COMMENT

A Step Too Far: Due Process and DNA Collection in California After Proposition 69

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INTRODUCTION

Advances in science and technology are a boon to law enforcement.[1] Computers reduce the time it takes to process and distribute crime scene information.[2] DNA sequencing and genotyping technology can generate a suspect's DNA profile from miniscule samples.[3] These two developments led to the proliferation of DNA databases, which are able to sort rapidly through thousands of specimens to find a match.[4]

On account of the advantages these DNA databases provide to crime solving, states passed laws expanding DNA databases.[5] The expansion and unification of DNA databases creates a more efficient system because the size of a DNA database determines its chance of success.[6] Unfortunately, this expansion also increases the possibility of abuse.[7]

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[1] *See* MICROSOFT, CRIME SOLVING RATES EXPECTED TO INCREASE FOLLOWING DEVELOPMENT OF TECHNOLOGY CONCEPT DESIGNED TO HELP INVESTIGATIONS 4 (2004), http://download.microsoft.com/documents/customerevidence/7374_Nottinghamshire_Police_Final.doc (using technology to accelerate information flow); *see also* John P. Cronan, *The Next Frontier of Law Enforcement: A Proposal for Complete DNA Databases*, 28 AM. J. CRIM. L. 119, 127 (2000) (noting revolutionary impact of DNA technology on law enforcement); Rebecca Sasser Peterson, *DNA Databases: When Fear Goes Too Far*, 37 AM. CRIM. L. REV. 1219, 1220 (2000) (noting some commentators claim DNA fingerprinting is "single biggest advancement in forensic science").

[2] *See* MICROSOFT, *supra* note 1, at 4 (accelerating distribution of crime scene data from 48 hours to 2 hours).

[3] *See* Cronan, *supra* note 1, at 128 (explaining why DNA profiling surpasses other methods of identification); President's DNA Initiative, http://www.dna.gov/news/ (last visited Jan. 25, 2007) (compiling news stories about use of DNA to solve crimes).

[4] *See* Martha L. Lawson, *Personal Does Not Always Equal "Private": The Constitutionality of Requiring DNA Samples from Convicted Felons and Arrestees*, 9 WM. & MARY BILL RTS. J. 645, 649-50 (2001); Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 33 J.L. MED. & ETHICS 102, 103-04 (2005).

[5] *See* Sarah L. Bunce, United States v. Kincade — *Justifying the Seizure of One's Identity*, 6 MINN. J. L. SCI. & TECH. 747, 753-55 (2005) (discussing DNA database legislation); Cronan, *supra* note 1, at 133-34 (describing FBI national database); Maclin, *supra* note 4, at 103 (explaining how CODIS links federal, state, and local crime labs for exchanging DNA profiles).

[6] *See* Peterson, *supra* note 1, at 1226-27 (discussing importance of number of samples for DNA database); Mark A. Rothstein & Meghan K. Talbott, *The Expanding Use of DNA in Law Enforcement: What Role for Privacy*?, 34 J.L. MED. & ETHICS 153, 153 (2006) (discussing view that more samples increases chance of finding matches).

[7] *See generally* Christine Rosen, *Liberty, Privacy, and DNA Databases*, 1 NEW ATLANTIS 37, 37 (2003), *available at* http://www.thenewatlantis.com/archive/1/TNA01-Rosen.pdf (discussing potential misuse of DNA database information).

A larger database may tempt law enforcement officers to make questionable arrests to gain DNA samples.

California's passage of Proposition 69 emphasizes the need for DNA database safeguards.[8] Proposition 69 allows for sampling of DNA on arrest rather than on conviction, radically changing California's DNA database program.[9] The proposition also redesigned the DNA database removal process.[10] Proposition 69 vests greater discretion in the judge and limits appeals in a way that hinders requests for expungement of DNA information.[11] The proposition severely curtails DNA removal and allows the database to retain DNA without legal cause.[12] In its attempt to make the DNA database more useful to law enforcement, Proposition 69 fails to safeguard the rights of the accused.[13]

This Comment argues certain sections of Proposition 69 violate due process and encourage investigative detentions.[14] Part I describes DNA collection and DNA databases and then proceeds to examine Fourth Amendment concerns.[15] Part II analyzes Proposition 69 in detail.[16] Part III argues Proposition 69 encourages investigative detention, the removal process provided by the Proposition violates procedural due process, and the limitations on expungement violate the Constitution.[17] Part IV describes amendments to the proposition that would resolve the current constitutional problems.[18]

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[8] *See infra* Part III (discussing problems with Proposition 69).

[9] *See* CAL. PENAL CODE § 295 (West 2004) (requiring DNA extraction on arrest for certain felony offenses); Tania Simoncelli & Barry Steinhardt, *California's Proposition 69: A Dangerous Precedent for Criminal DNA Databases*, 33 J.L. MED. & ETHICS 279, 280 (2005) (calling Proposition 69's expansion radical).

[10] *See* CAL. PENAL CODE § 299 (West 2004).

[11] *See id.*

[12] *See id.* § 297 (West 2004) (preventing dismissal or invalidation of "any identification, warrant, arrest, or prosecution" based on database match because of delay or failure to purge records); § 299 (preventing dismissal or invalidation of "any identification, warrant, probable cause to arrest, or arrest" based on database match because of delay or failure to expunge information).

[13] *See* Alice A. Noble, Am. Soc'y of Law, Med. & Ethics, *Summary of Key Provisions of the California Proposition 69 Initiative Statute* 1 (2004), *available at* http://www.aslme.org/dna_04/spec_reports/cal_prop_69.pdf (stating amendment intended to make database "more effective law enforcement tool"); *infra* Part III.

[14] *See infra* Part III.C.

[15] *See infra* Part I.

[16] *See infra* Part II.

[17] *See infra* Part III.

[18] *See infra* Part IV.

I. BACKGROUND

The use of DNA in criminal investigations is a relatively recent development.[19] Scientists developed the techniques to extract unique DNA information from a cell sample twenty-one years ago.[20] Since then, DNA extraction methods have become an important tool in criminal investigations.[21] As a result, legislatures created DNA databases to catalogue samples.[22]

Not everyone embraced DNA databases.[23] Specifically, convicted criminals often attempted to stop extraction because many statutes required them to provide DNA samples.[24] These opponents to compulsory DNA sampling often challenged the legality of the collection process based on procedural due process and Fourth Amendment considerations.[25]

A. DNA Collection and Databases

The history of forensic DNA collection began with British scientist Dr. Alec Jeffreys.[26] Utilizing Jeffreys' method of DNA fingerprinting,

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[19] *See* Kathryn Zunno, United States v. Kincade *and the Constitutionality of the Federal DNA Act: Why We'll Need a New Pair of Genes to Wear Down the Slippery Slope*, 79 ST. JOHN'S L. REV. 769, 769 (2005) (noting use of DNA as "crime solving weapon" since 1986).

[20] *See* Corey E. Delaney, *Seeking John Doe: The Provision and Propriety of DNA-Based Warrants in the Wake of* Wisconsin v. Dabney, 33 HOFSTRA L. REV. 1091, 1097 (2005) (discussing development of DNA identification techniques).

[21] *See* John P. Tribuiano III, *The Continued Expansion of the DNA Database: California's Response to September 11th*, 34 MCGEORGE L. REV. 405, 406 (2003) (calling DNA testing "powerful and revolutionary tool" for identifying suspects and obtaining convictions).

[22] *See* Jacqueline K.S. Lew, *The Next Step in DNA Databank Expansion? The Constitutionality of DNA Sampling of Former Arrestees*, 57 HASTINGS L.J. 199, 205-06 (2005) (discussing rise of state DNA databases); Paul E. Tracy & Vincent Morgan, *Big Brother and His Science Kit: DNA Databases for 21st Century Crime Control?*, 90 J. CRIM. L. & CRIMINOLOGY 635, 685 (2000) (discussing first DNA database).

[23] Aaron P. Stevens, Note, *Arresting Crime: Expanding the Scope of DNA Databases in America*, 79 TEX. L. REV. 921, 937-39 (2001) (discussing legal challenges to DNA databases).

[24] *See* Rosen, *supra* note 7, at 38 (noting all states now require certain convicted criminals to give DNA samples).

[25] *See* Stevens, *supra* note 23, at 937-39 (discussing legal challenges to DNA databases).

[26] *See* Heidi C. Schmitt, *Post-Conviction Remedies Involving the Use of DNA Evidence to Exonerate Wrongfully Convicted Prisoners: Various Approaches Under Federal and State Law*, 70 UMKC L. REV. 1001, 1002 (2002) (discussing Alec Jeffreys).

the British police used DNA genotyping to identify a rapist in 1986.[27] DNA genotyping involves matching the DNA of the suspect to DNA from the crime scene.[28] This case was the first in which criminal investigators used DNA to identify criminals.[29] Since then, law enforcement authorities have depended on the ability of scientists to isolate unique DNA sequences from a suspect's genetic material.[30] Police can compare the DNA from a suspect with the DNA profile from the crime scene to see if the two samples match.[31] DNA databases use the same procedure, but on a much larger scale.[32] Instead of merely comparing one sample with another, a database electronically compares the DNA profile to every sample in the database.[33] This allows police to find a match even when they have no initial suspect because a database contains samples from many people and multiple crime scenes.[34] Known as "cold hits," these unexpected matches are an important part of the success of DNA databases.[35] A year after Jeffreys used DNA genotyping to solve the rape case in Britain, law enforcement authorities in the United States also started using DNA technology in a forensics setting.[36]

Two years later, in 1989, Virginia created the first DNA database in the United States, and other states soon followed.[37] In 1994, Congress

[27] *See* Debra A. Herlica, Note, *DNA Databanks: When Has a Good Thing Gone Too Far?*, 52 SYRACUSE L. REV. 951, 952 n.8 (2002) (describing first use of DNA in criminal investigation).

[28] *See id.* (describing first case using DNA fingerprinting); D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORNELL J.L. & PUB. POL'Y 455, 461-63, 489 (2001) (discussing DNA genotyping).

[29] *See* Herlica, *supra* note 27, at 952 n.8 (describing first case using DNA fingerprinting).

[30] *See* Lawson, *supra* note 4, at 647 (discussing uniqueness of DNA).

