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The Compulsory Extraction of Blood from Convicted Offenders and the Fourth Amendment

PART I

The new millennium has ushered various technological advances into the criminal justice system. Most notable in recent years is the use of DNA evidence and databases in the field of law enforcement. In an effort to expand DNA databases, Congress enacted the DNA Analysis Backlog Elimination Act of 2000.¹ The DNA Act authorizes the collection, analysis, and storage of blood samples obtained from individuals who have been convicted of a qualifying federal offense,² and authorizes funding to update local governments' DNA analysis procedures.³

As this new technology emerges, courts have attempted to define the constitutional contours of using such innovations in law enforcement. As Ninth Circuit Judge Reinhardt stated:

Each leap forward in forensic science promises ever more efficient and swift resolution of criminal investigations. At the same time, technological advances frequently raise new constitutional concerns and threaten our basic liberties. Here, we confront the challenge compulsory DNA collection poses to one of the most fundamental and traditional preserves of individual privacy, the human body.⁴

The Fifth, Ninth, and Tenth Circuits of the United States Court of Appeals have recently confronted this challenge and

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¹ 42 U.S.C. § 14135 *et seq.* (2000) [hereinafter referred to as the "DNA Act" or the "Act"].

² 42 U.S.C. § 14135a(a)(1)-(2).

³ 42 U.S.C. § 14135(a).

⁴ *United States v. Kincade*, 345 F.3d 1095, 1096 (9th. Cir. 2003) [hereinafter *Kincade I*] (invalidating the DNA Act under the Fourth Amendment), *rev'd en banc*, 379 F.3d 813, 839 (2004) (plurality decision) [hereinafter *Kincade II*] (upholding the DNA Act under the Fourth Amendment).

decided whether the Fourth Amendment permits the compulsory extraction of blood⁵ from convicted offenders, without any individualized suspicion of wrongdoing, in order to maintain the FBI's DNA database.⁶

In deciding this question, the circuits have divided in their analytical approaches. In 2003, the Tenth Circuit in *United States v. Kimler* held that the DNA Act was constitutional under the Fourth Amendment,⁷ while the Ninth Circuit in *United States v. Kincade* (*Kincade I*) held to the contrary.⁸ Both the Tenth and Ninth circuits applied the "special needs" doctrine in determining the DNA Act's Fourth Amendment constitutionality,⁹ a categorical exception to the Fourth Amendment's individualized suspicion requirement.¹⁰ However, this past year, both the Fifth Circuit, in *Groceman v. United States Department of Justice*,¹¹ and the Ninth Circuit *en banc*, in *United States v. Kincade* (*Kincade II*),¹² rejected the special needs approach and applied the "totality of the circumstances" standard under which each court sustained the DNA Act's Fourth Amendment constitutionality.

This Note suggests that the Ninth Circuit's original decision in *Kincade I* is the most persuasive of the four circuit court decisions. Part II of this Note briefly discusses the DNA Act and the Fourth Amendment's totality of the circumstances standard and special needs exception. Part III discusses the

⁵ Because blood is easier to test and preserve than saliva or other bodily substances, the federal and participating state and local governments collect DNA by extracting blood. *Kincade II*, 379 F.3d at 816 (citing Nancy Beatty Gregoire, *Federal Probation Joins the World of DNA Collection*, 66 FED. PROB. 30, 31 (2002)). Although there may be no difference for purposes of the Fourth Amendment between drawing blood or, say, swabbing the inside of an individual's mouth, this Note only addresses the compulsory extraction of blood.

⁶ See *Kincade II*, 379 F.3d at 839 (invalidating the DNA Act under the Fourth Amendment); *Groceman v. United States Dep't of Justice*, 354 F.3d 411, 414 (5th Cir. 2004) (*per curiam*) (same); *Kincade I*, 345 F.3d at 1113 (upholding the DNA Act under the Fourth Amendment); *United States v. Plotts*, 347 F.3d 873, 877 (10th Cir. 2003) (invalidating the DNA Act under the Fourth Amendment); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003) (same), *cert. denied*, 124 S. Ct. 945 (2003).

⁷ *Kimler*, 335 F.3d at 1146.

⁸ *Kincade I*, 345 F.3d at 1113.

⁹ *Kimler*, 335 F.3d at 1146 ("The DNA Act . . . is a reasonable search and seizure under the special needs exception to the Fourth Amendment's warrant requirement . . ."); *Kincade I*, 345 F.3d at 1104 ("*The Special Needs Doctrine Does Not Exempt the Extraction of Blood from Parolee's Bodies from the Ordinary Requirements of the Fourth Amendment*").

¹⁰ See *infra* Part II.B.2.

¹¹ *Groceman*, 354 F.3d at 413-14.

¹² *Kincade II*, 379 F.3d at 835, 839.

application of the totality of the circumstances test in *Groce* and *Kincade II* and the application of the special needs doctrine in *Kimler*¹³ and *Kincade I*. Part IV suggests that the special needs test is the more appropriate approach in determining the DNA Act's Fourth Amendment constitutionality. It then applies the special needs analysis to the DNA Act and concludes that the Act is unconstitutional under the Fourth Amendment.

PART II

A. *The DNA Act*

The DNA Act authorizes prison and probation officials to collect DNA samples from individuals who have been convicted of a qualifying federal offense.¹⁴ The list of qualifying offenses is extensive and includes any offense relating to homicide, sexual abuse, peonage, robbery, burglary, and kidnapping.¹⁵ To begin the collection process, the Director of the Bureau of Prisons or the probation office responsible notifies the convicted offender of the Act's requirements and

¹³ See *Kimler*, 335 F.3d at 1146 (dismissing *Kimler*'s Fourth Amendment argument in one paragraph).

¹⁴ 42 U.S.C. § 14135a(a)(1)-(2). The DNA Act also authorizes the Attorney General to appropriate funds to states in order to enhance their ability to utilize DNA evidence and databases in law enforcement. The Act provides for funding to states (1) to conduct DNA analyses of samples retrieved from qualifying state offenders and crime scenes for inclusion in the FBI's database and (2) to increase the capacity of laboratories owned by the state to carry out such analysis. 42 U.S.C. § 14135(a)(1)-(3). For a state to be eligible to receive a grant, it must "provide assurances that [it] has implemented, or will implement . . . a comprehensive plan for the expeditious DNA analysis of samples" 42 U.S.C. § 14135(b)(1) (allowing states 120 days after the date of application for funds to implement "a comprehensive plan for the . . . DNA analysis of samples"). The Act directs recipient states to use the funds "to conduct . . . DNA analyses of [the] samples that relate to crimes in connection with which there are no suspects." 42 U.S.C. § 14135(c).

¹⁵ 42 U.S.C. § 14135a(d). Participating states have comparatively more expansive lists. See D.H. Kaye and Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413, 417, n.15 (2003) [hereinafter Kaye and Smith, *Case for Population-Wide Coverage*]. Similarly, the scope of state DNA databases has expanded to include individuals not convicted of crimes. See LA. REV. STAT. ANN. § 15:601-09 (West Supp. 2004); TEX. GOV'T CODE ANN. § 411.142 (Vernon 1998 & Supp. 2004). See also Bonnie L. Taylor, Note, *Storing DNA Samples of Non-Convicted Persons & The Debate Over DNA Database Expansion*, 20 T.M. COOLEY L. REV. 509, 512-515 (2003). For an argument for including arrestees in DNA databanks, see generally D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORNELL J.L. & PUB. POL'Y 455 (2001) [hereinafter Kaye, *DNA Sampling on Arrest*]. For an argument for a population-wide DNA databank, see generally *supra* Kaye and Smith, *Case for Population-Wide Coverage*.

subsequently retrieves the person's blood.¹⁶ Authorized officials may use "such means as are reasonably necessary to detain, restrain, and collect a DNA sample from [such] individual"¹⁷ Failing to cooperate in the collection of one's DNA sample pursuant to the Act is a class A misdemeanor.¹⁸

After the collection process, the FBI receives and analyzes the blood,¹⁹ and the results are stored in the Combined DNA Index System (CODIS), a computerized network linking nationwide DNA databases.²⁰ CODIS contains DNA records of convicted persons and DNA samples from crime scenes, unidentified human remains, and missing persons.²¹ The DNA evidence in CODIS is permanently available to federal, state, and local law enforcement officials for facilitating investigation and prosecution of crimes.²²

The DNA Act has drastically expanded DNA analysis and the use of CODIS throughout the country. In 1990, CODIS began as an experimental project, serving 14 state and local laboratories.²³ Currently, it serves all 50 states²⁴ and has assisted in more than nineteen thousand investigations across the nation.²⁵ With the government subjecting more individuals

¹⁶ 42 U.S.C. § 14135a(b).

¹⁷ 42 U.S.C. § 14135a(a)(4)(a).

¹⁸ 42 U.S.C. § 14135a(a)(5).

¹⁹ 42 U.S.C. § 14135a(b).

²⁰ See generally 42 U.S.C. § 14135(a).

The FBI Laboratory's Combined DNA Index System (CODIS) blends forensic science and computer technology into an effective tool for solving violent crimes. CODIS enables federal, state, and local crime labs to exchange and compare DNA profiles electronically, thereby linking crimes to each other and to convicted offenders.

The FBI's CODIS Home Page, *Mission Statement and Background*, at <http://www.fbi.gov/hq/lab/codis/program.htm> (last visited Oct. 4, 2004) [hereinafter CODIS Home Page, *Mission Statement and Background*].

²¹ *Groceman v. United States Dep't of Justice*, No. 3:01-CV-1619-G, 2002 U.S. Dist. LEXIS 11491, at *3 (N.D. Tex. June 26, 2002), *aff'd*, *Groceman v. United States Dep't of Justice*, 354 F.3d 411 (5th Cir. 2004) (per curiam).

²² See The FBI's CODIS Home Page, *National DNA Index System*, at <http://www.fbi.gov/hq/lab/codis/national.htm> (last visited Oct. 12, 2004). See also *Kincade I*, 345 F.3d 1095, 1097 (9th. Cir. 2003) ("Federal, state, and local law enforcement officials who conduct such investigations are able to compare CODIS information with DNA evidence obtained from crime scenes and, thereby, to identify the perpetrator, and subject him to prosecution.").

²³ See CODIS Home Page, *Mission Statement and Background*, *supra* note 20.

²⁴ The FBI's CODIS Home Page, *Participating States*, at <http://www.fbi.gov/hq/lab/codis/partstates.htm> (last visited Oct. 4, 2004).

²⁵ The FBI's CODIS Home Page, *Investigations Aided*, at <http://www.fbi.gov/hq/lab/codis/success.htm> (last visited Oct. 4, 2004). But see *Kincade I*, 345 F.3d at 1097-98 ("CODIS is currently a part of at least 137 laboratories

to DNA collection pursuant to the Act, challenges to its constitutionality have recently surfaced. In less than two years, four circuit courts have addressed the DNA Act's Fourth Amendment validity.

B. The Analytical Divide Between the Totality of the Circumstances Standard and the Special Needs Doctrine

As noted above, in determining the Act's Fourth Amendment constitutionality, an analytical divide has developed between the circuits that apply the totality of the circumstances test and those that apply the special needs doctrine. Under the totality of the circumstances approach, courts focus only on whether the search is reasonable.²⁶ They disregard the usual requirement of individualized suspicion of wrongdoing and weigh all relevant interests, including the countervailing interests of law enforcement and the individual.²⁷ Conversely, under the special needs doctrine, courts begin from the premise that searches lacking individualized suspicion are unreasonable.²⁸ They will only inquire into the search's reasonableness if the search serves a special need beyond normal law enforcement purposes.²⁹

1. The Totality of the Circumstances Standard

The Supreme Court recently applied the totality of the circumstances standard in *United States v. Knights*.³⁰ In *Knights*, the Court addressed whether reasonable suspicion of wrongdoing was sufficient to justify a search of a probationer's home.³¹ Although probable cause and a warrant are usually necessary to search an individual's home,³² the Court looked at the totality of the circumstances surrounding the search in

throughout the country, and as of 2002, had provided forensic assistance in more than 1,900 investigations in 31 states.").

²⁶ See *infra* text accompanying note 34.

²⁷ See *infra* Part III.A.

²⁸ See *infra* text accompanying note 49-54.

²⁹ See *infra* text accompanying notes 65-67. See also *infra* Part III.B. There are of course other exceptions to the individualized suspicion requirement, but no court has considered them in analyzing the DNA Act.

³⁰ *United States v. Knights*, 534 U.S. 112, 118 (2001) (upholding a search of a probationer's home based upon reasonable suspicion of wrongdoing).

³¹ *Id.* at 116-21.

