347 (2005) (estimating 50,000 individuals in California arrested annually but never charged). *But see* CAL. PENAL CODE § 299 (West 2004) (requiring deletion of DNA profile from database upon acquittal, dismissal, or conviction reversal). Thus, the impact on privacy is minimal if the arrestee is never convicted. *See* Villafior, *supra*, at 2347-50; *see also* D.H. Kaye, *Who Needs Special Needs? On the Constitutionality of Collecting DNA and Other Biometric Data from Arrestees*, 34 J.L. MED. & ETHICS 188, 193-95 (2006) (opining DNA collection on arrest constitutional based on “‘biometric identification’ exception to . . . warrant requirement”).

29. *See* *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)) (explaining probationers “do not enjoy ‘the absolute liberty to which every citizen is entitled’”); *see also* *United States v. Reyes*, 283 F.3d 446, 458 (2d Cir. 2002) (indicating parolee status diminishes, among other things, Fourth Amendment protections); Robert Cacace, *Samson v. California: Tearing Down a Pillar of Fourth Amendment Protections*, 42 HARV. C.R.-C.L. L. REV. 223, 226 (2007) (explaining probationers and parolees enjoy fewer Fourth Amendment protections than law-abiding citizens).

30. *See* *Samson v. California*, 126 S. Ct. 2193, 2198 (2006) (citing *United States v. Knights*, 534 U.S. 112, 119 (2001)) (recognizing “continuum” of punishment schemes in which “parolees have fewer expectations of privacy than probationers”); *see also* *United States v. Cardona*, 903 F.2d 60, 63 (1st Cir. 1990) (proclaiming “parolees enjoy even less of the average citizen’s absolute liberty than do probationers” (internal citations and quotation marks omitted)).

31. *Samson v. California*, 126 S. Ct. 2193, 2198 (2006) (reasoning “the essence of parole is release from prison, before the completion of sentence . . .”); *see also supra* note 30 (indicating probationers retain greater Fourth Amendment protections than parolees).

32. *See* Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3673, 28 U.S.C. §§ 991-998 (2006) (creating supervised release to replace most forms of parole). The Sentencing Reform Act of 1984 requires courts to establish supervised release terms following imprisonment, the length of which varies depending on the nature of the underlying predicate offense. 18 U.S.C. §§ 3583(a)-(b). Additionally, the new system requires offenders

In *United States v. Weikert*, the First Circuit aligned itself with all sister circuits by validating the constitutionality of forced DNA submissions of supervised releasees.³³ In addition to considering the other circuits' jurisprudence, the First Circuit benefited from the additional guidance provided by the Supreme Court in *Samson*.³⁴ Furthermore, the *Weikert* court explained that federal courts generally do not "distinguish[] between parolees, probationers, and supervised releasees for Fourth Amendment purposes."³⁵ Accordingly, the First Circuit concluded *Samson* controls the standard, despite *Weikert*'s distinguishing status as a supervised releasee.³⁶ In a dissenting opinion, however, Judge Stahl disagreed, interpreting *Samson* as limiting the application of a traditional Fourth Amendment balancing test to three specific situations, none of which he considered applicable to this case: "(1) programmatic searches; (2) special needs searches; and (3) searches conducted as part of a state's conditional release program."³⁷

The majority found salient *Weikert*'s status as a supervised releasee, due to the inherent limitations the status imposes upon expectations of privacy.³⁸ The First Circuit rejected *Weikert*'s proposition that supervised releasees are entitled to greater substantive protection than parolees, standing by its earlier refusal to distinguish between punishment schemes for Fourth Amendment purposes.³⁹ The court also disposed of *Weikert*'s argument that drawing blood,

to agree to judicially-determined conditions, and any violations may revoke the release and require the offender to serve, in prison, all or part of the supervised term without credit for time served on post-release supervision. *Id.* at § 3583(e)(1) (outlining revocation procedures). While parole and supervised release are markedly similar in most respects, "unlike parole, supervised release does not replace a part of a term of incarceration, but instead is . . . given in addition to any term of imprisonment imposed by a court." *United States v. Reyes*, 283 F.3d 446, 458 (2d Cir. 2002) (quoting 1 NEIL P. COHEN, *THE LAW OF PROBATION AND PAROLE* § 5:11 (2d ed. 1999)).

33. 504 F.3d at 3 (indicating agreement with eleven circuits holding DNA submissions constitutional); *see also supra* note 11 (listing cases in eleven circuits holding DNA submission constitutional).

34. *See* 504 F.3d at 7-8 (noting only Second and Seventh Circuits' decisions postdate *Samson*). The Second and Seventh Circuits, however, adopted the special needs test, despite *Samson*'s contradictory holding. *See United States v. Amerson*, 483 F.3d 73, 79 (2d Cir. 2007) (distinguishing *Samson* by focusing on probationer/parolee difference, thereby narrowing *Samson*'s application to parolees); *United States v. Hook*, 471 F.3d 766, 772 (7th Cir. 2006) (remaining silent as to *Samson*'s application).