[31] *See* Tribuiano, *supra* note 21, at 406 (explaining how DNA comparison can inculpate or exculpate particular suspect).

[32] *See* Maclin, *supra* note 4, at 103-04 (discussing how DNA databases work).

[33] *See* Peterson, *supra* note 1, at 1219-20 (explaining how police compare crime scene DNA sample to all samples in database hoping for match); Tribuiano, *supra* note 21, at 406 (discussing origin of DNA samples); Warren R. Webster, Jr., Note, *DNA Database Statutes & Privacy in the Information Age*, 10 HEALTH MATRIX 119, 123 (2000) (describing how DNA match is determined).

[34] *See* Cronan, *supra* note 1, at 132 (noting DNA databases contain crime scene samples).

[35] *See id.* at 134 (pointing out that Florida's DNA database solved previously baffling crimes with DNA cold hits); Peterson, *supra* note 1, at 1219-20 (explaining "cold hit").

[36] *See* Rosen, *supra* note 7, at 38 (discussing spread of DNA profiling).

[37] Tracy & Morgan, *supra* note 22, at 685.

created a national database that incorporated all the state databases.[38] As DNA databases spread across the country, states began passing laws requiring certain groups to provide DNA samples.[39] Thus, ten years after Jeffreys' successful use of DNA profiling, all states in the United States required convicted felons to submit DNA.[40]

Every state has developed a criminal DNA database.[41] The statutes, however, vary greatly on who must give DNA.[42] DNA collection on arrest remains the least used method, and only four states authorize it for some or all felony offenses: Louisiana, Virginia, Texas, and California.[43] Of those states, only two, Louisiana and California, refuse to overturn a conviction based on DNA obtained by mistake.[44] California is the only state which specifies that failure to follow its DNA database act does not invalidate a database match.[45] People required to give samples to these DNA databases have tried a variety of arguments to prevent extraction of their DNA.[46]

[38] Rosen, *supra* note 7, at 38 (stating DNA Identification Act established national DNA database in 1994 known as CODIS that links all state DNA databases).

[39] *See* Cronan, *supra* note 1, at 132-33 (reviewing growth of state DNA databases).

[40] Rosen, *supra* note 7, at 38 (stating ten years after first conviction based on DNA evidence all states required convicted felons to submit DNA samples).

[41] *See* Seth Axelrad, Am. Soc'y of Law, Med. & Ethics, *Survey of State DNA Database Statutes Users Guide* 1-2 (2005), *available at* http://www.aslme.org/dna_04/grid/guide.pdf; Tribuiano, *supra* note 21, at 405.

[42] *See* Cronan, *supra* note 1, at 132 (noting state DNA database laws "vary extensively" on who must provide DNA samples).

[43] *See* Axelrad, *supra* note 41, at 3 (discussing which states allow DNA sampling on arrest).

[44] *Compare* LA. REV. STAT. ANN. § 15:609 (2004) (preventing invalidation of "detention, arrest, or conviction" based on database information obtained or placed in database by mistake), *with* CAL. PENAL CODE § 297 (West 2004) (preventing invalidation of "detention . . . or conviction" based on database information obtained, placed, or retained by mistake).

[45] *See* § 297 (preventing invalidation or dismissal of any "identification, warrant, arrest, or prosecution" based on database match because of failure or delay in "purging" records); *id.* § 298 (West 2004) (preventing invalidation of "arrest, plea, conviction, or disposition" because of failure to comply with provisions of chapter); *id.* § 299 (West 2004) (preventing dismissal or invalidation of "any identification, warrant, probable cause to arrest, or arrest" based on database match because of delay or failure to "expunge" information).

[46] *See* Shaffer v. Saffle, 148 F.3d 1180, 1181 (10th Cir. 1998) (holding DNA extraction does not implicate Fifth Amendment); Boling v. Romer, 101 F.3d 1336, 1339-40 (10th Cir. 1996) (extracting sample is not cruel and unusual punishment); Ryncarz v. Eikenberry, 824 F. Supp. 1493, 1502 (E.D. Wash. 1993) (holding no First Amendment right to prevent extraction).

B. Fourth Amendment Challenges to Collection

The Fourth Amendment applies to DNA sampling as it prohibits unreasonable searches and seizures and protects individuals from invasive government acts.[47] Taking DNA is a seizure under the Fourth Amendment.[48] Any compulsory sampling must therefore meet constitutional minimums. Convicts had a strong argument that suspicionless, compulsory sampling was unconstitutional, as a search or seizure requires probable cause except in limited circumstances.[49]

Convicted criminals also challenged the constitutionality of compulsory DNA sampling on several other grounds.[50] First, criminals alleged compulsory DNA sampling constitutes cruel and unusual punishment.[51] The Tenth Circuit Court of Appeals held otherwise in *Boling v. Romer*.[52] Next, criminals argued DNA extraction violated the tenets of their religion.[53] *Ryncarz v. Eikenberry* rejected this argument.[54] Then, convicts claimed compulsory extraction violated the right against self incrimination.[55] The Tenth Circuit refuted this Fifth Amendment challenge, holding there was no

[47] *See* U.S. CONST. amend. IV; Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (stating Fourth Amendment protects against unreasonable searches and seizures); United States v. Arvizu, 534 U.S. 266, 273 (2002) (stating Fourth Amendment prohibits unreasonable searches and seizures by government); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 613 (1989) (stating Fourth Amendment protects against invasive acts by government officers); United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976) (stating Fourth Amendment limits government to prevent oppressive action); Camara v. Mun. Court of S.F., 387 U.S. 523, 528 (1967) (holding basic purpose of Fourth Amendment is to safeguard privacy and security of people against arbitrary governmental invasions).

[48] *See Skinner*, 489 U.S. at 617 (holding collection of urine constitutes search under Fourth Amendment); Schmerber v. California, 384 U.S. 757, 767-68 (1966) (holding compelled intrusion into body for blood is Fourth Amendment search); United States v. Kincade, 379 F.3d 813, 821 (9th Cir. 2004) (holding extraction of sample for DNA profiling implicates Fourth Amendment and is search within meaning of Constitution).

[49] *See Skinner*, 489 U.S. at 619 (holding that absent certain defined circumstances, search or seizure is unreasonable without warrant and probable cause); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (stating search without probable cause is "per se unreasonable" except in only few specific and defined exceptions); Stevens, *supra* note 23, at 937 (discussing legal challenges to DNA databases).

[50] *See* cases cited *supra* note 46.

[51] *See* Stevens, *supra* note 23, at 937.

[52] *See* Boling v. Romer, 101 F.3d 1336, 1339-40 (10th Cir. 1996).

[53] *See* Stevens, *supra* note 23, at 937.

[54] *See* Ryncarz v. Eikenberry, 824 F. Supp. 1493, 1502 (E.D. Wash. 1993).

[55] *See* Stevens, *supra* note 23, at 937.

violation because DNA is not testimonial in nature.[56] Most compelling, however, were criminals' Fourth Amendment challenges to the taking of DNA as an unreasonable seizure lacking probable cause.[57]

Courts generally rule that convicts have a lowered expectation of privacy and find DNA collection is only a minimal intrusion.[58] Combined with society's increased interest in identifying criminals, compulsory sampling of convicts and parolees is not unreasonable and therefore does not violate the Fourth Amendment.[59] Some circuit courts have even held such sampling is a special need and thus exempted from the normal requirements of probable cause.[60] The key component in all of these cases is that a court has convicted the individuals of a crime.[61] This shift in status lessens the protection of the Fourth Amendment as courts are more willing to find these actions reasonable and allow compulsory sampling from convicted criminals.[62]

Only in rare circumstances, however, will a court uphold a search or seizure without probable cause.[63] This protection extends to arrestees

[56] *See* Shaffer v. Saffle, 148 F.3d 1180, 1181 (10th Cir. 1998); *see also Boling*, 101 F.3d at 1339-40 (discussing Fifth Amendment and DNA).

[57] *See* United States v. Kincade, 379 F.3d 813, 821 (9th Cir. 2004) (holding extraction of sample for DNA profiling implicates Fourth Amendment and is search within meaning of Constitution); Stevens, *supra* note 23, at 937.

[58] *See Shaffer*, 148 F.3d at 1181 (holding extraction reasonable and minimal intrusion); *Boling*, 101 F.3d at 1339-40 (holding extraction is minimal intrusion); Rise v. Oregon, 59 F.3d 1556, 1559-60 (9th Cir. 1995) (holding no need for probable cause or warrant for extraction from convicts); Stevens, *supra* note 23, at 937.

[59] *See Kincade*, 379 F.3d at 839 (noting "overwhelming societal interests" advanced by collecting DNA samples from convicts); People v. Adams, 9 Cal. Rptr. 3d 170, 183 (Ct. App. 2004) (holding databases limited to convicted felons and parolees do not violate constitutional rights because jury has convicted them and society has greater interest in identity).

[60] *See* Green v. Berge, 354 F.3d 675, 679 (7th Cir. 2004); United States v. Kimler, 335 F.3d 1132, 1146 (10th Cir. 2003); Roe v. Marcotte, 193 F.3d 72, 79-82 (2d Cir. 1999); *see also Kincade*, 379 F.3d at 830-31 (noting Second, Seventh, and Tenth Circuits as well as various district courts have upheld DNA collection statutes from convicts under special needs analysis).

[61] *See, e.g.*, *Adams*, 9 Cal. Rptr. 3d at 183 (basing decision to allow sampling on convicted status).

[62] *See* Hudson v. Palmer, 468 U.S. 517, 523-24 (1984) (stating prisoners retain some constitutional rights but less than non-prisoners); *Adams*, 9 Cal. Rptr. 3d at 183 (discussing shift in status); People v. King, 99 Cal. Rptr. 2d 220, 226-27 (Ct. App. 2000) (discussing lessened rights after conviction).