³² *Id.* at 118-19.

order to determine whether the lesser standard of reasonable suspicion was sufficient.³³ The Court explained that:

The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests.'³⁴

In assessing the search's intrusion on the probationer's privacy rights, the Court considered the probationer's diminished expectation of privacy in his home.³⁵ It likened probation to other forms of punishment, including incarceration.³⁶ The Court also noted that upon accepting probation as a punishment, *Knights* and other similarly situated probationers were informed that law enforcement could search their property without a warrant.³⁷

Against these privacy considerations, the Court weighed the governmental interests in searching the probationer's home.³⁸ The Court noted the state's dual concern in its probation system: "On the one hand is the hope that [a probationer] will successfully complete the probation and be integrated back into the community. On the other hand is the concern . . . that he will be more likely to engage in criminal conduct than an ordinary member of the community."³⁹ Emphasizing the latter, the Court cited findings which indicate that "[t]he recidivism rate of probationers is significantly higher than the general crime rate."⁴⁰ It therefore concluded that law enforcement may "focus on probationers in a way that it does not on the ordinary citizen."⁴¹

Notably, however, the Supreme Court did not hold that probationary status eradicates the traditional requirement of individualized suspicion of wrongdoing.⁴² The law enforcement officials in *Knights* clearly had at least reasonable suspicion to

³³ *Id.* at 118.

³⁴ *Id.* at 118-19 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

³⁵ *Knights*, 534 U.S. at 119.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 120.

³⁹ *Id.* at 120-21.

⁴⁰ *Knights*, 534 U.S. at 120.

⁴¹ *Id.* at 121.

⁴² *Id.* at 120 n.6.

search the probationer's home.⁴³ Local law enforcement suspected Knights of being involved in the vandalism of an electrical company's vault, which was pried open and set on fire with gasoline.⁴⁴ Knights had a clear motive for the crime, and "just a week before the arson, a sheriff's deputy had stopped Knights and [his friend] . . . and observed pipes and gasoline in [his friend's] pickup truck."⁴⁵ A detective arranged surveillance of Knights's apartment and observed a friend of Knights exit the apartment carrying what looked like pipe bombs.⁴⁶ The detective also observed several items in the bed of a pickup truck parked in Knights's driveway linking him to the arson of the vault, including "a Molotov cocktail . . . , a gasoline can, and two brass padlocks that fit the description of those removed from the . . . vault."⁴⁷ As a result, the Court did not have to "decide whether the probation condition so diminished, or completely eliminated, Knight's reasonable expectation of privacy . . . that a search . . . without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment."⁴⁸

This would have been a difficult question for the Court considering it has repeatedly held that "a search . . . is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing."⁴⁹ Indeed, the Fourth Amendment usually requires a judicial warrant issued upon a showing of probable cause to conduct a search⁵⁰ in order to "safeguard the privacy and security of individuals against arbitrary invasions[.]"⁵¹ Even in the limited instances like *Knights* where a showing of reasonable suspicion—a lower evidentiary standard than probable cause—may be sufficient to justify a

⁴³ *Id.*

⁴⁴ *Id.* at 114,

⁴⁵ *Knights*, 534 U.S. at 114-15.

⁴⁶ *Id.* at 115.

⁴⁷ *Id.* at 115.

⁴⁸ *Id.* at 120 n.6.

⁴⁹ *Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). See also *Chandler v. Miller*, 520 U.S. 305, 313 (1997) ("To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing.").

⁵⁰ See *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 828 (2002) ("In the criminal context, reasonableness usually requires a showing of probable cause."). See also *Ferguson v. Charleston*, 532 U.S. 67, 77-79 (2001) (holding that searches unsupported by either a warrant or probable cause are constitutional only when special needs, other than the normal need for law enforcement, provide sufficient justification).

⁵¹ *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) (quoting *Camara v. San Francisco Mun. Ct.*, 387 U.S. 523, 528 (1967)).

search,⁵² some quantum of individualized suspicion of wrongdoing is almost always required.⁵³

2. The Fourth Amendment's Special Needs Exception

The Supreme Court, however, has upheld an extremely narrow regime of suspicionless searches "where the program [is] designed to serve 'special needs, beyond the normal need for law enforcement.'"⁵⁴ In *Vernonia School District 47J v. Acton*, for example, the Supreme Court upheld suspicionless drug testing of student-athletes under the special needs exception to the warrant requirement.⁵⁵ The Court noted that "[a] search unsupported by probable cause can be constitutional . . . 'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"⁵⁶ Finding special needs in the public school context, the Court explained that "the warrant requirement 'would unduly interfere with the maintenance of the swift and informal disciplinary procedures . . . needed'" and the ability of "teachers and administrators . . . to maintain order in the schools."⁵⁷

The Supreme Court has never upheld a suspicionless search under the special needs exception where the primary purpose was to detect evidence of ordinary criminal wrongdoing.⁵⁸ In *Indianapolis v. Edmond*, a leading special needs case, the Court invalidated a drug interdiction program

⁵² See, e.g., *Knights*, 534 U.S. at 122.

⁵³ See, e.g., *Edmond*, 531 U.S. at 37.

⁵⁴ *Id.*

⁵⁵ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

⁵⁶ *Id.* at 653 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

⁵⁷ *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340-341 (1985)). See also *Nat'l Treasury Employees v. Von Raab*, 489 U.S. 656, 664-66 (1989) (upholding suspicionless drug testing of U.S. Customs agents with the primary purpose of deterring "drug use among those eligible for promotion to sensitive positions within the Service and to prevent the promotion of drug users to those positions"); *United States v. Martinez-Fuerte*, 428 U.S. 543, 557, 562 (1976) (upholding a suspicionless checkpoint program designed to intercept illegal aliens along the border when requiring "reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens").

⁵⁸ *Edmond*, 531 U.S. at 41-44. "[W]e would not credit the 'general interest in crime control' as justification for a regime of suspicionless stops." *Id.* at 41 (quoting *Delaware v. Prouse*, 440 U.S. 648, 659 n.18 (1979)). See also *Ferguson v. Charleston*, 532 U.S. 67, 77-79 (2001) (holding that searches unsupported by individualized suspicion of wrongdoing are constitutional only when special needs, other than the normal need for law enforcement, provide sufficient justification).

under the Fourth Amendment because the primary purpose of the checkpoint was to generate evidence of normal criminal activity.⁵⁹ The Court noted that “the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.”⁶⁰ Rather, it instructed courts to consider in tandem the liberty interests and the particular law enforcement practices at issue.⁶¹

Similarly, in *Ferguson v. Charleston*, the Supreme Court held that individualized suspicion is required under the Fourth Amendment when the search’s primary purpose is inseparable from the state’s general interest in crime control.⁶² There, the Court invalidated a state hospital’s policy to test the urine of pregnant patients who met certain symptom criteria in order to obtain evidence of cocaine use, which was in turn reported to the police.⁶³ The Court concluded that the program fell outside of the Fourth Amendment’s special needs exception because “the primary purpose . . . was to use the threat of arrest and prosecution in order to force women into [drug] treatment.”⁶⁴

Both *Edmond* and *Ferguson* instruct courts to ascertain a search’s *primary* purpose in order to determine whether it falls under the special needs exception.⁶⁵ To do so, according to the Supreme Court, a court must engage in a close review of the statute’s “programmatic purpose” by considering “all the available evidence.”⁶⁶ When the primary purpose is a special need, beyond the normal need for law enforcement, the court must go on to balance the individual’s privacy expectations against the government’s interest to determine whether it would be impractical to require some level of individualized suspicion.⁶⁷

Because the DNA Act authorizes the search of probationers and prisoners without any suspicion that they have committed or will commit another offense,⁶⁸ courts

⁵⁹ *Edmond*, 531 U.S. at 41-42.

⁶⁰ *Id.* at 42.

⁶¹ *Id.* at 42-43.

⁶² *Ferguson*, 532 U.S. at 67.

⁶³ *Id.* at 70-73.

⁶⁴ *Id.* at 84.

⁶⁵ *Id.* at 81; *Edmond*, 531 U.S. at 46.

⁶⁶ *Ferguson*, 532 U.S. at 81. *See also Edmond*, 531 U.S. at 46-47.

⁶⁷ *Nat’l Treasury Employees v. Von Raab*, 489 U.S. 656, 665-66 (1989) (citing *Skinner v. Ry. Labor Executives Ass’n*, 489 U.S. 602, 619-20 (1989)).

⁶⁸ *Kincade I*, 345 F.3d 1095, 1097 (9th Cir. 2003).

determining its Fourth Amendment constitutionality have begun their analyses by deciding whether to apply the special needs doctrine or the totality of the circumstances test. The analytical split is indeed a real one: Several courts have applied the special needs doctrine,⁶⁹ including the opinions in *Kimler* and *Kincade I*, while several others have applied the totality of the circumstances standard,⁷⁰ including the opinions in *Groceman* and *Kincade II*.

⁶⁹ The following courts have applied the special needs doctrine in determining the Fourth Amendment constitutionality of a DNA collection statute: *Kincade II*, 379 F.3d 813, 840 (2004) (Gould, J. concurring opinion) (DNA Act); *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004) (Wisconsin DNA collection statute); *United States v. Plots*, 347 F.3d 873, 877 (10th Cir. 2003) (DNA Act); *Roe v. Marcotte*, 193 F.3d 72, 82 (2d Cir. 1999) (Connecticut DNA collection statute); *Vore v. United States Dep't of Justice*, 281 F. Supp. 2d 1129, 1137 (D. Ariz. 2003) (DNA Act); *Miller v. United States Parole Comm'n*, 259 F. Supp. 2d 1166, 1177-78 (D. Kan. 2003) (DNA Act); *United States v. Sczubelek*, 255 F. Supp. 2d 315, 323 (D. Del. 2003) (DNA Act); *Nicholas v. Goord*, 01 Civ. 7891 (RCC) (GWG), 2003 U.S. Dist. LEXIS 1621, at *50, 64 (S.D.N.Y. Feb. 6, 2003) (New York DNA collection statute), *aff'd mem. on other grounds*, 01 Civ. 7891 (RCC) (GWG), 2004 U.S. Dist. LEXIS 11708, at *16-19 (S.D.N.Y. June 24, 2004) (upholding the New York statute under a balancing test); *United States v. Miles*, 228 F. Supp. 2d 1130, 1138 (E.D. Cal. 2002) (the DNA Act); *United States v. Reynard*, 220 F. Supp. 2d 1142, 1165-69 (S.D. Cal. 2002) (the DNA Act); *Wisconsin v. Martin*, App. No. 03-3131, 2004 Wisc. App. LEXIS 592, at **8 (Wis. Ct. App. July 27, 2004) (Wisconsin DNA collection statute); *Washington v. Olivas*, 856 P.2d 1076, 1088 (Wash. 1993) (Washington DNA collection statute).

⁷⁰ The following courts have applied the totality of the circumstances test or a balancing analysis in determining the Fourth Amendment constitutionality of a DNA collection statute: *United States v. Walker*, No. 03-10650, 2004 U.S. App. LEXIS 20553, at *2 (9th Cir. Sept. 29, 2004) (DNA Act); *Schaffer v. Saffle*, 148 F.3d 1180, 1181 (10th Cir. 1998) (Oklahoma DNA collection statute); *Schlicher v. (NFN) Peters, I & I*, 103 F.3d 940 (10th Cir. 1996) (Kansas DNA collection statute); *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1996) (Colorado DNA collection statute); *Rise v. Oregon*, 59 F.3d 1556, 1558-61 (9th Cir. 1995) (Oregon DNA collection statute), *cert. denied*, 517 U.S. 1160 (1996); *Jones v. Murray*, 962 F.2d 302, 306-07 (4th Cir. 1992) (Virginia DNA collection statute), *cert. denied*, 506 U.S. 977 (1992); *Goord*, 2004 U.S. Dist. LEXIS 11708, at *16 (S.D.N.Y. June 24, 2004) (New York DNA collection statute); *Padgett v. Ferrero*, 294 F. Supp. 2d 1338, 1343-44 (N.D. Ga. 2003) (Georgia DNA collection statute); *United States v. Stegman*, 295 F. Supp. 2d 542, 548-50 (D. Md. 2003) (DNA Act); *United States v. Meier*, CR No. 97-72 HA, 2002 U.S. Dist. LEXIS 25755, at *11-13 (D. Or. Aug. 6, 2002) (DNA Act); *United States v. Lujan*, CR No. 98-480-02 HA, 2002 U.S. Dist. LEXIS 25754, at *11-13 (D. Or. July 9, 2002) (DNA Act); *Vanderlinden v. Kansas*, 874 F. Supp. 1210, 1214-15 (D. Kan. 1995) (Kansas DNA collection statute); *Kruger v. Erickson*, 875 F. Supp. 583, 588-89 (D. Minn. 1994) (Minnesota DNA collection statute); *Gilbert v. Peters, III*, Nos. 93 C 20012, 92 C 20354, 1994 U.S. Dist. LEXIS 9215, at *14-23 (N.D. Ill. June 28, 1994) (Illinois DNA collection statute).