35. 504 F.3d at 9-10 (internal quotations omitted) (quoting *United States v. Kincade*, 379 F.3d 813, 817 n.2 (9th Cir. 2004) (en banc)) (indicating unwillingness to draw distinctions between probationers and parolees). *But see United States v. Amerson*, 483 F.3d 73, 79 (2d Cir. 2007) (distinguishing *Samson* by drawing probationer/parolee distinction).

36. 504 F.3d at 8-11 (determining "special needs" test inapplicable).

37. *Id.* at 18-19 (Stahl, J., dissenting) (attacking majority's conclusion that *Samson* requires application of totality standard). Furthermore, Judge Stahl, applying a special needs test, concluded the Act, as applied to supervised release, violates the Fourth Amendment. *See id.* (explaining, as majority conceded, that Act enhances only general crime-solving ability).

38. *Id.* at 8 (majority opinion) (reasoning *Weikert* has no expectation of privacy "that society would recognize as legitimate").

39. *Id.* at 11-12 (rejecting *Weikert*'s continuum-based theory regarding privacy expectations). The First Circuit has on occasion, however, distinguished between probationers and parolees for Fourth Amendment purposes. *See United States v. Cardona*, 903 F.2d 60, 63 (1st Cir. 1990) (citation omitted) (explaining "[o]n the

by itself, constitutes an unreasonable intrusion, explaining that such medical procedures are “commonplace” and otherwise “[in]significant.”⁴⁰ Regarding Weikert’s remaining privacy argument—that the *retention* of his DNA profile exceeds constitutional bounds—the court interpreted it as invoking two distinct concerns: (1) the potential for misuse of information; and (2) the possibility that future scientific discoveries will enable the government to obtain infinite personal information.⁴¹ The court held that the first argument warrants little consideration in a general balancing test because it fails to consider “present circumstances.”⁴² As to the second concern, the court stated that it would reconsider the issue if new genetic discoveries enhance the value of junk DNA; consequently, Weikert’s privacy interests garnered scant weight.⁴³

In contrast, the First Circuit gave significant credence to the government’s asserted interests.⁴⁴ For example, the court explained that the governmental need to monitor, rehabilitate, and prevent recidivism of parolees collectively represents important interests already deemed “substantial” by the Supreme Court in *Samson*.⁴⁵ Additionally, the court stressed that DNA profiling—as opposed to fingerprinting or photography—enables the government to solve crimes with unparalleled accuracy and efficiency.⁴⁶ Balancing these considerations in light of the Fourth Amendment, the First Circuit concluded that the governmental interests outweigh Weikert’s privacy expectation.⁴⁷ The court, however, significantly limited its holding by recognizing that Weikert’s privacy interests changed considerably upon completion of his supervised release term.⁴⁸ Accordingly, the First Circuit refrained from determining the

Court’s continuum of possible punishments, parole is the stronger medicine”). Nonetheless, the First Circuit chose not to distinguish between parole and supervised release. 504 F.3d at 10. In dicta, however, the court explained that supervised releasees receive *less* privacy rights than parolees because supervised release is a “form[] of conditional release follow[ing] . . . a term of imprisonment.” *Id.* at 11-12 (debunking Weikert’s characterization of supervised release).

40. 504 F.3d at 12 (quoting *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 625 (1989)) (recognizing widespread acceptance of blood drawing).

41. *See id.* (bifurcating Weikert’s argument).

42. *Id.* at 13 (dismissing argument due to conjectural nature). Additionally, the court noted the substantial statutory penalty for governmental misuse of genetic information as minimizing the risk. *See id.* (citing 42 U.S.C. § 14135e(c) (2006)) (highlighting deterrence-based statutory provision instituting \$250,000 fine and one-year imprisonment for improper use).

43. *Id.* at 12-13 (limiting holding to present circumstances and affording Weikert’s privacy interests little weight).

44. 504 F.3d at 13-15 (attributing more weight to governmental interests).

45. *Id.* at 14 (affording considerable weight to same privacy interests asserted by the government in *Samson*); *see also* *Samson v. California*, 126 S. Ct. 2193, 2200-01 (2006) (accepting State’s interests as “substantial”).

46. 504 F.3d at 14 (explaining DNA profiling may “exonerate those wrongfully suspected of criminal activity”).

47. *Id.* (determining DNA extraction reasonable under circumstances).

48. *Id.* at 15-18 (expressing concerns as to continued retention of DNA profiles following termination of supervised release).

constitutionality of *continued* DNA retention beyond the defendant's term.⁴⁹

Constrained by unanimous persuasive authority from sister circuits and inhibited by recent Supreme Court precedent, the First Circuit upheld the constitutionality of forced DNA extractions for supervised releasees during the defendant's term.⁵⁰ The court refused to distinguish *Samson* on either the applicable standard or diminished privacy interests, despite the possibility of using a parole/supervised release distinction.⁵¹ In this context, however, the differences between parole and supervised release fail to warrant contradictory constitutional treatment.⁵²