[63] *See* cases cited *supra* note 49.

as well as citizens.[64] In *County of Riverside v. McLaughlin*, the U.S. Supreme Court acknowledged that warrantless arrests are possible, but required a judicial determination of probable cause soon after.[65] While the Supreme Court stated this hearing should take place promptly, it is permissible to hold the hearing after booking.[66] The Fourth Amendment curtails the power of the government with these restrictions to protect the individual from abusive action.[67] Although the Fourth Amendment applies to warrantless arrests, that does not end the analysis.[68] Other factors may permit the Fourth Amendment violation and validate the actions of the government.[69]

Absent any justification, however, courts generally use the exclusionary rule to remedy Fourth Amendment violations.[70] Commentators have criticized this approach as allowing criminals to go free for minor violations of their rights.[71] As a result of this

[64] *See* Devenpeck v. Alford, 543 U.S. 146, 152 (2004) (applying Fourth Amendment to warrantless arrest); Maclin, *supra* note 4, at 105-06 (analyzing arrestees' Fourth Amendment rights to prevent DNA sampling).

[65] *See* County of Riverside v. McLaughlin, 500 U.S. 44, 53 (1991) (permitting warrantless arrests only if prompt probable cause hearing after arrest).

[66] *See id.* (stating jurisdictions are not "constitutionally compelled" to hold probable cause hearing immediately after completing booking).

[67] DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 196 (1989) (quoting Davidson v. Cannon, 474 U.S. 344, 348 (1986)) (holding Due Process Clause of Fourteenth Amendment prevents government from abusing its power or using it to oppress); Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (stating "touchstone of due process" is protection against arbitrary government actions); Camara v. Mun. Court of S.F., 387 U.S. 523, 528 (1967) (holding basic purpose of Fourth Amendment is to safeguard privacy and security of people against arbitrary governmental invasions).

[68] *Skinner*, 489 U.S. at 618-19 (stating applicability of Fourth Amendment is only beginning of inquiry under standards governing intrusions); O'Connor v. Ortega, 480 U.S. 709, 719 (1987) (stating determination that Fourth Amendment applies does not end analysis); New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) (stating applicability of Fourth Amendment is only beginning of scrutiny).

[69] *See Skinner*, 489 U.S at 618-19 (holding permissibility of intrusion requires balancing violation of individual's Fourth Amendment interests against promotion of legitimate governmental interests); *T.L.O.*, 469 U.S. at 337 (discussing Fourth Amendment balancing); Delaware v. Prouse, 440 U.S. 648, 654 (1979) (noting similar balancing).

[70] *See* Michigan v. Tucker, 417 U.S. 433, 447 (1974) (holding exclusion of evidence gained by misconduct is meant to create greater respect for rights of accused); United States v. Jones, 72 F.3d 1324, 1330 (7th Cir. 1995) (holding exclusionary rule removes tainted evidence to discourage future wrongdoing); David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1351 (2005) (discussing Fourth Amendment exclusionary rule).

[71] *See, e.g.*, Christopher Slobogin, *Testilying: Police Perjury and What to Do About*

dissatisfaction with the exclusionary rule, California voters in 1982 approved Proposition 8, an amendment to the California Constitution.[72] This amendment prevented suppression of relevant evidence seized in violation of the California Constitution.[73] If the seizure violates the Federal Constitution, however, the exclusionary rule applies to California courts and the judge must exclude the evidence.[74] Even a state constitution cannot abrogate certain rights because the Federal Constitution guarantees a minimum level of protection.[75] Exclusion of evidence is one of those guarantees.[76]

It, 67 U. COLO. L. REV. 1037, 1057-58 (1996) (suggesting elimination of exclusionary rule to reduce perjury); Charles Alan Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 TEX. L. REV. 736, 738 (1972) (discussing criticism of exclusionary rule).

[72] CAL. CONST. art. I, § 28(d) (removing exclusionary rule); *see In re* Lance W., 694 P.2d 744, 747 (Cal. 1985) (discussing Proposition 8).

[73] *See In re Lance W.*, 694 P.2d at 747 (holding Proposition 8 abrogated vicarious exclusionary rule created by state judiciary and right to suppress evidence seized in violation of California Constitution but that Federal Constitution could still require exclusion).

[74] *See* California v. Greenwood, 486 U.S. 35, 38 (1988) (holding Proposition 8 barred suppression of evidence seized in violation of California law but not federal law); People v. Souza, 885 P.2d 982, 987 (Cal. 1994) (holding Proposition 8 permits exclusion of unlawfully obtained evidence only if U.S. Constitution requires exclusion); People v. Rege, 30 Cal. Rptr. 3d 922, 924-25 (Ct. App. 2005) (holding federal constitutional standards govern review of issues related to suppression of evidence seized by police); People v. Gutierrez, 209 Cal. Rptr. 376, 377 (Ct. App. 1984) (holding California courts only suppress evidence illegal under federal constitutional standards).

[75] *See* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986) (stating there exists federal floor of protection); John E. Simonett, *An Introduction to Essays on the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 227, 234 (1994) (noting Federal Constitution establishes floor that limits even state constitutions); Foster A. Stewart, Jr., *The Role of New Federalism in Pennsylvania: Does United States Supreme Court Precedent Have Any Weight?*, 30 DUQ. L. REV. 707, 709 (1992) (stating federal constitution creates floor for individual liberties that states cannot go below); *Developments in the Law — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1385 (1982) (noting supremacy of Federal Constitution over state constitutions).

[76] *See* Segura v. United States, 468 U.S. 796, 804 (1984) (holding evidence directly resulting from unconstitutional search or seizure is subject to exclusion); Mapp v. Ohio, 367 U.S. 643, 648 (1961) (quoting Weeks v. United States, 232 U.S. 383, 392 (1914)) (stating courts should not sanction conviction through unlawful seizures); Barry Latzer, *Whose Federalism? Or, Why "Conservative" States Should Develop Their State Constitutional Law*, 61 ALB. L. REV. 1399, 1406 n.31 (1998) (noting that when Fourth Amendment requires exclusion, Supremacy Clause requires California judges exclude evidence even after Proposition 8); Francis Barry McCarthy, *The Exclusionary Rule as a Remedy in Pennsylvania Criminal Prosecutions for Non-Constitutional Rights*

Courts generally exclude evidence to encourage a change in the offending behavior, not to provide a remedy for the violation.[77] Thus, exclusion of evidence is appropriate to discourage arrests made without probable cause.[78] This rule helps to deter law enforcement officers from ignoring the requirements of the Fourth Amendment.[79]

Similar reasoning led the U.S. Supreme Court to hold that exclusion is proper even if a statute provides authorization for the search.[80] A court should exclude evidence, however, only if it will deter the activity and not impose a greater cost on society than allowing the violation.[81] The Supreme Court developed several exceptions to the exclusionary rule where the cost to society of excluding the evidence was greater than the deterrent effect.[82]

C. Exceptions to the Exclusionary Rule

Over the years, courts have developed several exceptions to the exclusionary rule.[83] Only three, however, are applicable to

and Wrongs, 65 TEMP. L. REV. 865, 866 (1992) (stating Federal Constitution requires exclusionary rule).

[77] *See* United States v. Leon, 468 U.S. 897, 918 (1984) (holding exclusion is meant to alter behavior of law enforcement officers); *id.* at 906 (quoting Stone v. Powell, 428 U.S. 465, 540 (1976)) (stating exclusionary rule is not intended to cure invasion of rights); United States v. Peltier, 422 U.S. 531, 538 (1975) (noting exclusionary rule is not personal right of aggrieved).

[78] *See* Hayes v. Florida, 470 U.S. 811, 817 (1985) (applying rule to arrest without probable cause); Florida v. Royer, 460 U.S. 491, 507-08 (1983) (applying rule to detention without probable cause); People v. Jenkins, 19 Cal. Rptr. 3d 386, 399 (Ct. App. 2004) (stating courts consistently apply exclusionary rule to evidence from warrantless arrests without probable cause).

[79] *See Jenkins*, 19 Cal. Rptr. 3d at 399 (discussing rationale behind exclusion).

[80] *See Leon*, 468 U.S. at 912 n.8 (holding exclusionary rule requires suppression of evidence from searches allowed under unconstitutional statutes); *see also* Ybarra v. Illinois, 444 U.S. 85, 96 n.11 (1979) (requiring suppression of evidence from searches allowed under unconstitutional statutes); Torres v. Puerto Rico, 442 U.S. 465, 474 (1979) (requiring suppression of evidence from searches allowed under unconstitutional statutes); Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973) (requiring suppression of evidence from searches allowed under unconstitutional statutes); Berger v. New York, 388 U.S. 41, 63-64 (1967) (requiring suppression of evidence from searches allowed under unconstitutional statutes).

[81] *See Jenkins*, 19 Cal. Rptr. 3d at 398 (holding exclusion appropriate only if it deters wrongful activity and cost of excluding does not outweigh benefit).

[82] *See In re* Lisa G., 23 Cal. Rptr. 3d 163, 165 (Ct. App. 2004) (holding exclusion of evidence is two part process — was evidence seized in violation of Fourth Amendment and is exclusion appropriate remedy).

[83] *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §§ 3.1(c), 9.3 (2d ed. 2006) (discussing exclusionary rule exceptions).

compulsory DNA extraction after a warrantless arrest.[84] These are the inevitability, good faith, and special needs exceptions.[85]

The doctrine of inevitable discovery requires that lawful actions independent of the misconduct would have inevitably discovered the evidence.[86] Speculative future actions cannot prove inevitability; the actions must be capable of verification.[87] This doctrine requires historical facts a court can verify.[88] Thus, for example, in *Nix v. Williams*, the doctrine applied to evidence in a location that searchers would have reached as part of an already started grid search.[89]

The good faith doctrine allows the admission of evidence if the officer acted in good faith on a warrant later found to be defective.[90] If there is no misconduct, exclusion fails to produce beneficial change.[91] Thus, the exclusionary rule does not apply to reasonable actions by law enforcement.[92]

An officer cannot use a bare bones affidavit for a warrant, however, and claim the good faith exception when others act on the warrant.[93] The judge must consider the objective reasonableness of everyone

[84] The other exceptions to the exclusionary rule are the exigent circumstances and independent source doctrines. Exigent circumstances allow a search if waiting risks destruction of evidence. *See* Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 HASTINGS L.J. 283, 287 (1988) (noting exigent circumstances allow search to prevent destruction of evidence). The independent source exemption allows use of evidence discovered by a separate source. *See* Nix v. Williams, 467 U.S. 431, 443 (1984) (allowing evidence only if discovered by process wholly independent of any violation).

[85] *See* O'Connor v. Ortega, 480 U.S. 709, 732 (1987) (discussing special needs exception); United States v. Leon, 468 U.S. 897, 905 (1984) (discussing good faith exception); *Nix*, 467 U.S. at 443 (discussing inevitability exception).