PART III

A. *Circuit Decisions Applying the Totality of the Circumstances Test*1. *Groceman v. United States Department of Justice*⁷¹

The Fifth Circuit in *Groceman* was the first circuit court to address the DNA Act's constitutionality using the totality of the circumstances standard. Rejecting the special needs analysis, the court considered the totality of the circumstances in determining whether the suspicionless compulsory extraction of DNA violates the Fourth Amendment rights of the prisoners in question.⁷² It balanced the "inmate's diminished privacy rights, the minimal intrusion involved, and the legitimate government interest in using DNA to investigate crime."⁷³ The court concluded that prisoners have no reasonable expectation that the government will not extract blood from their bodies to analyze and include in a database.⁷⁴ It likened DNA collection to fingerprinting, explaining that individualized suspicion is unnecessary to collect DNA from convicted offenders because they "retain no constitutional privacy interest against their correct identification."⁷⁵ In conclusion, the court held that the Act is consistent with the Fourth Amendment's reasonableness requirement, and its application did not infringe the constitutional rights of the prisoners in question.⁷⁶

⁷¹ Plaintiffs, Jeffrey and Bradley Groceman, were convicted of armed bank robbery and conspiracy to commit armed bank robbery. *Groceman*, 354 F.3d at 412. The DNA Act required them to submit DNA samples. *Id.* They sued to enjoin the collection of their DNA samples on Fourth Amendment grounds and the district court dismissed their suit for failure to state a claim. *Id.* at 412-13. On appeal, they argued that the DNA Act authorizes unreasonable searches in violation of the Fourth Amendment. *Id.*

⁷² *Id.* at 413.

⁷³ *Groceman*, 354 F.3d at 413 (citing *Velaquez v. Woods*, 329 F.3d 420 (5th Cir. 2003) (per curiam)).

⁷⁴ *Id.* at 413-14.

⁷⁵ *Id.*

⁷⁶ *Id.* at 414.

2. *Kincade II*⁷⁷

The plurality in the Ninth Circuit *en banc* decision in *Kincade II* also applied the totality of the circumstances standard⁷⁸ and held that the DNA Act's authorized searches are constitutional under the Fourth Amendment.⁷⁹ Reversing *Kincade I*,⁸⁰ the plurality found the search reasonable in light of convicted offenders' reduced expectations of privacy, the minimal intrusiveness of blood extraction, and the government's legitimate and compelling interests in collecting DNA from convicted offenders.⁸¹

The decision is most notable for the plurality's comprehensive analysis of Fourth Amendment jurisprudence in order to determine whether the Act could be sustained under the totality of the circumstances test.⁸² In effect, it addressed whether individualized suspicion is always necessary to conduct a search to retrieve evidence for criminal prosecutions.⁸³ It noted several exceptions to the general rule that the state must have a judicial warrant issued upon probable cause to conduct such a search.⁸⁴ The plurality briefly explained the exceptions and concluded that after *Ferguson* and *Edmond*, no exception seemed to exist for suspicionless searches designed to gather evidence for prosecutorial purposes.⁸⁵ The DNA Act would therefore have to serve a non-law enforcement objective to pass constitutional muster, given that it authorizes suspicionless searches.

⁷⁷ Unlike *Groceman*, the challenger in *Kincade* was a probationer. *Kincade II*, 379 F.3d 813, 820 (9th Cir. 2004). Thomas Cameron Kincade robbed a bank using a firearm and was sentenced to ninety-seven months imprisonment, followed by three years supervised release. *Id.* In 2002, he was told that he had to comply with the DNA Act. *Id.* He refused and unsuccessfully challenged the DNA Act's Fourth Amendment constitutionality in United States district court. *Id.* at 821. He appealed to the Ninth Circuit and a panel of three judges held that the Act was unconstitutional. *See Kincade I*, 345 F.3d 1095, 1096 (9th Cir. 2003). The Ninth Circuit set aside that holding and this *en banc* proceeding followed. *See United States v. Kincade*, 345 F.3d 1000 (9th Cir. 2004) (reh'g *en banc*).

⁷⁸ *Kincade II*, 379 F.3d at 832.

⁷⁹ *Id.* at 839.

⁸⁰ *See Kincade I*, 345 F.3d at 1104, 1113 (three judge panel invalidating the Act within the special needs framework). *See infra* Part III.B.2 for the discussion of *Kincade I*.

⁸¹ *Kincade II*, 379 F.3d at 839.

⁸² *See id.* at 822-32.

⁸³ *See id.*

⁸⁴ *Id.* at 822.

⁸⁵ *See id.* at 822-27.

However, the plurality argued that the Supreme Court's holding in *United States v. Knights* removed any such obstacle for the DNA Act.⁸⁶ It explained that the Supreme Court in *Knights* approved a warrantless search of a probationer's home with the intention of finding evidence of normal criminal wrongdoing.⁸⁷ The plurality noted that the Court in *Knights* never mentioned *Ferguson* and "reference[d] *Edmond* only once—and purely in passing."⁸⁸ It interpreted this as a retreat from *Edmond's* and *Ferguson's* insistence that "any search conducted primarily for law enforcement purposes must be accompanied by at least some quantum of individualized suspicion[.]"⁸⁹

Although the plurality acknowledged that there was reasonable suspicion to search *Knights's* home and no individualized suspicion to search *Kincade's* person, it found that this distinction was without analytical effect.⁹⁰ It opined that the presence of reasonable suspicion was unrelated to *Knights's* implicit rejection of the special needs doctrine.⁹¹ The plurality explained that the special needs doctrine has been applied to searches accompanied by some quantum of individualized suspicion,⁹² thereby making *Knights's* dismissal of the special needs doctrine a departure from past cases, rather than a different case altogether.⁹³ Furthermore, it asserted that the Supreme Court in *Ferguson* distinguished suspicionless searches of prisoners and probationers from

⁸⁶ *Kincade II*, 379 F.3d at 827-28.

⁸⁷ *Id.* at 827.

⁸⁸ *Id.* at 828 n.22.

⁸⁹ *Id.* at 827 ("While [the Supreme Court's] recent case may seem to be moving toward requiring that any search conducted primarily for law enforcement purposes must be accompanied by at least some quantum of individualized suspicion, the Court signaled the existence of possible limitations in *United States v. Knights*." (citations omitted)).

⁹⁰ *Id.* at 829.

⁹¹ *Kincade II*, 379 F.3d at 829.

⁹² *Id.* ("The Court has long understood special needs analysis to be triggered not by a complete absence of suspicion, but by a departure from the *Fourth Amendment's* warrant-and-probable cause requirements."). The plurality cited *Griffin v. Wisconsin*, 483 U.S. 868, 875-76 (1987), in which the Supreme Court upheld a search of a probationer's home upon reasonable suspicion, reasoning that the supervision of probationers serves a special need. *Id.* at 875-80.

⁹³ See *Kincade II*, 379 F.3d at 828 ("Having thus upheld a warrantless probation search designed purely to further law enforcement purposes, and having done so wholly outside the confines of special needs analysis, *Knights* suggest [sic] something of a departure from *Edmond* and *Ferguson* (and to a more limited extent *Griffin*).").

suspicionless searches of the general public.⁹⁴ It argued that by doing so, the Court had laid “the framework for a jurisprudentially sound analytic division between these two classes of suspicionless searches.”⁹⁵ Taken together, the plurality concluded that suspicionless evidentiary searches of probationers may be upheld under a “pure totality of the circumstances analysis,”⁹⁶ even though the Supreme Court has not specifically addressed the issue.⁹⁷

The plurality criticized Judge Reinhardt’s dissent for condemning suspicionless law enforcement searches in light of the Supreme Court’s failure to address whether the reduced privacy expectations of convicted offenders alone could justify the complete departure from the usual individualized suspicion requirement.⁹⁸ It interpreted this abyss of Fourth Amendment jurisprudence as a reason to sit *en banc* and address the very issue.⁹⁹ Criticizing the dissent, the plurality wrote: “[T]he Supreme Court’s not yet having squarely resolved a legal question . . . is why we have a case to decide, and we are heartened by Judge Reinhardt’s recognition that there is good reason [for] sitting *en banc*.”¹⁰⁰

The overall effect of the *en banc* decision was not only to reverse the holding of *Kincade I*, but to also reject the special needs approach in favor of the totality of the circumstances analysis. Seemingly, the former is simply the result of the latter, given that the totality of the circumstances standard is starkly more deferential than the special needs analysis. Proving otherwise, however, the Tenth Circuit held that the DNA Act is constitutional under the Fourth Amendment within the special needs framework.¹⁰¹

⁹⁴ *Id.* at 832.

⁹⁵ *Id.*

⁹⁶ *Id.* at 833.

⁹⁷ *See id.* at 830.

⁹⁸ *Kincade II*, 379 F.3d at 832 n.27. (“A substantial portion of Judge Reinhardt’s dissent is devoted simply to establishing that the Supreme Court has never expressly authorized suspicionless, arguably law enforcement-oriented searches of conditional releasees. As we have demonstrated, the Court also has expressly declined to condemn such searches.”).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *See United States v. Kimler*, 335 F.3d 1132, 1146 (10th. Cir. 2003), *cert. denied*, 124 S. Ct. 945 (2003).

B. *Circuit Decisions Applying the Special Needs Analysis*

1. *United States v. Kimler*¹⁰²

With little analysis, the Tenth Circuit found that “the desire to build a DNA database goes beyond the ordinary law enforcement need.”¹⁰³ Finding a special need, the court justified the absence of individualized suspicion and found the search reasonable under a balancing test.¹⁰⁴ In support of its special need rationale, it cited two district court cases,¹⁰⁵ *Miller v. United States Parole Commission*¹⁰⁶ and *United States v. Sczubelek*,¹⁰⁷ and one circuit court case, *Roe v. Marcotte*.¹⁰⁸

In *Miller*, the district court in Kansas concluded that the Act’s authorized searches fall within the special needs exception, even though the Act’s primary purpose is to solve past and future crimes, clearly a law enforcement purpose.¹⁰⁹ The court reasoned that the searches authorized by the DNA Act are not used to target a specific crime or individual,¹¹⁰ but rather the Act “creates a database for solving crimes that have not yet occurred or crimes that have occurred but are not specifically being looked at when taking any one individual’s blood sample.”¹¹¹ It found that since the Act’s “primary purpose

¹⁰² Randy C. Kimler, the defendant, was convicted of one count of receiving and distributing computerized images of minors engaged in sexually explicit conduct. *Id.* at 1134. He was sentenced to eighty-seven months imprisonment and three years of supervised release. *Id.* As a condition of his release, Kimler was required to cooperate in the collection of his DNA sample pursuant to the DNA Act. *Id.* Following his conviction and sentencing, he raised several issues on appeal, including that the DNA Act violates the Fourth Amendment’s prohibition against unreasonable searches and seizures. *Id.*

¹⁰³ *Kimler*, 335 F.3d at 1146.

¹⁰⁴ *See id.* at 1146. Although the court found that the search was reasonable, it did not mention the interests it factored into the Fourth Amendment balancing test. *See id.*

¹⁰⁵ *See id.*

¹⁰⁶ *Miller v. United States Parole Comm’n*, 259 F. Supp. 2d 1166, 1175-78 (D. Kan. 2003) (finding the DNA Act constitutional under the special needs exception to the Fourth Amendment).

¹⁰⁷ *United States v. Sczubelek*, 255 F. Supp. 2d 315, 319-23 (D. Del. 2003) (finding the DNA Act constitutional under the special needs exception to the Fourth Amendment).

¹⁰⁸ *Roe v. Marcotte*, 193 F.3d 72, 76-82 (2d Cir. 1999) (finding the Connecticut DNA collection statute constitutional under the special needs exception).

¹⁰⁹ *See Miller*, 259 F. Supp. 2d at 1176-77.

¹¹⁰ *Id.* at 1176.

¹¹¹ *Id.*

is not investigating 'some specific wrongdoing[,]'" it serves special needs beyond ordinary law enforcement objectives.¹¹²

The Tenth Circuit also relied on *United States v. Sczubelek* in which the district court in Delaware similarly upheld the DNA Act under the special needs exception to the Fourth Amendment.¹¹³ The *Sczubelek* court found that the DNA Act's primary purpose is "to fill the CODIS system with DNA samples from qualifying federal offenders."¹¹⁴ Characterizing this purpose as a special need, it offered three distinctions between the objective of filling CODIS and normal law enforcement activity.¹¹⁵ First, the court explained that DNA samples are not evidence of criminal wrongdoing because they can only inculcate individuals "after the sample is analyzed

¹¹² *Id.* This reasoning was first articulated in *Nicholas v. Goord*, 01 Civ. 7891 (RCC) (GWG), 2003 U.S. Dist. LEXIS 1621, at *42-50 (S.D.N.Y. Feb. 6, 2003), *aff'd mem. on other grounds*, 01 Civ. 7891 (RCC) (GWG), 2004 U.S. Dist. LEXIS 11708, at *5-19 (S.D.N.Y. June 24, 2004). In distinguishing DNA samples from the drug tests in *Ferguson*, the *Nicholas* court contended that the latter produced evidence revealing whether an individual had committed a particular crime. *Id.* at *43. By contrast, the court argued that "DNA databank[s] prove nothing by themselves regarding whether the donor has committed a crime." *Id.* at *43. Moreover, the court noted that "the data bank's primary utility would not be to investigate past crimes but to maintain information available to solve future crimes." *Id.* at *43-44. The court suspected that "if . . . [the DNA database] is ever used, [it] may occur in connection with a crime that had not even happened at the time of the sampling." *Id.* at *45. See also *Vore v. United States Dep't of Justice*, 281 F. Supp. 2d 1129, 1135 (D. Ariz. 2003) ("Unlike the programs deemed unconstitutional by the Supreme Court in *Edmond* and *Ferguson*, the DNA Act is not designed to discover and produce evidence of a specific individual's criminal wrongdoing.").