If Weikert were on probation, as opposed to supervised release, the situation might justify disparate treatment due to the more prominent categorical differences between probation and parole.⁵³ The differences between parole and supervised release, however, are limited considering supervised release, as a punishment scheme, replaced most forms of parole in 1984.⁵⁴ Moreover, post-disposition sentencing determinations deserve little, if any, consideration in this context because it is the underlying *conviction* of a predicate offense, not the subsequent punishment, that triggers the need to submit DNA.⁵⁵ Thus, the First Circuit reached an unsurprising result given the statutory and precedential framework controlling Weikert's motion.⁵⁶

Beneath the surface issues presented in *Weikert* lie more troubling concerns, which signal an erosion of Fourth Amendment principles.⁵⁷ If privacy interests fluctuate on a continuum, with maximum security incarceration at one end and law-abiding citizenry on the other, this recent wave of Fourth Amendment

49. *Id.* at 17 (adhering to First Circuit's "general practice of deciding constitutional cases narrowly"). Realistically, however, it is unlikely that the continued retention of Weikert's DNA following the conclusion of his supervised release will fail constitutional scrutiny. *Id.* at 19 (Stahl, J., dissenting) (casting doubt on Weikert's ability to have DNA removed from CODIS after serving his term). One Ninth Circuit judge predicted that "the chance that [the defendant] could have his DNA removed from the CODIS database once he completes his supervised release is about the same as the chance that someone arrested and fingerprinted, but eventually found innocent, could force the FBI to delete his fingerprints from its database, namely nil." *United States v. Kincade*, 379 F.3d 813, 875 (9th Cir. 2004) (Kozinski, J., dissenting) (opining same disposition will practically result even after expiration of defendant's term).

50. 504 F.3d at 6-18 (basing decision, in large part, on *Samson* and analogous precedents).

51. *See supra* note 30 and accompanying text (citing precedent endorsing distinctions between different punishment schemes for Fourth Amendment purposes).

52. 504 F.3d at 12 (characterizing parole and supervised release as roughly one and same); *see also supra* note 32 and accompanying text (outlining only minor differences between parole and supervised release).

53. *See supra* note 31 and accompanying text (indicating parole is more akin to imprisonment than probation).

54. *See supra* note 32 and accompanying text (recounting Congress's attempt to restructure federal punishment schemes).

55. *See* 42 U.S.C. § 14135a(a)(2) (2006) (requiring only those parolees, probationers, and supervised releasees with qualifying underlying offenses to submit DNA).

56. 504 F.3d at 6-18 (finding little room for flexibility in its ultimate determination).

57. *Id.* at 19 (Stahl, J., dissenting) (opining majority "lays the groundwork for the expansion of [its] analysis . . . to include ordinary citizens"); *see also* Cacace, *supra* note 29, at 237 (noting "[a]s the DNA cases make clear, courts are eager to extend *Samson's* logic along the continuum toward law-abiding citizens").

jurisprudence, epitomized in *Samson*, reflects a growing judicial proclivity to apply less-exacting standards further down the continuum, one notch at a time.⁵⁸ Moreover, the substantial weight afforded to general crime-solving needs, coupled with the negligible weight afforded to individual privacy interests, signals cause for concern that “ordinary citizens who, because of their employment, activity, or position in society” may be subjected to unwarranted and suspicionless searches.⁵⁹ Thus, applying less-exacting standards for suspicionless searches promotes arbitrary exercises of governmental authority, potentially on law-abiding citizens, thereby eroding those “procedural safeguards designed to preserve individual liberty.”⁶⁰

On balance, the First Circuit fairly addressed the competing interests at stake in *United States v. Weikert*, given the statutory and precedential parameters. By upholding the constitutionality of DNA profiling for convicted felons on supervised release, the court essentially closed the book on the issue, as all twelve circuits have established analogous precedent. By restricting its holding, however, the court legitimized many surface-level privacy concerns. For example, agreeing to reconsider the issue at the conclusion of Weikert’s term reflects the court’s reluctance to endorse a blanket acceptance of DNA profiling—the position taken by most other circuits. While mandatory DNA profiling arguably represents a reasonable exercise of governmental authority in the context of convicted felons, a slow and calculated erosion of Fourth Amendment principles underscores this particular issue. Specifically, the growing judicial proclivity for applying less rigorous standards to suspicionless searches lays the foundation for arbitrary governmental interference into the private lives of law-abiding citizens.

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58. See *Samson v. California*, 126 S. Ct. 2193, 2202-05 (2006) (Stevens, J., dissenting) (noting majority’s decision reached through “faulty syllogism” with “circular reasoning”); see also Cacace, *supra* note 29, at 229 (recognizing *Samson* “sanctions a dangerous conflation of the special needs and balancing test”).

59. 504 F.3d at 18-20 (Stahl, J., dissenting) (commenting on far-reaching consequences of majority’s analysis).

60. See Cacace, *supra* note 29, at 231 (asserting Pre-*Samson* safeguards namely include application of more rigorous standards to suspicionless searches). Applying more exacting standards, such as the special needs test, ensures careful judicial scrutiny by examining whether the purpose for a suspicionless search narrowly corresponds to some “critical” and “immediate” need. *Id.* (opining more rigorous standards better prevent arbitrary governmental interference with privacy expectations).