[86] *See Nix*, 467 U.S. at 432; People v. Perez, 630 N.E.2d 158, 162 (Ill. App. Ct. 1994) (requiring inevitable discovery of evidence by lawful means without reference to any misconduct).

[87] *See Nix*, 467 U.S. at 444 (requiring facts capable of verification for inevitability).

[88] See *id.* at 444 n.5 (stating inevitable discovery focuses on "demonstrated historical facts capable of ready verification").

[89] *Id.* at 449.

[90] *See Leon*, 468 U.S. at 905.

[91] *See id.* at 919 (discussing rationale for rule).

[92] *See id.* (noting exclusionary rule should not deter objectively reasonable law enforcement activity).

[93] *See id.* at 923 n.24; United States v. Weaver, 99 F.3d 1372, 1378 (6th Cir. 1996).

involved.[94] A court should still exclude the evidence if everyone involved did not act appropriately.[95]

Another exception, the special needs doctrine, allows a search if requiring a warrant or probable cause is impractical.[96] The special need must be independent of law enforcement.[97] Thus, in *Skinner v. Railway Labor Executives' Ass'n*, the Supreme Court upheld drug testing of railroad employees to prevent accidents, a need distinct from gathering evidence.[98]

These exceptions to the exclusionary rule allow the use of evidence that would otherwise be inadmissible.[99] If no exception applies, however, a court must exclude evidence from a search or seizure in violation of the Fourth Amendment.[100] This exclusion includes any evidence derived from the initial violation.[101] Proposition 69 requires DNA sampling on arrest, but if the police make an invalid arrest, a court must exclude evidence from DNA taken pursuant to that arrest.

II. PROPOSITION 69

Prior to the passage of Proposition 69, California's DNA database statute was less expansive. The California legislature created the state's first DNA database in 1998 to help solve sexual offense and violent crimes.[102] Known as the DNA and Forensic Identification Data Base and Data Bank Act of 1998 ("DNA Database Act" or "Act"), the

[94] *See Leon*, 468 U.S. at 923 n.24.

[95] *See id.* (discussing when exception would not apply).

[96] *See* O'Connor v. Ortega, 480 U.S. 709, 732 (1987) (holding exception for special needs beyond normal law enforcement where warrant and probable cause are impracticable).

[97] *See* Ferguson v. City of Charleston, 532 U.S. 67, 82-83 (2001) (declining to apply exception where immediate objective of search was to generate evidence for law enforcement purposes even though ultimate goal was substance abuse treatment).

[98] *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 620-21 (1989) (upholding testing of railroad employees to prevent accidents); s*ee also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 658 (1995) (stating one factor upholding special needs exception for drug testing was that school did not turn results over to law enforcement).

[99] *See* cases cited *supra* note 49.

[100] *See supra* note 49 (discussing unreasonableness in absence of exception).

[101] *See* United States v. Crews, 445 U.S. 463, 470 (1980) (holding exclusion applies to any "fruits" of constitutional violation); Wong Sun v. United States, 371 U.S. 471, 484 (1963) (holding exclusion is proper for indirect and direct products of invasion).

[102] *See* Tribuiano, *supra* note 21, at 406 (discussing history of California DNA Database Act).

DNA Database Act limited sampling to nine felonies.[103] Furthermore, police could compare a person's DNA with crime scene DNA only when that person was a suspect.[104] Subsequent amendments in 2000 and 2002, respectively, removed this limitation and also expanded the list of felonies for which the police could sample.[105] At this point, the total subset of crimes requiring sampling included arson, burglary, and other violent or sexual crimes.[106]

Voters approved Proposition 69 in 2004.[107] Bruce Harrington initiated the amendment to the DNA Database Act in the hope that a larger database would help solve the murder of members of his family.[108] The passage of Proposition 69 dramatically expanded California's DNA database.[109]

A. How Proposition 69 Works

Proposition 69 significantly amended California's DNA database law.[110] The proposition mandates compulsory sampling on conviction for any felony, arson, or misdemeanor sexual offense.[111] This change applies retroactively and requires DNA extraction from previously convicted prisoners and parolees who meet the new requirements.[112] This modification will add over 400,000 new samples to the database.[113] The statute also mandates DNA extraction from adults arrested for felony sex offenses or murder, and by 2009 the proposition requires sampling from adults arrested for any felony.[114] Although police currently arrest only 4,000 adults for qualifying charges, that number will grow exponentially with the expansion of

[103] *Id.* at 406-07.

[104] *Id.* at 406.

[105] *Id.* at 406-07.

[106] *See id.* at 407 n.20.

[107] *See* Simoncelli & Steinhardt, *supra* note 9, at 279.

[108] *See id.* at 280.

[109] *See* CAL. PENAL CODE § 296 (West 2004) (requiring compulsory DNA sampling on arrest for specified allegations); *id.* § 297 (West 2004) (preventing invalidation of convictions and arrests based on database identifications even if samples obtained by mistake); *id.* § 299 (West 2004) (listing requirements for expungement and removal); Simoncelli & Steinhardt, *supra* note 9, at 279-80 (calling expansion dangerous and discussing changes).

[110] *See* Simoncelli & Steinhardt, *supra* note 9, at 279.

[111] Noble, *supra* note 13, at 1 (listing Proposition 69 changes).

[112] *Id.*

[113] *See* Simoncelli & Steinhardt, *supra* note 9, at 280 (calculating number of retroactive samples).

[114] *See* Noble, *supra* note 13, at 1.

qualifying offenses.[115] When the 2009 provisions begin, sampling on arrest will add over 100,000 new entries a year to the database.[116]

In addition, the proposition modifies the DNA removal process.[117] An individual can request removal of DNA from the database if proven innocent or if a court dismisses the charges.[118] The petitioner must send a copy of the request to the court, the prosecuting attorney, and the California Department of Justice laboratory that manages the DNA samples.[119] If no one objects, then 180 days after petitioner gives notice, the judge may order the samples expunged.[120]

Proposition 69 grants the judge complete discretion in deciding to grant an expungement request.[121] The statute does not require a judge to expunge the DNA samples even if the petitioner meets all the requirements for DNA removal.[122] A person cannot appeal the denial of a removal request, nor can he challenge it by a petition for writ.[123] Even if a judge orders expungement, database administrators may fail to fully expunge the record.[124]

Other sections of the proposition prevent invalidation of information gained from a database match.[125] One section prevents invalidating or dismissing any identification, warrant, or arrest, or probable cause to arrest based on a database match because of failure to expunge a record.[126] Another section precludes overturning a conviction, arrest, or detention based on database information

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[115] *See* Simoncelli & Steinhardt, *supra* note 9, at 280 (calculating yearly samples based on arrests).

[116] *See* CRIMINAL JUSTICE STATISTICS CTR., CALIFORNIA ATTORNEY GENERAL, *Adult Felony Arrest Dispositions*, *in* CRIME IN CALIFORNIA 67, 67 (2003), *available at* http://caag.state.ca.us/cjsc/publications/candd/cd03/dispos.pdf (listing number of adult felony arrests for 2003).

[117] *See* Noble, *supra* note 13, at 2-3 (discussing changes to removal process).

[118] CAL. PENAL CODE § 299 (West 2004) (listing requirements for removal).

[119] *Id.*

[120] *Id.*

[121] *See id.* (discussing removal process).

[122] *See id.* (giving judge discretion to grant or deny request).

[123] *Id.*

[124] Any information not removed is available for future identifications. *See id.* § 297 (West 2004) (preventing invalidation of convictions and arrests based on database identifications even if samples obtained by mistake); *id.* § 298 (West 2004) (preventing dismissal of database identification for violation of Act's statutory requirements).

[125] *See infra* notes 126-28 and accompanying text (discussing prevention of invalidation).

[126] § 297.

acquired or retained by mistake.[127] A third clause refuses to invalidate an arrest, plea, or conviction because of a failure to comply with the statute.[128] These sections allow the database to keep data and police to use any information derived from that data regardless of its legality.[129] Consequently, citizens filed suits challenging Proposition 69 because the proposition changed important provisions of the DNA Database Act.[130]

B. Legal Challenges

Only a few suits challenging Proposition 69 have reached the courts since its passage.[131] One such case challenged the expansion of California's DNA database.[132] In 2005, a class action suit, *Weber v. Lockyer*, attacked the constitutionality of Proposition 69.[133] The plaintiffs claimed DNA testing on arrest violated the Fourth and Fourteenth Amendments.[134] The majority of plaintiffs in *Weber*, however, would not be subject to testing until 2009.[135] The court dismissed the case for lack of ripeness and it never reached the merits of the claim.[136]

Coffey v. Superior Court, another 2005 case, raised a different issue regarding Proposition 69.[137] Coffey pled guilty to a felony, but the judge sentenced him to a misdemeanor.[138] The court had the option to punish the offense as a felony or a misdemeanor, a type of offense known as a "wobbler."[139] Coffey argued the database should destroy

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[127] *Id.*

[128] *See* § 298 (preventing dismissal or invalidation for violation of Proposition 69's statutory requirements).

[129] *See infra* note 203 and accompanying text (discussing exclusion of evidence and Proposition 69).

[130] *See* Weber v. Lockyer, 365 F. Supp. 2d 1119, 1121 (N.D. Cal. 2005) (challenging Proposition 69 generally); Coffey v. Superior Court, 29 Cal. Rptr. 3d 59, 63 (Ct. App. 2005) (challenging denial of removal request); Simoncelli & Steinhardt, *supra* note 9, at 280 (calling Proposition 69 radical change).

[131] *See, e.g.*, *Weber*, 365 F. Supp. 2d at 1121 (attacking Proposition 69); *Coffey*, 29 Cal. Rptr. 3d at 63 (challenging denial of removal request).

[132] *See Weber*, 365 F. Supp. 2d at 1121 (challenging Proposition 69).

[133] *Id.* (arguing Proposition 69 violates Fourth and Fourteenth Amendments).

[134] *Id.*

[135] *Id.* at 1125.

[136] *Id.* at 1126.

[137] Coffey v. Superior Court, 29 Cal. Rptr. 3d 59 (Ct. App. 2005).

[138] *Id.* at 61-62.