¹¹³ *United States v. Sczubelek*, 255 F. Supp. 2d 315, 322-23 (D. Del. 2003).

¹¹⁴ *Id.* at 322. See also *United States v. Reynard*, 220 F. Supp. 2d 1142, 1167-69 (S.D. Cal. 2002). The court in *United States v. Reynard* upheld the DNA Act under the Fourth Amendment's special needs exception. *Id.* Looking to the "plain text of the DNA Act," the court concluded that "Congress's immediate purpose in authorizing DNA 'searches' was to permit probation officers to fill the CODIS databases with . . . DNA fingerprints . . ." *Id.* at 1167. The court further noted that the Act requires probation officers and prison officials, who do not normally conduct criminal investigations, to fill the database. *Id.* 1167-68. In light of the primary purpose and the lack of traditional law enforcement involvement, the court held that the DNA Act is "programmatically in scope," and serves special needs, beyond normal law enforcement activity. *Id.* at 1168. The court conceded that the search allows law enforcement authorities to use the DNA to solve pending criminal cases, a normal law enforcement objective. *Reynard*, 220 F. Supp. 2d at 1168 n.30. It found that this did not remove the Act from the special needs exception, however, because the immediate purpose in enacting the DNA Act—the creation of a more complete DNA database—is beyond normal law enforcement activity. *Id.* Conversely, the court characterized the Act's ordinary law enforcement objectives as ultimate objectives of the Act, noting that the ultimate objectives of a search are not dispositive of the search's special needs status. *Id.* It then explained that searches that ultimately achieve normal law enforcement purposes are more likely to fit into the special needs category if the administering of the searches is non-discretionary and uniform, as they are under the DNA Act. *Id.*

¹¹⁵ *Sczubelek*, 255 F. Supp. 2d at 322-23.

and then evaluated against available crime scene samples¹¹⁶ Second, the court emphasized that CODIS “only offers the potential to solve crimes” because there is only a hit for every thousand new samples.¹¹⁷ Lastly, it noted, as did the *Miller* court,¹¹⁸ that the searches are not connected to any specific individual or crime.¹¹⁹ It concluded therefore that the DNA Act’s objective to solve crimes is not ordinary, and that the application of a balancing test is justified to determine the Act’s Fourth Amendment constitutionality.¹²⁰

The last of the special needs cases cited by the Tenth Circuit was *Roe v. Marcotte* in which the Second Circuit upheld the Connecticut DNA collection statute as applied to prisoners.¹²¹ The court found that the DNA statute serves the special need of reducing the recidivism rates of sex offenders.¹²² Relying upon various studies, the *Marcotte* court concluded that sex offenders have a uniquely high recidivism rate and that increased supervision decreases their likelihood to commit sex crimes in the future.¹²³

Finally, the Tenth Circuit criticized the district court in *United States v. Miles*¹²⁴ for ignoring the analytical import of the probationers’ reduced privacy expectations.¹²⁵ Applying the special needs analysis, the *Miles* court found that the diminished privacy rights of convicted offenders may weigh into the special need balancing test, but they do not affect whether a search actually falls under the special needs

¹¹⁶ *Id.* at 322.

¹¹⁷ *Id.* It predicted that this ratio is not likely to improve in light of the enormous backlog of samples. *Id.* at 322.

¹¹⁸ *Supra* text accompanying notes 110-11.

¹¹⁹ *Sczubelek*, 255 F. Supp. 2d at 322 n.14.

¹²⁰ *Id.* at 322-23.

¹²¹ *Roe v. Marcotte*, 193 F.3d 72, 82 (2d Cir. 1999). The prisoner in question only challenged the portion of the statute which encompassed sexual offenders. *Id.* at 76.

¹²² *Id.* at 79-80.

¹²³ *Id.* at 79. The court then applied a traditional balancing test and found the search reasonable. *Id.* at 80, 82.

¹²⁴ *United States v. Miles*, 228 F. Supp. 2d 1130, 1138-41 (E.D. Cal. 2002). The *Miles* court held that the searches pursuant to the DNA Act were unconstitutional because they lacked individualized suspicion and failed to fall within the special needs exception. *Id.* The court concluded that the Act’s primary purpose was to increase prosecutions, which is an implicit and integral objective of law enforcement. *Id.* As a result, it found that some quantum of individualized suspicion was needed for the Act’s authorized searches to be reasonable under the Fourth Amendment. *Id.*

¹²⁵ *United States v. Kimler*, 335 F.3d 1132, 1146 n.14 (10th Cir. 2003), *cert. denied*, 124 S. Ct. 945 (2003).

exception.¹²⁶ The Tenth Circuit disagreed and explained that convicted offenders enjoy less privacy than the general public, thereby affecting whether the DNA Act requires individualized suspicion of wrongdoing to pass constitutional muster.¹²⁷

2. *Kincade I*¹²⁸

The court in *Kincade I* similarly concluded that in order to extract DNA from probationers, there must be individualized suspicion of wrongdoing or a special need, beyond normal law enforcement purposes.¹²⁹ In contrast to the Tenth Circuit, it found that neither was present.¹³⁰

Following *Knights*, the *Kincade I* court first considered the totality of the circumstances and concluded that at least reasonable suspicion is required to extract blood from probationers.¹³¹ It argued that although probationers have a reduced expectation of privacy due to their lawful conviction and subsequent state supervision, this alone does not subject them to suspicionless searches designed to collect evidence to use in criminal prosecutions.¹³² The court refused to extend *Knights*¹³³ to cover suspicionless searches for normal law enforcement purposes in light of the absence of Supreme Court cases upholding such searches under the totality of the circumstances test.¹³⁴ It therefore concluded that while probationary status may reduce the level of suspicion required to justify a search, it does not completely eliminate all need for individualized suspicion.¹³⁵

¹²⁶ See *Miles*, 228 F. Supp. 2d at 1137-39.

¹²⁷ See *Kimler*, 335 F.3d at 1146 n.14.

¹²⁸ As noted, the Ninth Circuit *en banc* reversed *Kincade I*. *Supra* note 4.

¹²⁹ *Kincade I*, 345 F.3d 1095, 1096 (9th. Cir. 2003).

¹³⁰ *Id.*

¹³¹ *Id.* at 1102-03, 1104.

¹³² *Id.* at 1102 ("[A]lthough parole may reduce the degree of constitutional protection afforded an individual's body, it does not eradicate it.").

¹³³ *Id.* ("The *Knights* Court did not reach the question whether searches of parolees and probationers could lawfully be conducted in the absence of reasonable suspicion." (emphasis in original)).

¹³⁴ *Kincade I*, 345 F.3d at 1102 n.20 (citing *Hudson v. Palmer*, 468 U.S. 517, 526 (1984)) ("Even a prisoner, who has no legitimate expectation of privacy in his cell, retains an expectation of privacy in his body unless there is reasonable cause to violate his bodily integrity and a legitimate penological interest in doing so." (citations omitted)).

¹³⁵ *Id.* at 1103 ("[T]he government's desire to complete a comprehensive data bank does not outweigh Kincade's reasonable expectation of privacy in his body. . . . While weighing these interests could affect the degree of suspicion or cause required to conduct such searches, it could not serve to eliminate the requirement of individualized

The government argued, however, that when looking at the totality of the circumstances, the court must consider the government's interests in light of the special need in supervising probationers, as articulated in *Griffin v. Wisconsin*.¹³⁶ Rejecting the government's contention, the court noted that the special need in *Griffin* merely reduced the degree of individualized suspicion required.¹³⁷ The Supreme Court in *Griffin* held that the special need in supervising probationers may justify a search of a probationer's apartment based upon reasonable suspicion of wrongdoing, instead of the usual warrant and probable-cause requirements.¹³⁸ According to the *Kincade I* court, *Griffin* failed to authorize suspicionless searches and therefore was not directly controlling in this case.¹³⁹

More importantly, the court distinguished the primary purposes of the DNA search and the search in *Griffin*.¹⁴⁰ It explained that the special need in *Griffin* was "directly related to the administration of parole[,] while the primary purpose of the DNA Act is to solve future crimes."¹⁴¹ The court reasoned that solving crimes is not related to the parole/probation system because the interest in solving future crimes survives

suspicion entirely."). Finding that individualized suspicion was a constitutional floor, the court discredited the Ninth Circuit's previous decision in *Rise v. Oregon* in which it approved Oregon's analogous DNA statute. *Id.* at 1107-08. In *Rise*, the Ninth Circuit applied a balancing test and held that the suspicionless searches were reasonable, even though they were designed to further law enforcement objectives. *Rise v. Oregon*, 59 F.3d 1556, 1559-62 (9th Cir. 1995), *cert. denied*, 517 U.S. 1160 (1996). The *Rise* court concluded that convicted offenders under state supervision lack any reasonable expectation of privacy in their identification, and, as a result, the taking of their blood does not infringe upon their Fourth Amendment rights. *Id.* at 1560. The *Kincade I* court explained, however, that *Ferguson* and *Edmond* debauched *Rise*'s precedential effect "[b]ecause *Rise* depended on reasoning and reached a result that the Supreme Court has since expressly disavowed . . ." *Kincade I*, 345 F.3d at 1108. Specifically, it argued that *Ferguson* and *Edmond* "made clear that the Court would 'decline to suspend the usual requirement of individualized suspicion where the police seek to employ a [search] primarily for the ordinary enterprise of investigating crimes.'" *Id.* (quoting *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (formatting in original)). The *Kincade I* court explained that this principle applies equally to searches of prisoners and probationers, opining that "it would be a unique construction of the Constitution to hold that Fourth Amendment protections exist only for the benefit of the innocent, and not for all persons in our society." *Id.* at 1109.

¹³⁶ *Kincade I*, 345 F.3d at 1103.

¹³⁷ *Id.*

¹³⁸ *Griffin v. Wisconsin*, 483 U.S. 868, 872-75 (1987).

¹³⁹ *Kincade I*, 345 F.3d at 1103.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

and, in fact, increases after the expiration of the parole or probationary term.¹⁴²

The government argued alternatively that suspicionless searches authorized under the DNA Act are constitutional because the Act's immediate objective of filling CODIS serves a special need.¹⁴³ The court gave no credence to the distinction the government made between filling CODIS and gathering evidence for criminal investigations.¹⁴⁴ It observed: "The purpose of these searches is no more to put samples into CODIS than is the purpose of finger-printing to place cards into index files."¹⁴⁵

Finally, the government contended that the Act's ultimate objective in increasing the efficacy of the criminal justice system is a special need.¹⁴⁶ But as in *United States v. Miles*,¹⁴⁷ the *Kincade I* court concluded that decreasing wrongful prosecutions is not beyond normal law enforcement purposes.¹⁴⁸ It found it "troubling" for the government to assert that prosecutorial accuracy is beyond normal law enforcement objectives.¹⁴⁹ Even if it were, the court continued, the exoneration of the innocent "would still not serve to supplant the primary law enforcement objective of these searches—the solving of crimes and the prosecution of those responsible."¹⁵⁰ It explained that the ultimate achievement of a "benign motive" does not automatically cloak a search with the protective status of the special needs exception.¹⁵¹

Moreover, the court maintained that although exoneration of the innocent is a worthy cause, the government does not need to "exonerate people who do not want to be

¹⁴² *Id.* ("Any use of the information to solve crimes committed during a parolee's term of supervision is fortuitous and incidental to the primary purpose of the Act.").

¹⁴³ *Id.* at 1111-12 (quoting the government's brief without a citation).

¹⁴⁴ *Kincade I*, 345 F.3d at 1112.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *See United States v. Miles*, 228 F. Supp. 2d 1130, 1139 (E.D. Cal. 2002).

¹⁴⁸ *Kincade I*, 345 F.3d at 1112-13.

¹⁴⁹ *Id.* at 1112. *See also Miles*, 228 F. Supp. 2d at 1139 ("[T]he accurate prosecution of crime is an inherent and implicit goal of the government's ordinary law enforcement objective.").

¹⁵⁰ *Kincade I*, 345 F.3d at 1112.