[139] *Id.* at n.2. A wobbler offense is one that can be a misdemeanor or a felony depending on punishment imposed. If the convicted person is not sent to a state

his DNA samples because the judge sentenced him to a misdemeanor.[140] The trial court denied this request.[141] Coffey then requested a writ of mandate to order the lower court to remove his sample.[142]

The appellate court looked at the DNA Database Act as amended by Proposition 69, which controls the collection of DNA samples, for guidance.[143] Under the Act, denial of a request for expungement is not reviewable by writ or appeal.[144] Coffey claimed, however, that the samples were taken in violation of the Fourth Amendment as the statute did not authorize the seizure and, therefore, it was unreasonable.[145] The court agreed to hear his appeal as Coffey did not seek relief under the Act.[146] In dicta, the appellate court questioned whether the DNA Database Act could preclude constitutional challenges, but did not resolve the issue.[147] The court held that, despite Coffey not being a felon, no authority existed for expungement of his samples.[148]

So far, no court in California has considered the constitutional implications of Proposition 69.[149] Therefore, no one knows what level of deference a judge will give to the limitations on review and expungement in the DNA Database Act as amended by Proposition 69.[150] Even with a constitutional violation in obtaining the DNA, courts may not be able to provide a remedy as the statute prevents invalidation of database identifications.[151]

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prison, the offense is treated as a misdemeanor for all purposes. *See* People v. Holt, 690 P.2d 1207, 1215 n.7 (Cal. 1984) (discussing wobbler).

[140] *Coffey*, 29 Cal. Rptr. 3d at 63.

[141] *Id.* at 61-62.

[142] A writ of mandamus is an order from a superior court to a lower court requiring the lower court to perform a mandatory duty correctly. BLACK'S LAW DICTIONARY 973 (7th ed. 1999) (defining "writ of mandamus"). A successful petition for writ could require a lower court to order expungement of DNA records. *See Coffey*, 29 Cal. Rptr. 3d at 61 (seeking writ of mandate to compel lower court to order removal of DNA samples).

[143] *Coffey*, 29 Cal. Rptr. 3d at 63-64.

[144] *Id.* at 63; *see* CAL. PENAL CODE § 299 (West 2004) (prohibiting appeal of or petition for writ for denial of removal requests).

[145] *Coffey*, 29 Cal. Rptr. 3d at 64.

[146] *Id.*

[147] *Id.* at 65.

[148] *Id.* at 71.

[149] As of this writing no court has considered the constitutional validity of the act.

[150] *See generally Coffey*, 29 Cal. Rptr. 3d at 63-64 (pointing out Act generally precludes review of expungement decisions).

[151] *See supra* notes 126-28 and accompanying text (discussing prevention of

III. ANALYSIS

The dramatic changes wrought by Proposition 69 to California's DNA database raise several concerns.[152] The discretionary standard for removal hearings and the inability to appeal, along with the limitations on expungement, render the hearing meaningless and ineffectual.[153] The most troubling modifications are those restricting expungement.[154] These restrictions are an unconstitutional abrogation of the exclusionary rule and may encourage police misconduct.[155] The statute encourages investigative detentions because police can use a database match even when the initial arrest is invalid.[156]

A. The Hearing Provided by Proposition 69 for Removal of DNA Information Is Inadequate and Violates Procedural Due Process

The removal hearing provided by Proposition 69 is ineffectual and meaningless. A judge has unreviewable discretion to deny a removal request, and the statute limits the effectiveness of an expungement order.[157] This limited review is not acceptable because the initial seizure of DNA raises constitutional concerns.[158] The Constitution requires certain procedures that satisfy due process when arrestees are forced to give a DNA sample.[159] Therefore, Proposition 69's removal hearing is constitutionally inadequate.[160]

The U.S. Supreme Court has held due process requires a hearing when a person has been deprived of property.[161] This hearing must be

invalidation or dismissal).

[152] *See* Simoncelli & Steinhardt, *supra* note 9, at 284 (arguing Proposition 69 is highly problematic).

[153] See *infra* Part III.A.

[154] *See infra* Part III.B.

[155] *See infra* Part III.B.

[156] *See infra* Part III.C.

[157] *See* sources cited *supra* note 45.

[158] *See infra* note 180 and accompanying text (discussing seizures and due process for identification purposes).

[159] *See* United States v. Kincade, 379 F.3d 813, 821 (9th Cir. 2004) (holding extraction of DNA sample is constitutional search); Weimer v. Amen, 870 F.2d 1400, 1405 (8th Cir. 1989) (holding due process allows state to take "life, liberty, or property" only if certain procedures are followed).

[160] *See infra* notes 167-77 and accompanying text (discussing inadequacy of removal process).

[161] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (holding essential principle of due process is hearing appropriate to nature of case before deprivation); Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (holding some form of hearing required before deprivation); *Weimer*, 870 F.2d at 1405 (holding due process

meaningful and adequate to safeguard the right at issue.[162] Extracting a DNA sample is a seizure under the Fourth Amendment.[163] Some commentators argue people have a property interest in their DNA sample and courts have not ruled otherwise.[164] Keeping the sample after dismissal of charges therefore results in deprivation of property and due process requires a hearing.[165] This hearing must be adequate to protect the right and satisfy the requirements of procedural due process.[166]

The removal procedures and hearing process of Proposition 69 are flawed. The statute provides no guidelines or requirements for the

allows state to take "life, liberty, or property" only if certain procedures are followed).

[162] *See* Fuentes v. Shein, 407 U.S. 67, 80 (1972) (noting that meaningful manner of review is fundamental to procedural due process); Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (holding due process requires hearing be meaningful in time and manner); Link v. Wabash R.R. Co., 370 U.S. 626, 632 (1962) (holding opportunity for hearing adequate to safeguard constitutional right is fundamental requirement of due process).

[163] *See* cases cited *supra* note 48.

[164] *See* Boling v. Romer, 101 F.3d 1336, 1341 (10th Cir. 1996) (dismissing due process claim by inmate based on compelled extraction of DNA after conviction not for lack of property interest in DNA, but because trial itself satisfied due process hearing requirement); Rise v. Oregon, 59 F.3d 1556, 1562-63 (9th Cir. 1995) (stating no need for due process hearing for extraction of blood for DNA sample where statute requires conviction before extraction because not much to contest at subsequent due process hearing); Leigh M. Harlan, *When Privacy Fails: Invoking a Property Paradigm to Mandate the Destruction of DNA Samples*, 54 DUKE L.J. 179, 197-204 (2004) (arguing for property interest in DNA taken from innocent individuals for law enforcement purposes); Roberto Iraola, *DNA Dragnets — A Constitutional Catch?*, 54 DRAKE L. REV. 15, 45-47 (2005) (noting some commentators claim DNA sample triggers property interest and failure to provide procedural protections for retention or destruction of DNA sample may violate due process); Jonathan F. Will, Comment, *DNA as Property: Implications on the Constitutionality of DNA Dragnets*, 65 U. PITT. L. REV. 129, 130 (2003) (discussing property interest in DNA and due process). *But see* Michael S. Yesley, *Protecting Genetic Difference*, 13 BERKELEY TECH. L.J. 653, 664-65 (1998) (arguing no need for property interest in intangible genetic data like DNA).

[165] *See Loudermill*, 470 U.S. at 542; Hudson v. Palmer, 468 U.S. 517, 533 (1984) (stating unauthorized intentional deprivation of property does not violate due process if meaningful post deprivation remedy available); *Mathews*, 424 U.S. at 333; *Weimer*, 870 F.2d at 1405.

[166] *See* Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting) (saying right to be free from unreasonable searches and seizures is fundamental right); Peretz v. United States, 501 U.S. 923, 936-37 (1991) (referring to Fourth and Fifth Amendments as fundamental rights); California v. Carney, 471 U.S. 386, 390 (1985) (calling Fourth Amendment fundamental right); Fuentes v. Shein, 407 U.S. 67, 80 (1972) (noting that meaningful manner of notice and opportunity to respond are fundamental to procedural due process); *supra* cases cited note 162 (discussing procedural due process requirements).

judge to follow and the decision is left to the judge's sole discretion.[167] Thus, a judge can refuse to expunge a DNA sample even if the person meets the technical requirements of the statute.[168]

In addition, denial of a removal request by a petitioner is nonappealable, and a court cannot reevaluate it through a petition for writ.[169] Denial of a removal request means the DNA records will remain in the database and police can use them in future investigations.[170] Limiting review for denial is worrisome as it prevents overturning erroneous decisions.[171] Furthermore, an expungement order is not constitutionally adequate as the statute renders the order ineffectual; it cannot provide a remedy.[172]

Even if a judge orders removal, whether on appeal or at the initial hearing, police can still use any result from a database match.[173] The statute prevents invalidation or dismissal of a database identification.[174] Additionally, any failure to expunge DNA records from the database does not prevent using a previous identification in the future.[175] These invalidation provisions defeat the primary purpose of the hearing provision, which is to remove information from the database.[176] Therefore, because the hearing is unable to compel removal and inadequately safeguards Fourth Amendment rights, the hearing provision does not satisfy the requirements of due process.[177]

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[167] *See* CAL. PENAL CODE § 299 (West 2004).

[168] *See id.*

[169] *See id.*

[170] *See* Coffey v. Superior Court, 29 Cal. Rptr. 3d 59, 71 (Ct. App. 2005) (denying request to remove records).

[171] Currently, a judge can refuse to order expungement even if the technical requirements of the statute are met. *See* § 299 (discussing requirements and vesting judge with discretion). The judge's discretion is subject to review for possible error. *See* Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 400 (2006) (discussing abuse of discretion review).

[172] *See* CAL. PENAL CODE § 297 (West 2004) (preventing dismissal or invalidation for delay or failure to expunge records); *id.* § 298 (West 2004) (preventing dismissal or invalidation for violation of statutory requirements); Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (holding factor of due process analysis is risk of erroneous deprivation through current procedures).

[173] *See* § 297.

[174] *See id.* (discussing removal limitations).

[175] *See id.*

[176] *See* § 299 (stating person can request expungement of data).

[177] A hearing that cannot provide relief is not meaningful in any normative sense of the word. *See* Fuentes v. Shein, 407 U.S. 67, 80 (1972) (noting meaningful manner of review is fundamental to procedural due process); Armstrong v. Manzo, 380 U.S. 545,

One could argue that procedural due process does not apply to the taking of the DNA sample because it is not a seizure under the Fourth Amendment.[178] Therefore, because there is no deprivation, the Constitution does not require a due process hearing.[179] Fingerprints and DNA are both used for identification purposes.[180] Thus, like fingerprints, the taking of DNA in this situation is outside the protection of the Fourth Amendment.[181] The government can require submission of fingerprints during booking for identification purposes without implicating the Fourth Amendment.[182] Compulsory DNA submission during booking should not trigger the full protection of procedural due process because it is likely that DNA will supplant fingerprints as the main identification method.[183] Along this line of reasoning, the Massachusetts Supreme Court upheld the collection of DNA from convicts for identification purposes and to prevent future crimes.[184] Therefore, taking DNA on arrest is not a search or seizure

552 (1965) (holding due process requires hearing be meaningful in time and manner); Link v. Wabash R.R. Co., 370 U.S. 626, 632 (1962) (holding opportunity for hearing adequate to safeguard constitutional right is fundamental requirement of due process).

[178] If it is not a search or seizure, then there is no deprivation triggering due process. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (noting deprivation triggers due process); Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (stating hearing needed before deprivation); *Armstrong*, 380 U.S. at 550 (stating due process applies to deprivations of life, liberty, or property).

[179] *See Loudermill*, 470 U.S. at 542; Carey v. Piphus, 435 U.S. 247, 259 (1978) (discussing deprivation and due process); *Matthews*, 424 U.S. at 321 (discussing deprivation part of test).

[180] *See* Mark A. Rothstein & Sandra Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 BROOK. L. REV. 127, 144-46 (2001) (discussing use of DNA for identification purposes). *See generally* Debra Cassens Moss, *DNA — The New Fingerprints*, 74 A.B.A. J. 66, 68 (1988) (discussing spread and acceptance of DNA testing).

[181] United States v. Leon, 468 U.S. 897, 919-20 (1984) (noting exclusionary rule should not deter objectively reasonable law enforcement activity); United States v. Peltier, 422 U.S. 531, 538-39 (1975) (discussing deterrent purpose of rule); Rothstein & Carnahan, *supra* note 180, at 144-46 (discussing use of DNA).

[182] *See* Smith v. United States, 324 F.2d 879, 882 (D.C. Cir. 1963) (holding person in lawful custody must submit to fingerprinting as part of routine identification process); 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, 192-95 (2006) (arguing for biometric identification exception for DNA sampling on arrest).

[183] *See* Andrew C. Bernasconi, *Beyond Fingerprinting: Indicting DNA Threatens Criminal Defendants' Constitutional and Statutory Rights*, 50 AM. U. L. REV. 979, 1007-16 (2001) (discussing fingerprinting and DNA); Rothstein & Carnahan, *supra* note 180, at 144-46 (discussing use of DNA for identification).

[184] Landry v. Attorney Gen., 709 N.E.2d 1085, 1092 (Mass. 1999) (holding interest in preserving permanent identification record allows use of DNA identification in

that triggers Fourth Amendment protections, which means due process does not require a hearing.[185]

There is a distinction, however, between the gathering of fingerprints, and, by extension, DNA, for information as opposed to identification.[186] Arrestees have a greater expectation of privacy than convicts, but less than free people.[187] Courts may allow taking DNA samples during arrest for identification purposes, but keeping the information after acquittal or dismissal of the charges is a violation of their constitutional rights.[188] Someone seeking removal under the statute is no longer an arrestee but a free person entitled to the full protection of the Constitution.[189] Refusing to expunge the DNA records is a deprivation of their property interest that must comply

place of fingerprints).

[185] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985); Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Armstrong v. Manzo, 380 U.S. 545, 550 (1965) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)) (stating due process applies to deprivations of life, liberty, or property).

[186] United States v. Kincade, 379 F.3d 813, 836 n.31 (9th Cir. 2004) (holding constitutionally significant distinction between "gathering of fingerprint evidence from 'free persons' . . . to determine their guilt of an unsolved criminal offense and the gathering of fingerprints for identification purposes from persons within the lawful custody of the state" (quoting Rise v. Oregon, 59 F.3d 1556, 1559-60 (9th Cir. 1995))).

[187] *See id.* (discussing distinction); People v. Adams, 9 Cal. Rptr. 3d 170, 183 (Ct. App. 2004) (holding "society has vastly increased interest" in identity of those found guilty); Peterson, *supra* note 1, at 1235 (discussing lessened expectations of privacy because of employment or status as offender); Gilbert J. Villaflor, *Capping the Government's Needle: The Need to Protect Parolees' Fourth Amendment Privacy Interests from Suspicionless DNA Searches in* United States v. Kincade, 38 LOY. L.A. L. REV. 2347, 2360 (2005) (discussing lessened privacy interest of parolees).

[188] *See Loudermill*, 470 U.S. at 542 (quoting *Mullane*, 339 U.S. at 313) (holding essential principle of due process is hearing appropriate to nature of case before deprivation); *Eldridge*, 424 U.S. at 333 (holding hearing required before final deprivation); *Armstrong*, 380 U.S. at 550 (stating due process applies to deprivations of life, liberty, or property).

[189] *See* CAL. PENAL CODE § 299 (West 2004) (requiring innocence or dismissal of charges before one can request expungement of DNA record); *Kincade*, 379 F.3d at 835-36 (stating distinction between "law-abiding citizens" and "lawfully adjudicated convicts" and holding fingerprint evidence from free persons triggers privacy interests); Weimer v. Amen, 870 F.2d 1400, 1405 (8th Cir. 1989) (holding due process allows state to take "life, liberty, or property" only if it follows certain procedures); Peterson, *supra* note 1, at 1235.

with due process.[190] Proposition 69 fails to provide the necessary review.[191]

B. Proposition 69 Unconstitutionally Prevents Exclusion of Evidence Taken in Violation of the Fourth Amendment Without Providing an Adequate Substitute

Proposition 69 prevents exclusion of evidence from an investigative detention without providing an adequate substitute that safeguards the rights of the accused.[192] If an exception to the exclusionary rule applied to seizures authorized by Proposition 69, preventing exclusion without providing an alternative would be permissible.[193] No exception applies, however, and, therefore, a court must exclude the evidence in the absence of a satisfactory substitute.[194]

In order to exclude DNA evidence as required by the exclusionary rule, a court must act in opposition to the text of Proposition 69.[195] The proposition is clear that identification from DNA sent in by mistake or based on a sample that a court ordered expunged is still admissible.[196] While this leaves a court the power to dismiss the

[190] *See Loudermill*, 470 U.S. at 542; Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978) (stating Fourteenth Amendment limits actions of government that deprive person of property interest); *Eldridge*, 424 U.S. at 333; Boddie v. Connecticut, 401 U.S. 371, 379-80 (1971) (stating court must protect meaningful opportunity to be heard from laws hindering it); *Armstrong*, 380 U.S. at 552 (holding due process requires meaningful hearing); Harlan, *supra* note 164, at 210-15 (arguing due process applies to retention of DNA samples from innocent persons).

[191] *See supra* notes 167-77 and accompanying text (discussing inadequacy of removal process).

[192] Proposition 69 limits exclusion but provides no alternative. *See* CAL. PENAL CODE § 299 (West 2004) (preventing dismissal or invalidation for delay or failure to expunge records).

[193] *See* James v. Illinois, 493 U.S. 307, 311 (1990) (noting exclusion not required if exception applies); *In re* Lisa G., 23 Cal. Rptr. 3d 163, 165 (Ct. App. 2004) (holding exclusion of evidence is two part process: was evidence seized in violation of Fourth Amendment and is exclusion appropriate remedy).

[194] *See* Withrow v. Williams, 507 U.S. 680, 701 (1993) (stating any violation of Fourth Amendment may require exclusion of evidence); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (stating Fourth Amendment prevents using illegally seized evidence even outside of court unless exception applies); United States v. Jones, 72 F.3d 1324, 1330 (7th Cir. 1995) (stating exclusionary rule removes evidence tainted by official wrongdoing).

[195] *See James*, 493 U.S. at 311 (discussing exclusionary rule); *Jones*, 72 F.3d at 1330.

[196] *See* CAL. PENAL CODE §§ 297, 299 (West 2004) (preventing dismissal or invalidation for delay or failure to expunge records or for using sample sent in by mistake).

original arrest, it does not deter abuse. Even if the judge orders the records removed, police are still able to secure a warrant that is not dismissible.[197] The police would simply arrest the suspect with the valid warrant and extract a new sample.[198] Excluding the first sample is not a deterrent without also excluding the information subsequently obtained from it.

Although the statute does not directly repudiate the exclusionary rule, it does defeat the purpose behind the rule.[199] Consider this likely scenario: Police arrest a suspect on suspicion that he committed a crime, but lack probable cause. During booking his sample is taken and sent to a laboratory.[200] At a hearing to determine the validity of the arrest, counsel for the accused succeeds in showing the arrest was unconstitutional.[201] The court proceeds to dismiss the arrest and all evidence resulting from it.[202] Meanwhile, back at the lab, the sample matches the suspect to DNA at the crime scene.

Normally, the police could not use this identification; a court should exclude derivative evidence resulting from a constitutional violation.[203] Proposition 69, however, states that a judge cannot dismiss any identification, warrant, or arrest for failure to purge records.[204] Thus, police can use the tainted identification to obtain a valid warrant to re-arrest the suspect.[205] From this second arrest, police can extract a

[197] *See* § 299.

[198] See *infra* notes 205-06.

[199] Proposition 69 prevents invalidation of evidence obtained through investigative detentions. *See* § 297. This result conflicts with the purpose behind the exclusionary rule. *See James*, 493 U.S. at 311 (stating suppression of illegally obtained evidence is necessary cost to preserve constitutional values); Stone v. Powell, 428 U.S. 465, 486 (1976) (holding justification for exclusionary rule is deterrence of Fourth Amendment violations by police).

[200] *See* CAL. PENAL CODE § 295 (West 2004) (requiring extraction during booking and immediately sending sample to Department of Justice laboratory).

[201] *See* U.S. CONST. amend. IV (requiring probable cause); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1679 (1998) (noting Fourth Amendment requires probable cause for arrest).