¹⁵¹ *Id.* The court noted that "the special needs cases provide a *narrow exception* to the ordinary Fourth Amendment requirements, not a convenient means by which to avoid the strictures of the Constitution." *Id.* (emphasis in original).

exonerated.”¹⁵² Convicted felons who believe they are innocent can volunteer their DNA, leaving no reason to forcibly seize DNA in the name of the innocent. The court suggested that a statute requiring the government to collect and analyze the DNA upon the request of convicted felons would serve the asserted purpose without offending the Fourth Amendment.¹⁵³ As a result, the court opined that the government’s concerns regarding the innocent are likely disingenuous.¹⁵⁴

In conclusion, the court held that “forced blood extractions pursuant to the [DNA Act] violate the Fourth Amendment because they constitute suspicionless searches with the objective of furthering law enforcement purposes.”¹⁵⁵ In accordance with *Knights*, the court noted that the DNA Act must condition searches on the finding of reasonable suspicion in order for the Act to pass constitutional muster.¹⁵⁶

PART IV

The Ninth Circuit’s *Kincade I* decision is the most persuasive decision in two important respects. First, the Ninth Circuit panel correctly delineated the special needs doctrine as the more appropriate approach in determining the Act’s Fourth Amendment constitutionality, in contrast to the totality of the circumstances standard endorsed by the Fifth Circuit and the Ninth Circuit *en banc*.¹⁵⁷ Second, the Ninth Circuit panel’s special needs analysis comports more with Supreme Court precedent than the Tenth Circuit’s analysis and is therefore a more honest judicial review.¹⁵⁸

A. *The Special Needs Analysis: The More Appropriate Approach for Analyzing the DNA Act*

In this context, a court’s determination of the correct analytical approach is of paramount importance. Considering the typically lax review under the totality of the circumstances standard and the narrowness of the special needs exception,

¹⁵² *Id.* at 1113 (quoting *Miles*, 228 F. Supp. 2d at 1139).

¹⁵³ *Id.*

¹⁵⁴ *Kincade I*, 345 F.3d at 1113.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Infra* Part IV.A.

¹⁵⁸ *Infra* Part IV.B.

this determination is practically outcome determinative. More fundamentally, in selecting one approach over the other, a court defines the Fourth Amendment's limitations on the government more profoundly than when it simply determines whether a search is reasonable, or whether probable cause exists.

The choice between the totality of the circumstances standard and the special needs doctrine reflects two very different interpretations of the Fourth Amendment's safeguards. Under the totality of the circumstances test, courts do not require any individualized suspicion of wrongdoing, but rather conduct a balancing test to determine whether the reasonable privacy expectations of probationers or prisoners have been violated by the suspicionless extraction of blood.¹⁵⁹ The primary justification for departing from the usual requirement of individualized suspicion is the convicted offenders' reduced expectation of privacy.¹⁶⁰ Under the special needs approach, courts refrain from departing from the traditional individualized suspicion requirement, unless there are identifiable special needs beyond normal law enforcement objectives.¹⁶¹

As applied to the DNA Act, the balancing approach has, at most, tenable support from Fourth Amendment jurisprudence, and is indeed the less prudent choice. Aside from exigencies¹⁶² and other narrowly defined circumstances,¹⁶³ individualized suspicion of wrongdoing is necessary to search an individual for purposes related to the general interest in crime control.¹⁶⁴ Moreover, the Supreme Court has made clear that there are few exceptions to the individualized suspicion

¹⁵⁹ See *supra* Part III.A.

¹⁶⁰ See *id.* Cf. *supra* Part II.B.1 (discussing *Knights* in which the Supreme Court departed from the usual warrant and probable cause requirements largely due to the reduced privacy expectations of probationers).

¹⁶¹ See *supra* Part III.B.

¹⁶² See, e.g., *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) ("Of course, there are circumstances that may justify a law enforcement check-point where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control. For example, . . . the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack . . .").

¹⁶³ See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 557, 562 (1976) (upholding a suspicionless checkpoint program designed to intercept illegal aliens along the border).

¹⁶⁴ See *Edmond*, 531 U.S. at 44; *Ferguson v. Charleston*, 532 U.S. 67, 79 n.15 (2001); *Chandler v. Miller*, 520 U.S. 305, 308 (1997).

requirement¹⁶⁵ and has discouraged the creation of new categories of Fourth Amendment reasonableness.¹⁶⁶ Nonetheless, the courts employing the totality of the circumstances standard have in effect created a new category of searches not requiring justification by any individualized suspicion of wrongdoing, regardless of the search's purpose.

This simply does not comport with Supreme Court precedent. The Court has not categorically denied prisoners and probationers the protections of the traditional individualized suspicion requirement.¹⁶⁷ Although these individuals generally have diminished expectations of privacy,¹⁶⁸ they retain some privacy interests in their bodily integrity.¹⁶⁹ While the precise import of these privacy

¹⁶⁵ See, e.g., *Edmond*, 531 U.S. at 451 ("While such suspicion is not an 'irreducible' component of reasonableness, we have recognized only limited circumstances in which the usual rule does not apply." (internal citations omitted)).

¹⁶⁶ *Kincade I*, 345 F.3d 1095, 1104 n.22 (9th Cir. 2003) (citing *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985) ("We do not think that the Fourth Amendment's emphasis upon reasonableness is consistent with the creation of a third verbal standard in addition to 'reasonable suspicion' and 'probable cause[.]'")).

¹⁶⁷ See *United States v. Knights*, 534 U.S. 112, 120 n.6 (2001) (reserving for another time the question of whether suspicionless searches of probationers for normal law enforcement purposes could be reasonable); *Bell v. Wolfish*, 441 U.S. 520, 545, 558-60 (1979) (expressing concern for inmates' bodily integrity, the Court wrote that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison").

¹⁶⁸ See *Knights*, 534 U.S. at 119 (explaining that probationary status diminishes an individual's privacy rights); *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (same); *Hudson v. Palmer*, 468 U.S. 517, 526-28 (1984) (concluding that prisoners have no reasonable expectation of privacy in their cells because of the paramount interest in maintaining institutional order); *Bell*, 441 U.S. at 556-57 (1979) (explaining that prisoners have a reduced expectation of privacy).

¹⁶⁹ See *Bell*, 441 U.S. at 545, 558-60 (explaining that prisoners have some Fourth Amendment rights); *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) ("There is no iron curtain drawn between the Constitution and [convicted offenders]."). Cf. *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 127-29 (1977) (holding that inmates retain some First Amendment rights); *Meachum v. Fano*, 427 U.S. 215, 225 (1976) (holding that prisoners have the right to the protection of the Due Process Clause); *Pell v. Procunier*, 417 U.S. 817, 822 (1974) ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."). See also *Schmerber v. California*, 384 U.S. 757, 770 (1966) ("The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great."). Despite this premise, in upholding DNA collection statutes under a balancing or totality of the circumstances test, courts have said that prisoners and probationers have no legitimate expectation of privacy in their correct identification. *Groce v. United States Dep't of Justice*, 354 F.3d 411, 413-14 (5th Cir. 2004) (per curiam); *Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995), cert. denied, 517 U.S. 1160 (1996); *Jones v. Murray*, 962 F.2d 302, 306-07 (4th Cir. 1992), cert. denied, 506 U.S. 977 (1992). This assertion misses the mark: The issue is whether they have a reasonable expectation of privacy in the identifying information of their blood. And, indeed they do. "To say that no reasonable privacy

expectations is unclear, the Court has never approved a suspicionless search of a prisoner or probationer without reference to some special or legitimate penological need.¹⁷⁰

The plurality in *Kincade II* inaccurately suggested that *Knights* signaled a retreat from requiring individualized suspicion upon searching convicted offenders under state supervision for normal law enforcement purposes.¹⁷¹ Explaining that the Supreme Court in *Knights* upheld a warrantless search of a probationer's home without mentioning the special needs doctrine, it argued that the Court had departed from *Griffin v. Wisconsin* which upheld a warrantless search of a probationer's home within the special needs exception.¹⁷² But, as the dissent noted in *Kincade II*, there was at least reasonable suspicion that *Knights* was involved in the arson of a vault, including the fact that a friend was seen leaving *Knights*'s apartment carrying pipe bombs, a fact that the Supreme Court strongly emphasized in evaluating the totality of the circumstances.¹⁷³

The plurality in *Kincade II* nonetheless found that it was arbitrary to distinguish *Knights* and the DNA searches on the basis of law enforcement's level of suspicion.¹⁷⁴ It maintained that the special needs doctrine applies similarly to

interest protects against the search is to say that police officers have complete discretion to conduct the search as they like." The Honorable Ronald M. Gould and Simon Stern, *Catastrophic Threats and the Fourth Amendment*, 77 S. CAL. L. REV. 777, 812 (2004).

¹⁷⁰ See *Turner v. Safley*, 482 U.S. 78, 89 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to *legitimate penological interests*."); *Hudson*, 468 U.S. at 527-28 (justifying a search of a prisoner's cell without individualized suspicion by reference to the needs of institutional order and safety); *Bell*, 441 U.S. at 558-60 (justifying a search of a prisoners' body cavities after contact visits without any individualized suspicion by reference to the needs of institutional order and safety). For a recent case applying the *Turner* standard to strip searches, see N.G. and S.G. v. Connecticut, No. 02-9274, 2004 U.S. App. LEXIS 18834, at *22-32 (2d Cir. Sept. 7, 2004). As the panel in *Kincade I* held, the Fourth Amendment prohibits suspicionless searches of convicted offenders, unless there are identifiable legitimate penological or special needs. See *Kincade I*, 345 F.3d at 1096.

¹⁷¹ *Kincade II*, 379 F.3d at 827-30.

¹⁷² *Id.* at 828. See *supra* note 92 (discussing *Griffin v. Wisconsin*).

¹⁷³ See *Knights*, 534 U.S. at 115, 121. After repeatedly emphasizing the presence of reasonable suspicion throughout the opinion, the Court in the last paragraph reminded us that "[t]he District Court found, and *Knights* concedes, that the search in this case was supported by reasonable suspicion." *Id.* at 122. See *Kincade II*, 379 F.3d at 861-62 (Reinhardt J., dissenting) (explaining that the Court in *Knights* departed from the special needs doctrine on the account of several factors, strongly emphasizing "the fact that the search was supported by reasonable suspicion").

¹⁷⁴ *Kincade II*, 379 F.3d at 828-29.

searches with reasonable suspicion and without.¹⁷⁵ According to the plurality, because *Knights* applied the totality of the circumstances standard, instead of the special needs doctrine, a suspicionless search could similarly be sustained by looking at the totality of the circumstances.¹⁷⁶ But suspicionless searches and suspicion-based searches are not interchangeable. The dissent in *Kincade II* pointed out that “the line between suspicionless law enforcement searches and searches based upon reasonable individualized suspicion is as old as the *Fourth Amendment* and is fundamental to the preservation of the privacy interests which that provision protects.”¹⁷⁷ The law of suspicionless searches cannot blindly adopt the law of suspicion-based searches simply because both types of searches have appeared in the special needs context.

Admittedly, the Supreme Court has exercised less vigorous Fourth Amendment scrutiny in connection with probationers in order to aid crime prevention.¹⁷⁸ The Supreme Court in *Knights* wrote: “[The state’s] interest in apprehending violators of the criminal law . . . may . . . justifiably focus on probationers in a way that it does not on the ordinary citizen.”¹⁷⁹ It is conceivable that the Supreme Court will no longer require individualized suspicion to search prisoners and probationers due to their reduced expectation of privacy, regardless of the normal law enforcement purpose of such searches.¹⁸⁰ Alternatively, the Court might consider probationers’ propensities to commit crime as a proxy for the normal individualized suspicion requirement.¹⁸¹ But these possibilities remain conjectures. The Supreme Court has never found the individualized suspicion requirement inapplicable to searches

¹⁷⁵ *Id.* at 829.

¹⁷⁶ *See id.* at 827-28.

¹⁷⁷ *Id.* at 863 (Reinhardt, J. dissenting).

¹⁷⁸ *See, e.g., Knights*, 534 U.S. at 121.

¹⁷⁹ *Id.*

¹⁸⁰ *See id.* at 121-22. *See also* *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (noting that diminished expectations of privacy may justify an exception to the *warrant requirement*).

¹⁸¹ In *Knights* and *Griffin*, the Supreme Court emphasized that “the very assumption of the institution of probation’ is that the probationer ‘is more likely than the ordinary citizen to violate the law.’” *Knights*, 534 U.S. at 120 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987)). *See also* *Connecticut v. Smith*, 540 A.2d 679, 688-89 (Conn. 1988) (upholding court imposed drug testing a year after the sentencing of the probationer because the probationer had a history of drug abuse). *But cf.* *United States v. Lifshitz*, 369 F.3d 173, 188 (2d Cir. 2004) (“There is, indeed, a nearly universal consensus that the criminal status of the probationer cannot, viewed on its own, be sufficient to support a determination that ‘reasonable suspicion’ exists[.]”).

of prisoners and probationers without regard to some non-law enforcement need.¹⁸²

As we have seen, many courts have analogized DNA collection to fingerprinting to surmise that the Supreme Court would uphold the DNA Act.¹⁸³ The argument is that the collection of DNA, like fingerprinting, should be viewed as part of normal booking procedures.¹⁸⁴ This analogy can only withstand scrutiny if the DNA Act's primary objective is to ascertain the identity of the individual in custody. As the *Kincade I* court correctly noted, however, the primary purpose for the samples retrieved under the Act is the gathering of evidence for criminal investigations.¹⁸⁵ In fact, the DNA samples are not collected until after the individual's identity is verified and permanently recorded.¹⁸⁶ When law enforcement officials obtain evidence in furtherance of a criminal investigation, whether via fingerprinting or blood extraction, individualized suspicion must be present.¹⁸⁷

This is not to suggest that it would be constitutional to replace fingerprinting during the booking process with the extraction of blood. Fingerprinting and DNA collection entail distinct levels of intrusiveness. Unlike fingerprinting, contemporary DNA analysis requires a compelled intrusion beneath the skin, revealing and seizing fluid that is not routinely exposed to public view.¹⁸⁸

¹⁸² See *supra* note 170. Accord *Kincade II*, 379 F.3d at 862-63. In *United States v. Miles*, the court maintained that there was "no Supreme Court case upholding a suspicionless search of inmates, probationers, or supervisees where the justification for the search was primarily law enforcement." 228 F. Supp. 2d 1130, 1137 (E.D. Cal. 2002).