[202] *See* People v. Jenkins, 19 Cal. Rptr. 3d 386, 399 (Ct. App. 2004) (stating exclusionary rule consistently applied to evidence from warrantless arrests without probable cause).

[203] *See* United States v. Crews, 445 U.S. 463, 470 (1980) (holding exclusion applies to any "fruits" of constitutional violation); Harrison v. United States, 392 U.S. 219, 222 (1968) (discussing "poisonous tree" metaphor); Wong Sun v. United States, 371 U.S. 471, 484 (1963) (holding exclusion is proper for indirect and direct products of invasion).

[204] *See* § 297.

[205] Because a court cannot dismiss or invalidate the database identification, police can use it to obtain a warrant that a court likewise could not dismiss or invalidate.

new, legal sample of DNA.[206] The primary purpose of the exclusionary rule is to deter violations of Fourth Amendment rights.[207] Here it woefully failed. While a court can exclude the first sample, Proposition 69 prevents it from fully remedying the problem.

Preventing a court from excluding evidence violates the Constitution.[208] Exclusion is necessary for some Fourth Amendment violations as other attempts to encourage compliance with the Constitution have failed.[209] In the absence of a more effective sanction, the suppression of evidence from a Fourth Amendment violation is required.[210] While exclusion is not required for all violations, the deterrent effect of exclusion is the key component in deciding to apply the rule.[211] Without an adequate alternative, exclusion is necessary for intentional Fourth Amendment violations.[212]

The section also prevents dismissal or invalidation of an arrest based on a database identification. *See id.*

[206] This second arrest allows police to extract a new sample. Because the database identification provides probable cause for the arrest, the second sample is admissible.

[207] *See* United States v. Leon, 468 U.S. 897, 906 (1984) (stating rule is judicially created remedy to safeguard Fourth Amendment through deterrence); Stone v. Powell, 428 U.S. 465, 486 (1976); People v. Smith, 37 Cal. Rptr. 2d 524, 528 (Ct. App. 1995) (stating Fourth Amendment exclusionary rule designed to deter police misconduct).

[208] *See* George E. Dix, *Nonconstitutional Exclusionary Rules in Criminal Procedure*, 27 AM. CRIM. L. REV. 53, 54, 56 (1989) (noting exclusionary rule is federal constitutional requirement and application of rule is part of court's duty to apply constitutional provisions). There is also an argument that such a restriction violates separation of powers. *See* People v. Bunn, 37 P.3d 380, 390 (Cal. 2002) (holding direct legislative influence over judicial proceeding is unconstitutional). There is a fine line between permissive regulation and unconstitutional encroachment. *See* Kerns v. CSE Ins. Group, 130 Cal. Rptr. 2d 754, 770 (Ct. App. 2003) (holding legislative statutes can regulate power of courts but may not impair exercise of core constitutional powers and functions). Requiring a judge to seek permission from the district attorney to dismiss a charge violates separation of powers. *See* People v. Tenorio, 473 P.2d 993, 996 (Cal. 1970) (holding judicial power is compromised when judge must bargain with prosecutor to dismiss charge in interests of justice). The provisions prevent the court from enforcing the Constitution, one of its core and inviolable functions; therefore, they are impermissible intrusions into the power of the judiciary.

[209] *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding all evidence obtained in violation of Constitution is inadmissible in state court); *id.* at 651-53 (noting other remedies to exclusion were worthless and futile).

[210] *See* Franks v. Delaware, 438 U.S. 154, 171 (1978) (stating Supreme Court has not questioned continued application of exclusionary rule to states in absence of more effective sanction where Fourth Amendment violation is intentional).

[211] *See Leon*, 468 U.S. at 906-08 (discussing purpose of exclusion).

[212] *See id.* at 908-09 (discussing exceptions to exclusionary rule); *see also* United States v. Jones, 72 F.3d 1324, 1330 (7th Cir. 1995) (stating exclusionary rule removes evidence tainted by official wrongdoing); People v. Needham, 93 Cal. Rptr. 2d 899,

Although the rule is a judicially created remedy, a statute cannot prevent exclusion for this violation any more than a state could waive the requirements of probable cause.[213]

Even though Proposition 69 prevents the exclusion of evidence, supporters of Proposition 69 would argue it does not necessarily violate the Constitution. If the actions of the police fit within one of the exceptions to the exclusionary rule, there is no constitutional requirement for exclusion. Therefore, Proposition 69 could permissibly remove exclusion as an option. Proponents of Proposition 69 would argue that the doctrines of special needs, inevitable discovery, or good faith are the most likely exceptions to apply.

Courts have used the special needs doctrine to justify compulsory DNA extraction from convicts and parolees.[214] Society's interest in the identity of criminals is substantial enough that the exclusionary rule does not apply.[215] Compulsory sampling on arrest raises a similar interest in the identity of the arrestee.[216] The same reasoning should allow DNA extraction on arrest.

Further, courts argue, the doctrine of inevitable discovery allows introduction of evidence if police would have inevitably discovered it by lawful means.[217] The statute allows sampling of DNA on arrest.[218] If the arrest is valid, evidence of the identification would be admissible. Thus, to satisfy inevitability, one only needs to prove that the police would arrest the accused for a felony in the future.[219] It is

902 (Ct. App. 2000) (holding exclusion necessary for evidence from search or seizure in violation of Fourth Amendment).

[213] *See Leon*, 468 U.S. at 906 (stating Supreme Court created exclusionary rule to safeguard Fourth Amendment through deterrence); *id.* at 913 n.8 (noting statutes authorizing searches without probable cause or warrant are unconstitutional).

[214] *See* Green v. Berge, 354 F.3d 675, 679 (7th Cir. 2004) (upholding compulsory extraction from convicts as special need); United States v. Kimler, 335 F.3d 1132, 1146 (10th Cir. 2003); Roe v. Marcotte, 193 F.3d 72, 79-82 (2d Cir. 1999).

[215] *See* United States v. Kincade, 379 F.3d 813, 839 (9th Cir. 2004) (noting "overwhelming" societal interests in identity of convicts); People v. Adams, 9 Cal. Rptr. 3d 170, 183 (Ct. App. 2004) (holding society has "vastly increased interest" in identity of those found guilty).

[216] *See* Jennifer Graddy, *The Ethical Protocol for Collecting DNA Samples in the Criminal Justice System*, 59 J. MO. B. 226, 232 (2003) (arguing DNA sampling of arrestees allowed because of government's interest in preventing crimes). *But see* Maclin, *supra* note 4, at 118 (arguing DNA sampling on arrest cannot be upheld as special need).

[217] *See* Nix v. Williams, 467 U.S. 431, 443 (1984) (discussing inevitability exception).

[218] *See* CAL. PENAL CODE § 296 (West 2004) (requiring sampling on arrest).

[219] *Nix*, 467 U.S. at 444 (allowing evidence if lawful means would inevitably discover it).

probable that a lawful future arrest would occur because evidence links the accused to a crime. Therefore, the inevitability exception applies to the seizure.

Similarly, the good faith doctrine also precludes application of the exclusionary rule. Here, police can use evidence if the officer acted in good faith on a warrant later found to be defective.[220] The laboratory entered the DNA sample in good faith and excluding the information would not affect those who collect or process the sample.[221] The doctrine therefore could arguably preclude exclusion because the exclusionary rule does not apply to reasonable actions by law enforcement and exclusion fails to produce beneficial change.[222] Therefore, preventing exclusion does not violate the Constitution.

A closer analysis of these exceptions, however, shows that they do not apply. None of the exceptions discussed earlier prevent application of the exclusionary rule.[223] Therefore, exclusion is proper and Proposition 69 cannot allow a court to enter evidence found because of a Fourth Amendment violation.

The special needs doctrine is inapplicable to DNA sampling on arrest.[224] Unlike other special need cases, requiring a warrant or probable cause is not impractical, the Constitution requires it.[225] The

[220] *See* United States v. Leon, 468 U.S. 897, 905 (1984) (requiring officer to act in reasonable good faith reliance on warrant later held defective).

[221] *See id.* at 922 (stating slight deterrence does not outweigh costs of excluding evidence from invalid warrant acted on in good faith).

[222] *See id.* at 919-20 (stating exclusion of evidence obtained through reasonable conduct does not further purpose of exclusionary rule).

[223] The other exceptions to the exclusionary rule do not apply, but this Comment covers them here for completeness. The doctrine of exigent circumstances is not applicable to a DNA sample taken after arrest. The suspect is available for testing and one cannot destroy or alter DNA from jail, so there is no contamination risk. *See* Peterson, *supra* note 1, at 1231 (noting that DNA is unalterable). The independent source exemption does not apply as police extract the DNA sample pursuant to an arrest in violation of the Fourth Amendment. This taints the sample. *See* Nix v. Williams, 467 U.S. 431, 443 (1984) (requiring evidence to be "wholly independent of any . . . violation"). Police cannot argue that the lab results are an independent source allowing arrest. *See id.* (requiring independence from violation); United States v. Crews, 445 U.S. 463, 470 (1980) (holding exclusion applies to any "fruits" of constitutional violation); Wong Sun v. United States, 371 U.S. 471, 484 (1963) (holding exclusion is proper for indirect and direct products of invasion).

[224] *See* Maclin, *supra* note 4, at 107-18 (discussing special needs doctrine and arguing it would not apply to Virginia and Louisiana DNA statutes).

[225] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (upholding drug testing of school athletes because of substantial need to maintain order in schools); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 620-21 (1989) (upholding testing of railroad employees to prevent accidents). The Constitution and the

desire for information leads to abuse and makes a DNA sample taken on arrest fundamentally different from one taken after conviction.[226] Here, the special need is not independent of law enforcement, the statute has hopelessly commingled them.[227]

Courts should also reject applying either the good faith or inevitable discovery doctrines.[228] If the inevitability exception applied, the court would be sanctioning the violation even though the exclusionary rules are meant to deter misconduct.[229] More importantly, the possibility of future arrest is not inevitable.[230] Speculative actions are not enough to satisfy the rule.[231] Skilled sophistry should not blind courts to the intrinsic illegality.

Similarly, the good faith doctrine is inapplicable.[232] The arresting officer is relying on the ignorance of those who take the sample to purify the false arrest.[233] The judge should consider the knowledge and intent of all involved.[234] As the arresting officer lacks the required good faith, the exception cannot apply.[235] A judge should exclude the evidence because none of the exceptions to the exclusionary rule apply.[236] Proposition 69, however, prevents exclusion of the

Supreme Court require probable cause or a warrant for arrest. *See* U.S. CONST. amend. IV (requiring probable cause); County of Riverside v. McLaughlin, 500 U.S. 44, 53 (1991) (requiring probable cause determination after warrantless arrest).

[226] *See* Peterson, *supra* note 1, at 1235 (stating lessened expectations of privacy because employment or status as offender is critical basis for Supreme Court special needs analysis for compulsory DNA sampling).

[227] *See Acton*, 515 U.S. at 658 (stating one factor upholding special needs exception for drug testing was that school did not give results to law enforcement).

[228] *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (noting that without exclusion doctrine, Fourth Amendment protection against unreasonable search and seizure is easily ignored).

[229] People v. Smith, 37 Cal. Rptr. 2d 524, 528 (Ct. App. 1995) (stating Fourth Amendment exclusionary rule is designed to deter police misconduct).

[230] The speculative nature of an arrest sometime in the future is not enough to trigger the exception. *See* Nix v. Williams, 467 U.S. 431, 444 (1984) (holding speculative elements cannot prove inevitable discovery, only historical facts capable of verification).

[231] *See id.* (discussing requirements of rule).

[232] *See* United States v. Leon, 468 U.S. 897, 922-23 (1984) (discussing doctrine).

[233] *But see id.* at 923 (holding limitation of suppression still leaves probable cause standard and requirements for valid warrant untouched).

[234] *See id.* at 923 n.24 (requiring that court consider objective reasonableness of all involved in obtaining evidence).

[235] *See id.* at 923 (stating suppression is still appropriate if others mislead by false information).

[236] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (stating search without probable cause is "per se unreasonable" except in few specific and defined

wrongfully obtained DNA evidence.[237] That prohibition unconstitutionally conflicts with the exclusionary rule.[238]

C. Proposition 69 May Encourage Police Misconduct by Allowing Investigative Detentions

The shift from sampling on conviction to sampling on arrest raises serious due process issues.[239] The quick collection and forwarding of the DNA sample of an arrestee encourages abuse.[240] It is possible to make questionable arrests to obtain genetic evidence because police collect the sample immediately.[241]

There are concerns about prejudice in the justice system and an increase in investigative detentions will exacerbate the problem.[242] Police release ninety-two percent of African American men charged with drug offenses for lack of evidence or inadmissible evidence.[243] The number of Caucasians police arrest for similarly unsustainable drug offenses in California is sixty-four percent.[244] Proposition 69 fails to limit misconduct and may encourage the underlying bias reflected by this disparity in unsustainable arrests.[245]

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exceptions); United States v. Jones, 72 F.3d 1324, 1330 (7th Cir. 1995) (stating exclusionary rule removes evidence tainted by official wrongdoing); People v. Needham, 93 Cal. Rptr. 2d 899, 902 (Ct. App. 2000) (holding exclusion necessary for evidence from search or seizure that violates Fourth Amendment).

[237] *See* CAL. PENAL CODE § 297(g) (West 2004) (preventing invalidation or dismissal of database identification for failure or delay in purging records).

[238] *See* Latzer, *supra* note 76, at 1405-06 n.31 (noting that even after Proposition 8, Supremacy Clause requires that California judges exclude evidence when Fourth Amendment requires exclusion); McCarthy, *supra* note 76, at 865-66 (stating Federal Constitution requires exclusionary rule).

[239] *See* Kaye, *supra* note 28, at 472 (discussing how DNA sampling on arrest violates Fourth Amendment if seizure is unreasonable). *See generally* Maclin, *supra* note 4, at 102 (discussing constitutionality of taking DNA samples on arrest).

[240] The invalidation provision means that once a sample has been entered into the database it can be used even if the arrest is thrown out. False arrests can be made to gather useable evidence because there is no review before submission. *See* CAL. PENAL CODE § 297(g) (limiting invalidation).

[241] Again the lack of review is the problem. Once submitted, a judge cannot invalidate information from a database match. *See id.*

[242] *See* Jerome G. Miller, *From Social Safety Net to Dragnet: African American Males in the Criminal Justice System*, 51 WASH. & LEE L. REV. 479, 480-83 (1994) (discussing prejudice in justice system).

[243] *Id.* at 489.

[244] *Id.*

[245] The statute does not provide for review before a sample is sent off nor does it allow for invalidation of information. *See* CAL. PENAL CODE § 295(h) (West 2004) (listing review requirements); § 297(g) (limiting invalidation).

Consider another hypothetical situation, similar to the first one: Police suspect a person committed a crime but lack sufficient evidence for a warrant.[246] Police arrest that individual anyway, gather the DNA sample, and then drop the charges.[247] The officers lacked probable cause to arrest, but hope that the investigative detention will provide information.[248] If the DNA comparison exonerates the accused, police can move on to the next suspect.[249] If the DNA comparison implicates the suspect, police can use the information even though they did not have probable cause for the initial arrest.[250]

Normally, a judge would exclude such evidence at the probable cause hearing. Proposition 69, however, allows the prosecutor to use it.[251] The statute requires that police send the DNA sample to the laboratory before a judge determines the validity of the arrest.[252] By forwarding the information before the hearing, the statute prevents destruction of the sample before the database can analyze it. This process allows police to gain verification of their suspicions. Furthermore, the statute allows police to use any information revealed

[246] This situation has not occurred, but the potential exists.

[247] Because police lack probable cause, they have no reason to keep up the facade after obtaining a DNA sample.

[248] Given the usefulness of DNA evidence, this is a distinct possibility. *See* Tribuiano, *supra* note 21, at 406 (discussing value of DNA evidence as law enforcement tool).

[249] Even if the sample does not link the accused to a crime, the suspect still faces the daunting task of removing a DNA record from the database. *See infra* Part III.A (discussing difficulty of removal).

[250] Commentators have already noted similar abuses with DNA dragnets. *See* Peterson, *supra* note 1, at 1227 (discussing discriminatory DNA dragnet requiring samples from all African American men matching vague description); Rothstein & Talbott, *supra* note 6, at 155-56 (discussing use of dragnets for DNA samples).

[251] *See* CAL. PENAL CODE § 295(h)(1) (West 2004) (requiring immediate forwarding of DNA sample); *id.* § 297(c)(2) (West 2004) (preventing dismissal or invalidation of database identification for failure or delay in expunging records); United States v. Crews, 445 U.S. 463, 470 (1980) (holding exclusion applies to any "fruits" of constitutional violation); Wong Sun v. United States, 371 U.S. 471, 484 (1963) (holding exclusion is proper for indirect and direct products of invasion); People v. Jenkins, 19 Cal. Rptr. 3d 386, 399 (Ct. App. 2004) (stating courts consistently apply exclusionary rule to evidence from warrantless arrests without probable cause).

[252] Probable cause hearings can be held after booking. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 53 (1991) (allowing hearing after booking). Proposition 69 requires sending the sample during booking or soon thereafter. *See* CAL. PENAL CODE § 295(a), (c) (West 2004) (requiring extraction during booking and immediate sending of sample to Department of Justice laboratory).

by the sample.[253] By removing the threat of exclusion of evidence, Proposition 69 encourages police to engage in investigative detentions.

IV. SOLUTION

A statute should not encourage arbitrary enforcement or discrimination, but Proposition 69 is an invitation for misconduct.[254] The statute is not unsalvageable, however, as the problems stem mainly from the limitations on excluding database identifications and from the removal process. By rewording these sections to comply with the Federal Constitution, it is possible to require DNA samples on arrest and still safeguard the rights of the accused.

Amending the statute would allow a greater degree of control and efficiency than any court decision.[255] The first change would be to require an arrest warrant or hearing to determine probable cause before the sample is sent to a lab. The Virginia DNA database statute requires such a process and the Constitution requires either a warrant or hearing shortly after arrest anyway.[256] The legislature could add the requirement to the section describing when police should send the sample to the California Department of Justice laboratory and use language similar to the Virginia statute.[257] This modification would eliminate the incentive for investigative detentions as a court could order a DNA sample from an illegal arrest destroyed before the police could obtain any information.

The next change would be to remove the discretionary standard at expungement hearings and allow review of denials.[258] This is the first step in making the review meaningful. It provides certainty to the removal process and acts as a check against erroneous decisions. The legislature could delete the section preventing appeals and replace the discretionary standard with language requiring application of the

[253] *See* CAL. PENAL CODE § 297(g) (West 2004) (limiting invalidation).

[254] *See generally* City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (holding courts should not construe statute to encourage such behavior).

[255] Currently there are two bills seeking to amend parts of the statute: S.B. 953, 2005 Leg., Reg. Sess. (Cal. 2005), and A.B. 851, 2005 Leg., Reg. Sess. (Cal. 2005). A.B. 851 allows appeal and review of denial of expungement in addition to reducing the complexity of the written request. S.B. 953 only makes cosmetic changes to the statute.

[256] *See* VA. CODE ANN. § 19.2-310.3:1 (West 2004) (requiring police to attach arrest warrant or capias to sample); *id.* § 19.2-310.2:1 (West 2004) (requiring determination of probable cause for arrest before taking sample); *McLaughlin*, 500 U.S. at 53 (permitting warrantless arrests only if prompt probable cause hearing after arrest).

[257] This language is in CAL. PENAL CODE § 295 (West 2004).

[258] California Assembly Bill 851 already proposes this change. *See supra* note 255.

statutory requirements for removal.[259] The final change would be to adjust the sections preventing invalidation of database identification.[260] The legislature could drop this part altogether or simply reword the sections to "prevent invalidation except when required by the Federal Constitution." This new version would safeguard the rights of arrestees and still provide law enforcement with a useful tool for crime prevention.

CONCLUSION

As it currently stands, California's DNA database statute as amended by Proposition 69 cannot survive unchanged. It manages to escape judicial scrutiny for the moment, but that reprieve will not last. Once a court sustains a challenge, the Constitution will require the court to strike sections of the statute. A legislative solution would be better as it allows the greatest flexibility in resolving the problems currently posed by California's DNA database statute.

[259] This language is in CAL. PENAL CODE § 299 (West 2004).

[260] These are CAL. PENAL CODE §§ 297, 299 (West 2004).