¹⁸³ *Groceman v. United States Dep't of Justice*, 354 F.3d 411, 413-14 (5th Cir. 2004) (per curiam); *Boling v. Romer*, 101 F.3d 1336, 1339-40 (10th Cir. 1996); *Rise v. Oregon*, 59 F.3d 1556, 1559-60 (9th Cir. 1995), *cert. denied*, 517 U.S. 1160 (1996); *Jones v. Murray*, 962 F.2d 302, 306-07 (4th Cir. 1992), *cert. denied*, 506 U.S. 977 (1992). But see *Kincade II*, 379 F.3d at 821-39 (failing to make the analogy between fingerprinting and DNA collection).

¹⁸⁴ *Groceman*, 354 F.3d at 413-14 (quoting *Jones*, 962 F.2d at 306-07); *Boling*, 101 F.3d at 1339-40; *Rise*, 59 F.3d at 1559-60; *Jones*, 962 F.2d at 306-07.

¹⁸⁵ *Kincade I*, 345 F.3d 1095, 1110-11 (9th Cir. 2003). See generally 146 CONG. REC. S11645 (daily ed. Dec. 6, 2000); 146 CONG. REC. H8572 (daily ed. Oct. 2, 2000).

¹⁸⁶ See *Kincade II*, 379 F.3d at 857 n.16 (Reinhardt, J. dissenting) ("Claiming that DNA profiles are designed to 'identify' the releasee, much like fingerprinting, is disingenuous.").

¹⁸⁷ *Hayes v. Florida*, 470 U.S. 811, 816-17 (1985).

¹⁸⁸ *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 616-17 (1989) (explaining that there is a difference in the level of intrusion when the state searches beneath the skin). Accord *Kincade I*, 345 F.3d at 1100 ("Fingerprinting, involving aspects of an individual's identity routinely exposed to public view, 'represents a much

Moreover, as “the information containing blue print of human life,” DNA is fundamentally different than fingerprints.¹⁸⁹ One respected scientist has described DNA samples as a “future diary of genetic information.”¹⁹⁰ Unlike fingerprinting, for example, DNA analysis reveals genetic predispositions to a host of medical conditions.¹⁹¹ Although the government claims that the samples collected for CODIS are taken from so-called “junk sites” of genetic information,¹⁹² it has been said that these sites can also reveal genetic predispositions to Type I diabetes.¹⁹³

Even assuming that the samples are in fact “junk,” while the blood samples sit in a warehouse and our genetic knowledge develops, yesterday’s “junk” will become tomorrow’s jewel.¹⁹⁴ Scientists have agreed that at some point, if not already, the samples taken by law enforcement will reveal

less serious intrusion upon personal security than other types of searches and detentions.” (quoting *Hayes*, 470 U.S. at 814)).

¹⁸⁹ Mark A. Rothstein & Sandra Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Databanks*, 67 BROOK. L. REV. 127, 156 (2001). See *Skinner*, 489 U.S. at 617 (explaining that the nature of the information retrieved from urinalysis increases the intrusiveness of the search). See also *Kincade II*, 379 F.3d at 867 (Reinhardt, J., dissenting) (“The startling advance of technology has magnified the power of the initial search authorized by the DNA Act, such that the invasion of privacy is vastly more significant than we might have previously assumed.”).

¹⁹⁰ Mark Wills, *Safeguarding the ‘Future Diary’ Encoded in the Human Genome*, Wright State Univ. of Med., at <http://www.med.wright.edu/whatsnew/daymed/0298.pdf> (last visited Oct. 19, 2004).

¹⁹¹ See, e.g., Symposium, *The Human Genome Project, DNA Science and the Law: The American Legal System’s Response to Breakthroughs in Genetic Science*, 51 AM. U.L. REV. 401, 424-25 (2002).

¹⁹² *DNA Analysis Backlog Elimination Act of 2000*, H.R. Rep. No. 106-900(I), 27 (2000). For an explanation of junk sites, see Dan L. Burk, *DNA Identification Testing: Assessing the Threat to Privacy*, 24 U. TOL. L. REV. 87, 90-93 (1992); Rebecca Sasser Peterson, Note, *DNA Databases: When Fear Goes Too Far*, 37 AM. CRIM. L. REV. 1219, 1222-23 (2000); Veronica Valdivieso, Note, *DNA Warrants: A Panacea for Old, Cold Rape Cases?*, 90 GEO. L.J. 1009, 1013-17 (2002).

¹⁹³ Christine Rosen, *Liberty, Privacy, and DNA Databases*, THE NEW ATLANTIS (Spring 2003), <http://www.thenewatlantis.com/archive/1/rosenprint.htm> [hereinafter Rosen, THE NEW ATLANTIS]; Christine Rosen, *DNA: Is the Ninth Circuit Wrong?*, NATIONAL REVIEW ONLINE, (Oct. 14, 2003), at <http://www.nationalreview.com/debates/dna200310141029.asp>. See also Burk, *supra* note 192, at 94-95 (suggesting that “junk” sequences could one day be associated with genetic abnormalities).

¹⁹⁴ See Ronald M. Green & A. Matthew Thomas, *DNA: Five Distinguishing Features for Policy Analysis*, HARV. J.L. & TECH. 571, 577 (1998); Burk, *supra* note 192, at 94-95 (“As some molecular biologists have been known to quip, ‘Garbage is something you throw out; junk is something you keep.’ . . . Presumably, evolutionary pressure would dictate that organisms discard such wasteful artifacts if in fact they offer no competitive advantage.”).

genetic facts beyond mere identification.¹⁹⁵ “[F]uture DNA analysis may . . . reveal an individual’s medical history; proclivities toward certain diseases; and hereditary information such as race, physical, and behavioral traits.”¹⁹⁶ After even more time, “DNA donated today may expose the progeny of the donors to new and unimagined forms of stigmatism and discrimination.”¹⁹⁷ In contrast to fingerprinting, DNA collection poses a far different threat to personal privacy and autonomy.¹⁹⁸

DNA samples’ infinite capabilities also make them more susceptible to abuse than fingerprints. Indeed, there are inherent dangers whenever the government systematically collects and disseminates our personal information.¹⁹⁹ To say that we can trust our government not to use DNA databanks for purposes not authorized in CODIS is naïve.²⁰⁰ As Judge Reinhardt wrote:

The problem with allowing the government to collect and maintain private information about the intimate details of our lives is that the bureaucracy most often in charge of the information “is poorly

¹⁹⁵ See, e.g., Burk, *supra* note 192, at 95.

¹⁹⁶ Jeffrey S. Grand, Note, *The Bleeding of America: Privacy and the DNA Dragnet*, 23 CARDOZO L. REV. 2277, 2288 (2002). See also *An Ancient Helper - Useful “Junk” DNA: Some ‘Junk’ DNA May Have a Function*, THE ECONOMIST (Sept. 6, 2003), 2003 WL 58583958; Rosen, THE NEW ATLANTIS, *supra* note 193.

¹⁹⁷ Green & Thomas, *supra* note 194, at 577.

¹⁹⁸ See *id.* at 578. Even more alarming is the inevitable potential of the DNA Act to lead to a racially skewed genetic database. See Kaye and Smith, *Case for Population-Wide Coverage*, *supra* note 15, at 452-55. Undoubtedly, black males will be far more likely to be included in CODIS than their white counterparts. *Id.* at 453.

¹⁹⁹ See, e.g., Brief of Amicus Curiae, Public Defender Service For the District of Columbia, *Kincade II*, 379 F.3d 813 (9th Cir. 2004), (No. 02-50380), available at www.epic.org/privacy/kincade/pd_amicus.pdf (last visited on 9/27/04) [hereinafter Public Defender Service].

²⁰⁰ For example, the government promised in the 1930s that Social Security numbers would only be used to assist in distributing benefits under the retirement program. See, e.g., Press Release, American Civil Liberties Union, ACLU Warns of Privacy Abuses in Government Plan to Expand DNA Databases (March 1, 1999), at <http://www.aclu.org/news/NewsPrint.cfm?ID=8422&c=129> (last visited Oct. 12, 2004). Now, they are used universally and almost any sophisticated enterprise can retrieve an individual’s social security number. *Id.* See also Timothy Lynch, *Databases Ripe for Abuse: Opposing View*, CATO Inst. (Aug. 21, 2000), at <http://www.cato.org/research/articles/lynch-000821.html> (last visited Oct. 12, 2004) (“If we believe that tomorrow’s political leaders will somehow be incapable of abusing their power over a fully centralized DNA database, the next generation will never forgive us—and rightly so.”). DNA databases have in fact already been abused. Public Defender Serv., *supra* note 199. Despite the military’s promise that its DNA repository would only be used to identify human remains, it has given the FBI its DNA, which is now used to match DNA samples found at crime scenes. *Id.* The DNA Act has also been utilized beyond the government’s original expressed intentions. See generally *supra* note 15.

regulated and susceptible to abuse. This [] has profound social effects because it alters the balance of power between the government and the people, exposing individuals to a series of harms, increasing their vulnerability and decreasing the degree of power that they exercise over their lives." To allow such information to be collected through the compulsory extraction of blood from the bodies of non-consenting Americans runs contrary to the values on which this country was founded.²⁰¹

This is compounded by the fact that the government may contract with private entities to collect DNA samples from qualifying convicted offenders.²⁰² There are several enterprises interested in genetics that have a substantial but unfortunate financial incentive to misuse the DNA samples collected for CODIS.²⁰³ As recent events have shown, the government's motivation and ability to monitor and control private enterprises is truly questionable.²⁰⁴ As in other areas where our government has invited the private sector to manage public affairs, there is a greater susceptibility to corruption and scandal.²⁰⁵ Nonetheless, under the present statute, an individual who uses a sample for an unauthorized purpose is not subject to imprisonment and may only be subject to fines up to one hundred thousand dollars.²⁰⁶

In light of the sensitivity of DNA samples, DNA collection must not be compared to fingerprinting. Rather, it is a search with the capability of divulging incredibly personal

²⁰¹ *Kincade II*, 379 F.3d at 843 (Reinhardt, J. dissenting) (quoting Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1105 (2002)).

²⁰² 42 U.S.C. § 14135a(a)(4)(B).

²⁰³ For a brief discussion about the genetic industry and their potential to misuse DNA databases, see generally Rosen, *NEW ATLANTIS*, *supra* note 193.

²⁰⁴ For example, many of the horrid abuses at Abu Ghraib have been attributable to private contractors and their inability to manage the prison. As one private interrogator who worked at Abu Ghraib explained, the private contractors in charge focus on interrogating the most detainees as possible in a given day. As evidenced by using cooks and truck drivers as interrogators, little concern is given to the quality of interrogation or international human rights. See, e.g., Julian Borger, *Cooks and Drivers Were Working as Interrogators*, THE GUARDIAN (May 7, 2004), <http://www.commondreams.org/headlines04/0507-03.htm> (last visited on 9/16/04).

²⁰⁵ A respected scientist averred that biotech companies are starving "to get their hands on" DNA samples. Interview by Mark Compton with George J. Annas, Professor & Chair of the Health Law Dep't Boston Univ. Sch. of Pub. Health, *Genetic Turf Wars: Whose DNA Is It Anyway?*, DNA DISPATCH (November 2000), <http://www.geneforum.org/node/view/32> (last visited Oct. 12, 2004).

²⁰⁶ 42 U.S.C. 14135e(c).

information—information that is even unknown to the owner.²⁰⁷ With so much at stake, it makes little sense to remove the traditional protections afforded to convicted offenders under the Fourth Amendment.²⁰⁸

Beyond the particular dangers in enforcing the DNA Act is the dangerous precedent established by the plurality's reasoning in *Kincade II*. If all it takes is diminished privacy rights to suspend the traditional requirement of individualized suspicion, then suspicionless searches would be commonplace in our society.²⁰⁹ Under the rationale in *Kincade II*, for example, a national DNA database could easily be sustained.²¹⁰ Although the plurality stated that the difference between the privacy rights of convicted offenders and free citizens largely affected its analysis, there are many "free" individuals in our society who also face diminished privacy rights, including, but not limited to, public school students, railroad operators, and government employees.²¹¹

The totality of the circumstances standard will perpetually be overpowered by the government's interest in solving more crimes.²¹² In contrast, the less malleable individualized suspicion requirement provides a real and measurable limit on the effectuation of the government's normal law enforcement objectives. In the plurality's world, the only safeguard from overzealous politicians and police is "the willingness of the judiciary to weigh properly the relative importance of the general law enforcement interests and the individual's privacy right."²¹³ Our liberty is better protected when the state is required to have individualized suspicion of wrongdoing before searching individuals to gather evidence for the ordinary purposes of law enforcement.²¹⁴

²⁰⁷ For an interesting discussion about the devastating psychological impact on an individual who learns "that they carry genes that may predispose them to serious medical problems" see Green & Thomas, *supra* note 194, at 572-73.

²⁰⁸ The *Kincade I* court explicitly rejected the Ninth Circuit's fingerprint analogy in *Rise. Kincade I*, 345 F.3d 1095, 1100 n.15 (9th Cir. 2003).

²⁰⁹ *Kincade II*, 379 F.3d 813, 864 (9th Cir. 2004) (Reinhardt, J. dissenting).

²¹⁰ *Cf. id.* at 863-66 (arguing that under the plurality's reasoning, a vast array of suspicionless searches of individuals not convicted of crimes could be upheld).

²¹¹ *Id.* at 864.

²¹² *Id.* at 865.

²¹³ *Id.* at 860.

²¹⁴ See *Kincade II*, 379 F.3d at 866 (Reinhardt, J. dissenting).

B. *The Special Needs Analysis of the DNA Act*

The issue therefore becomes whether the DNA Act in fact serves normal law enforcement objectives. For a short period, the Tenth and Ninth circuits were split on this issue.²¹⁵ The Tenth Circuit held that the creation of a comprehensive DNA database serves special needs beyond normal law enforcement objectives,²¹⁶ while the Ninth Circuit panel held that the DNA Act's primary purpose is to solve crimes, a normal law enforcement purpose.²¹⁷

The Tenth Circuit's characterization of the DNA Act's primary purpose is perhaps intentionally misleading. Borrowing from *Sczubelek*,²¹⁸ the Circuit narrowly identified the Act's primary purpose in order to avoid the inevitable conclusion that the Act serves normal law enforcement ends. Instead of defining the primary purpose as the creation of CODIS, the inquiry should have shed light on the objectives of CODIS itself, since the primary purposes of the DNA Act and CODIS are one in the same. Applying *Sczubelek*'s logic to a search of an individual's home for evidence of criminal wrongdoing, the purpose of the search would be to effectuate the search warrant and not to gather evidence for a criminal investigation or prosecution.²¹⁹

In fact, the legislative record is replete with references to the connection between CODIS and crime solving.²²⁰ As one of the legislative proponents proclaimed: "The purpose of [CODIS] is to match DNA samples from crime scenes where there are no suspects with the DNA of convicted offenders. Clearly, the more samples we have in the system, the greater the likelihood

²¹⁵ The Ninth Circuit panel's decision was quickly set aside and vacated *en banc*, removing the split in the circuits. See *supra* Part I.

²¹⁶ *United States v. Kimler*, 335 F.3d 1132, 1146 (10th. Cir. 2003), *cert. denied*, 124 S. Ct. 945 (2003).

²¹⁷ *Kincade I*, 345 F.3d at 1096, 1110-1111.

²¹⁸ See *United States v. Sczubelek*, 255 F. Supp. 2d 315, 322 (D. Del. 2003) ("The DNA Act . . . was enacted to fill the CODIS system with DNA samples from qualifying federal offenders."). See also *United States v. Reynard*, 220 F. Supp. 2d 1142, 1167 (S.D. Cal. 2002) ("Congress's immediate purpose in authorizing DNA 'searches' was to permit probation officers to fill the CODIS database with the DNA fingerprints of all qualifying supervisees.").

²¹⁹ As noted earlier, the Ninth Circuit panel similarly argued that "[t]he purpose of these searches is no more to put samples into CODIS than is the purpose of finger-printing to place cards into index files." *Kincade I*, 345 F.3d at 1112.

²²⁰ See generally 146 CONG. REC. S11645 (daily ed. Dec. 6, 2000); 146 CONG. REC. H8572 (daily ed. Oct. 2, 2000).

we will come up with matches and solve cases.”²²¹ Thus, distinguishing between the creation of CODIS and the desire to solve crimes is only possible by denying the algebraic similarity between the two. It is “intellectually dishonest” to rely on such a semantic disconnection to justify upholding the Act’s constitutionality.²²²

According to the Ninth Circuit panel, however, even if the Act’s primary purpose is the special need of creating CODIS, the normal law enforcement objectives ultimately achieved render the special needs exception inapplicable.²²³ It interpreted Supreme Court precedent as prohibiting suspicionless searches “if either the immediate or the ultimate objective serves a law enforcement purpose[.]”²²⁴ Indeed, the Supreme Court has distinguished the import of a search’s primary objective from its ultimate objective.²²⁵ In *Ferguson*, the Supreme Court wrote:

In our opinion, this distinction is critical. Because law enforcement involvement always serves some broader social purpose or objective, . . . virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment.²²⁶

The Ninth Circuit suggested that “the reverse would be [no] less objectionable.”²²⁷ That is, a court cannot ignore the Act’s ultimate objectives by defining the purpose only in terms of its immediate purpose.²²⁸

Because the Supreme Court has never quite suggested this, it is more persuasive to debunk the characterization of the DNA Act’s primary purpose as a special need. First, consider the argument in *Sczubelek* that although the Act’s primary purpose is to solve crimes, CODIS’s method of crime solving is not ordinary law enforcement activity because “[o]nly after the [DNA] sample is analyzed and then evaluated against available crime scene samples can the results inculcate or exculpate an

²²¹ 146 CONG. REC. H8572 (daily ed. Oct. 2, 2000), at H8575-6.

²²² *United States v. Miles*, 228 F. Supp. 2d 1130, 1138 n.6 (E.D. Cal. 2002).

²²³ *Kincade I*, 345 F.3d at 1112.

²²⁴ *Id.* (citing *Ferguson v. Charleston*, 532 U.S. 67, 82-84 (2001)).

²²⁵ *Ferguson*, 532 U.S. at 82-84.

²²⁶ *Id.* at 84.

²²⁷ *Kincade I*, 345 F.3d at 1112.

²²⁸ *See id.*

individual.”²²⁹ Consider, however, a search of a person’s dwelling with the intent to solve several murder cases. If the police find a licensed gun in the person’s home, they must later analyze the gun and the bullet casings left at the crime scenes in order to ascertain a match. Such a search does not fall within the special needs exception to the Fourth Amendment, despite the fact that the gun by itself does not link the person to the crime. The fact that a DNA sample, by itself, does not reflect that the donor committed a crime is similarly inconsequential.

Second, the *Sczubelek* court argued that CODIS is distinct from ordinary crime solving because it offers only the potential to solve crimes.²³⁰ It emphasized that “a DNA sample could remain unmatched or even unanalyzed for an indefinite period” due to the backlog of samples.²³¹ Such a contention is unpersuasive because the DNA Act is designed to eliminate the backlog of samples that the *Sczubelek* court so ironically cites as the reason the crime solving here is beyond ordinary law enforcement. Further, a search does not necessarily serve a special need because its derivative benefit, i.e., crime solving, is delayed.

Lastly, the courts in both *Miller* and *Sczubelek* argued that the Act serves objectives beyond normal law enforcement because it solves future crimes or crimes that are not being investigated by the particular DNA search.²³² This distinction, initially articulated in *Nicholas v. Goord*,²³³ is simply a smoke screen, specifically designed to cover the Act’s blatant ordinary law enforcement purpose. Regardless of whether the search is disconnected from a particular crime, the special needs exception does not encompass searches designed to collect evidence for use in criminal prosecutions.²³⁴ In *Edmond*, for instance, the Supreme Court held that a suspicionless highway checkpoint program designed to detect drug-related crimes was unconstitutional because it was indistinguishable from normal

²²⁹ United States v. *Sczubelek*, 255 F. Supp. 2d 315, 322 (D. Del. 2003).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Miller v. United States Parole Comm’n*, 259 F. Supp. 2d 1166, 1176 (D. Kan. 2003); *Sczubelek*, 255 F. Supp. 2d at 322 n.14 (explaining that it would find otherwise if there was evidence suggesting that the DNA search was directed at a particular defendant in connection with a specific crime).

²³³ See *supra* note 112.

²³⁴ See *Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000).

law enforcement activity.²³⁵ As the Court recently explained, the infirmity was that it was “justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that *any given* [individual] *has committed some crime*.”²³⁶ This is precisely the motivation and objective of the searches under the DNA Act.

What makes a special needs search “special” is that its primary purpose is not to uncover evidence for criminal prosecutions.²³⁷ The Supreme Court has erected an insurmountable barrier between special needs searches and searches designed to turn over evidence to law enforcement for prosecutorial purposes.²³⁸ For example, in *National Treasury Employees Union v. Von Raab*, the Supreme Court upheld suspicionless drug tests of United States Customs Service employees who seek transfer or promotion to drug enforcement positions, finding a special need to prevent promoting people who use illicit drugs to those positions.²³⁹ In finding this search to be reasonable in the absence of individualized suspicion, the Court emphasized that the “[t]est results [could] not be used in a criminal prosecution of the employee without the employee’s consent.”²⁴⁰ Additionally, in *Acton*, the Supreme Court noted that “the results of the [student drug] tests are disclosed only to a limited class of school personnel . . . [,] and they are not turned over to law enforcement authorities or used for any internal disciplinary function.”²⁴¹ Similarly, in *Board of Education School District No. 92 v. Earls*, the Supreme Court upheld suspicionless drug testing of students participating in extra-curricular activities in part because the drug tests, under no circumstances, could be turned over to law enforcement.²⁴²

In contrast, the DNA Act’s authorized search is specifically designed to provide law enforcement officials with evidence to solve crimes and increase prosecutions.²⁴³ Senators

²³⁵ *Edmond*, 531 U.S. at 40-42.

²³⁶ *Illinois v. Lidster*, 124 S. Ct. 885, 889 (2004) (quoting *Edmond*, 531 U.S. at 44) (emphasis in original).

²³⁷ See e.g., *Ferguson v. Charleston*, 532 U.S. 67, 78-79 (2001).

²³⁸ See *Id.* at 84-86. Accord *Edmond*, 531 U.S. at 41-42.

²³⁹ *Nat’l Treasury Employees v. Von Raab*, 489 U.S. 656, 664-66 (1989).

²⁴⁰ *Id.* at 666.

²⁴¹ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995).

²⁴² *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 833 (2002).

²⁴³ See generally 146 CONG. REC. S11645-02 (daily ed. Dec. 6, 2000), H8572-01 (daily ed. Oct. 2, 2000).

argued that “[c]ollection of convicted offender[s]’ DNA is crucial to solving many of the crimes occurring in our communities.”²⁴⁴ As a result, many law makers believed that “[t]his legislation w[ould] be a huge asset for our local law enforcers in their day-to-day fight against crime.”²⁴⁵ As Congressman Canady of Florida plainly put it: “[The DNA Act] will put more criminals behind bars by correcting practical and legal obstacles that leave crucial DNA evidence unused and too many violent crimes unsolved.”²⁴⁶ In light of this legislative record and the plain text of the statute, the Act’s ordinary law enforcement nature is undeniable.²⁴⁷

Aside from apprehending criminal suspects, however, the DNA Act serves to decrease wrongful prosecutions.²⁴⁸ Few courts, not including the Tenth Circuit,²⁴⁹ have contended that this brings the Act within the special needs exception.²⁵⁰ The court in *United States v. Vore*, for example, argued that there is a special need in collecting DNA to prevent the execution of innocent individuals on death row.²⁵¹ The court noted that “post-conviction DNA testing and other post-conviction investigative techniques have shown that innocent people have been sentenced to death in the United States.”²⁵²

Clearly, the goal of exonerating the innocent cannot trigger special needs status.²⁵³ Put simply, an everyday objective of law enforcement is to capture the right person. Most Americans would hope to believe that the accurate prosecution of crime is an implicit goal of police, detectives, and

²⁴⁴ 146 CONG. REC. S11645-02 (daily ed. Dec. 6, 2000), at S11646.

²⁴⁵ *Id.*

²⁴⁶ 146 CONG. REC. H8572-01 (daily ed. Oct. 2, 2000), at H8577.

²⁴⁷ As the Ninth Circuit panel concluded, “the record overwhelmingly demonstrates that the Act mandating these suspicionless searches was enacted, is enforced, and is understood by all concerned to serve the purpose of law enforcement, and to further its objectives.” *Kincade I*, 345 F.3d 1095, 1111 (9th Cir. 2003).

²⁴⁸ 146 CONG. REC. H8572-01 (daily ed. Oct. 2, 2000), at H8577. As Senator Leahy pronounced: “[DNA] should be used to do what is equally scientifically reliable to do—prove innocence.” 146 CONG. REC. S11645-02 (daily ed. Dec. 6, 2000), at S11647.

²⁴⁹ See *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003), *cert. denied*, 124 S. Ct. 945 (2003).

²⁵⁰ See *Vore v. United States Dep’t of Justice*, 281 F. Supp. 2d 1129, 1137 (D. Ariz. 2003) (concluding that the exoneration of the innocent is a special need); *United States v. Reynard*, 220 F. Supp. 2d 1142, 1168 (S.D. Cal. 2002) (same).

²⁵¹ *Vore*, 281 F. Supp. 2d at 1137.

²⁵² *Id.* (quoting 146 CONG. REC. S11645-02 (daily ed. Dec. 6, 2000), at S11645).

²⁵³ See *Kincade I*, 345 F.3d 1095, 1112-13 (9th Cir. 2003). See *supra* Part III.B.2 for the Ninth Circuit panel’s argument that exonerating the innocent is not a special need.

prosecutors.²⁵⁴ Seemingly, courts have attempted to detract from the DNA Act's normal law enforcement purposes by pointing to the laudable goal of exonerating the innocent.²⁵⁵

Moreover, as a practical matter, exonerating an individual by collecting his DNA is indistinguishable from advancing the government's interest in normal law enforcement objectives.²⁵⁶ Primarily, DNA evidence can exculpate a suspect if his DNA does not match the DNA found at the crime scene. "[L]ike a good alibi, the sample would only eliminate him from the field of suspects under investigation."²⁵⁷ Otherwise, the exoneration of the innocent will only occur by inculcating the individual being searched.²⁵⁸ As the district court in *United States v. Miles* opined, "the asserted interest in accurate prosecution is nothing more than the other side of the same law enforcement coin."²⁵⁹

Courts have also argued that "[t]he use of probation officers . . . suggests Congress' intent to isolate [DNA databanks] from the responsibility of ordinary law enforcement."²⁶⁰ To the contrary, blood samples retrieved from individuals are immediately sent to the FBI for analysis and storage.²⁶¹ Probation and correction officers are only responsible for the collection of the blood, while the subsequent analysis and storage is the task of the FBI²⁶²—clearly a normal law enforcement organization. The samples are then available to federal, state, and local law enforcement agencies to use in solving criminal cases, creating "a penal character with a far greater connection to law enforcement than other searches sustained under [the] special needs rationale."²⁶³

For example, in *Skinner v. Railway Labor Executives' Association*, the Supreme Court noted its concern with holding

²⁵⁴ See *United States v. Miles*, 228 F. Supp. 2d 1130, 1139 (E.D. Cal. 2002).

²⁵⁵ As the Ninth Circuit panel noted: "The presence of a 'benign' motive cannot justify a departure from Fourth Amendment protections, given the pervasive involvement of law enforcement." *Kincade I*, 345 F.3d at 1112 (quoting *Ferguson v. Charleston*, 532 U.S. 67, 85 (2001)).

²⁵⁶ *Miles*, 228 F. Supp. 2d at 1139.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *United States v. Sczubelek*, 255 F. Supp. 2d 315, 323 (D. Del. 2003).

²⁶¹ 42 U.S.C. § 14135a(b). See also *Kincade I*, 345 F.3d 1095, 1111 n.30 (9th Cir. 2003).

²⁶² See 42 U.S.C. § 14135a(b).

²⁶³ *Kincade I*, 345 F.3d at 1111 (quoting *Ferguson v. Charleston*, 532 U.S. 67, 88-89 (2001) (Kennedy, J., concurring)).

railroad supervisors responsible for warrant procedures in administering employee drug tests.²⁶⁴ The Court opined that imposing such procedures on individuals who have no connection to law enforcement would be unreasonable.²⁶⁵ In contrast, it does not seem unreasonable to expect designated probation and correction officers to familiarize themselves with the requirements of the Fourth Amendment, considering their primary role in supervising probationers and prisoners and their close relationship with law enforcement officials.

The DNA Act is also easily distinguished from the few cases where the Supreme Court has recognized special needs in law enforcement contexts. Such application has only occurred in extraordinary situations where a warrant or probable cause requirement would undoubtedly threaten public safety.²⁶⁶ In *Michigan Department of State Police v. Sitz*, the Supreme Court upheld the Fourth Amendment constitutionality of a suspicionless sobriety checkpoint because the search's primary purpose was to remove dangerous drunk drivers from the road, despite the secondary law enforcement purpose of apprehending DWI suspects.²⁶⁷ Additionally, in *Skinner*, the Supreme Court upheld suspicionless drug testing of railroad employees immediately following railroad accidents.²⁶⁸ The Court concluded that the search in *Skinner* was not designed to "assist in the prosecution of employees, but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.'"²⁶⁹

Conversely, where there is no immediate threat to public safety, the Fourth Amendment prohibits a normal law enforcement search absent individualized suspicion.²⁷⁰ Although

²⁶⁴ *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 623-24 (1989) (upholding suspicionless drug and alcohol testing of railroad employees immediately following train accidents under the special needs exception).

²⁶⁵ *Id.* at 623-24 (quoting *O'Connor v. Ortega*, 480 U.S. 709, 722 (1987)). The Court explained that "[r]ailroad supervisors, like school officials, and hospital administrators, are not in the business of investigating violations of the criminal laws or enforcing administrative codes, and otherwise have little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence." *Id.* at 623.

²⁶⁶ See *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990); *Skinner*, 489 U.S. at 620-21.

²⁶⁷ *Sitz*, 496 U.S. 444. See also *Indianapolis v. Edmond*, 531 U.S. 32, 43 (2000) (explaining its holding in *Sitz*).

²⁶⁸ *Skinner*, 489 U.S. at 602.

²⁶⁹ *Id.* at 620-21.

²⁷⁰ See, e.g., *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (holding that Georgia's requirement that candidates for state office pass a drug test is outside the category of constitutionally permissible suspicionless searches).

“[t]he detection and punishment of almost any criminal offense serves broadly the safety of the community,”²⁷¹ the DNA Act simply does not address the “type of immediate . . . threat to life and limb that the . . . [searches] in *Sitz* [and *Skinner* were] designed to eliminate.”²⁷² In fact, the DNA Act is in part designed to ultimately prevent crime before it even happens.²⁷³

A more convincing comparison is between the DNA Act and special need searches of convicted offenders under state supervision as was upheld in *Griffin*. But as the panel appropriately recognized in *Kincade I*, the search’s purpose in *Griffin* is distinguishable from the search authorized under the DNA Act.²⁷⁴ In *Griffin*, the reduction in individualized suspicion was justified by the special need to supervise probationers, and thus was directly related to the administration of parole itself rather than the solving of crimes.²⁷⁵ The DNA Act is disconnected from the interest in supervision because it targets the criminal activity of individuals after their probationary status has expired.²⁷⁶ An individual’s blood remains in CODIS well after the state’s responsibility of supervision has ceased.²⁷⁷ Plus, the DNA Act applies predominantly to prisoners.²⁷⁸

And, as the Second Circuit in *Roe v. Marcotte* argued with regard to Connecticut’s DNA statute, “none of the ‘special

²⁷¹ *Edmond*, 531 U.S. at 43.

²⁷² *Id.*

²⁷³ Deterrence is indeed one of the objectives of the Act. See 146 CONG. REC. S11645-02 (daily ed. Dec. 6, 2000), at S11648. One legislator noted that the DNA Act would help reduce the chances “that many of these violent felons will repeat their crimes once they are back in society.” *Id.* at S11646. See *Roe v. Marcotte*, 193 F.3d 72, 82 (2d Cir. 1999) (noting DNA statutes’ ability to prevent recidivism). See also *United States v. Reynard*, 220 F. Supp. 2d 1142, 1168 (S.D. Cal. 2002) (citing 146 CONG. REC. S11645-02 (daily ed. Dec. 6, 2000), at S11646) (same).

²⁷⁴ *Kincade I*, 345 F.3d 1095, 1103 (9th Cir. 2003). See also *Kincade II*, 379 F.3d 813, 857 (9th Cir. 2004) (Reinhardt, J. dissenting) (distinguishing the search in *Griffin* from the DNA Act); *supra* Part III.B.2 (same).

²⁷⁵ *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987) (“A State’s operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents ‘special needs,’ beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.”).

²⁷⁶ *Kincade I*, 345 F.3d at 1103 (“By contrast, the purpose of obtaining DNA samples is to obtain material for future use in a permanent DNA databank to help solve future crimes, no matter how long after the end of a parole term they may be committed.”). Accord *Kincade II*, 379 F.3d at 856-57 (Reinhardt, J. dissenting).

²⁷⁷ See generally *supra* text accompanying notes 19-22.

²⁷⁸ See, e.g., *Kincade II*, 379 F.3d at 858 (Reinhardt, J. dissenting) (“The overwhelming majority of individuals convicted of federal offenses are not sentenced to probation; they are sentenced to prison, where, under the Act, the compulsory extraction of blood samples occurs.”).

needs' cases involving prisons . . . is precisely on point" because the statute "is not motivated by concerns for inmate safety and health, institutional order, or discipline."²⁷⁹ That same motivation was also lacking in the passage of the DNA Act.²⁸⁰ The Act is thus distinguishable from the suspicionless searches of prisoners upheld in *Bell v. Wolfish*.²⁸¹ The Supreme Court in *Bell* sustained suspicionless searches of detainees' body cavities not only because of the detainees' reduced expectations of privacy, but because the search served the legitimate penological needs of maintaining security and order in the prison setting.²⁸² The DNA Act's legislative history simply does not indicate that it was designed to promote penological objectives.²⁸³

Nor is the DNA Act similar to the regime of suspicionless administrative searches upheld by the Supreme Court.²⁸⁴ In the leading case of *New York v. Burger*, the Court upheld a search pursuant to an administrative scheme designed to ensure that individuals in the business of vehicle dismantling were not involved in automobile theft.²⁸⁵ The Supreme Court explained that administrative searches of highly regulated businesses deserve special needs protection, only if their primary purposes are distinct from the general interest in crime control.²⁸⁶ The Court concluded that the suspension of normal Fourth Amendment requirements may be justified even if the administrative inspection generates evidence of ordinary criminal wrongdoing.²⁸⁷ But the Court emphasized that the search's immediate purposes must be

²⁷⁹ *Roe v. Marcotte*, 193 F.3d 72, 78-79 (2d Cir. 1999). *Cf. Hudson v. Palmer*, 468 U.S. 517, 527-28 (1984) (justifying searches of prisoners' cells due to the need to maintain institutional order and safety).

²⁸⁰ See generally 146 CONG. REC. S11645-02 (daily ed. Dec. 6, 2000), H8572-01 (daily ed. Oct. 2, 2000).

²⁸¹ *Bell v. Wolfish*, 441 U.S. 520 (1979).

²⁸² *Id.* at 559-60.

²⁸³ See generally 146 CONG. REC. S11645-02 (daily ed. Dec. 6, 2000), H8572-01 (daily ed. Oct. 2, 2000).

²⁸⁴ See *New York v. Burger*, 482 U.S. 691, 712 (1987) (upholding warrantless inspections of vehicle dismantling businesses under the special needs exception); *Donovan v. Dewey*, 452 U.S. 594, 602 (1981) (upholding warrantless inspections of mines); *United States v. Biswell*, 406 U.S. 311, 316 (1972) (upholding warrantless compliance checks of sporting weapons vendors); *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 531 (1967) (upholding suspicionless inspections of apartments for housing code violations).

²⁸⁵ *Burger*, 482 U.S. at 714-15.

²⁸⁶ *Id.* at 713.

²⁸⁷ *Id.* at 716-17.

narrower than the penal objectives ultimately achieved.²⁸⁸ In *Burger*, “[t]he discovery of evidence of other violations would have been merely incidental to the purposes of the administrative search.”²⁸⁹ Unlike in *Burger*, the DNA Act has no identifiable administrative purpose, but rather is solely designed to accurately solve past and future crimes.²⁹⁰

Indeed, the Fourth Amendment’s special needs exception is amorphous and perhaps intentionally flexible in order to accommodate compelling objectives. However, the Supreme Court has clearly explained that searches designed to gather evidence of ordinary criminal wrongdoing have no place in special needs jurisprudence. The DNA Act undoubtedly serves the purpose of solving crimes, and moreover, it cannot be said to serve a special need simply because it employs innovative technology. Courts have an obligation to construe and apply the Fourth Amendment to growing technologies, even if doing so arguably disrupts the efforts of law enforcement.²⁹¹ To this end, the Ninth Circuit panel correctly held that the Act is unconstitutional under the Fourth Amendment unless it requires reasonable suspicion of wrongdoing.²⁹²

CONCLUSION

The Ninth Circuit’s decision in *Kincade I* is an easy target for critics because it disregarded Congress’s effort to put more criminals behind bars. We must remember, however, that the judiciary’s task is not to rubber stamp congressional action, but to determine whether the Constitution is respected. Instead of succumbing to political pressure, the *Kincade I* decision correctly and honestly applied Supreme Court precedent. The decision is an excellent display of judicial review and a reminder of the necessary constitutional restraints on the ever-growing police state. Its replacement, the Ninth Circuit *en banc* decision, is troubling not only for its

²⁸⁸ *Id.*

²⁸⁹ *Ferguson v. Charleston*, 532 U.S. 67, 83 n.21 (2001).

²⁹⁰ See *supra* text accompanying notes 243-48 (describing the DNA Act’s objectives).

²⁹¹ See *Olmstead v. United States*, 277 U.S. 438, 473-74 (1928) (Brandeis, J. dissenting) (“Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.”).

²⁹² *Kincade I*, 345 F.3d 1095, 1096 (9th Cir. 2003).

specific holding, but its disregard for the most common sense protection we enjoy from government search and seizure: the requirement of individualized suspicion of wrongdoing.

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