

UNITED STATES V. KINCADE AND THE CONSTITUTIONALITY OF THE FEDERAL DNA ACT: WHY WE'LL NEED A NEW PAIR OF GENES TO WEAR DOWN THE SLIPPERY SLOPE

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*Privacy erodes first at the margins, but once eliminated, its protections are lost for good, and the resultant damage cannot be undone.*¹

INTRODUCTION

Breakthroughs in technology have revolutionized the war on crime by aiding law enforcement officials in virtually every type of criminal investigation.² Since 1986, the most increasingly utilized crime-solving weapon has been the analysis of deoxyribonucleic acid (“DNA”) artifacts found at crime scenes in

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¹ United States v. Kincaide, 345 F.3d 1095, 1113–14 (9th Cir. 2003) [hereinafter *Kincaide I*], *reh’g en banc granted*, 354 F.3d 1000, 1000 (9th Cir. 2004), *rev’d en banc*, 379 F.3d 813 (9th Cir. 2004) [hereinafter *Kincaide II*], *cert. denied*, 544 U.S. ___, 125 S.Ct 1638 (2005).

² See Michelle Hibbert, *DNA Databanks: Law Enforcement’s Greatest Surveillance Tool?*, 34 WAKE FOREST L. REV. 767, 768, 812–13 (1999) (indicating that “machines are taking over the role of primary crime fighters” and “assisting human detectives to catch thieves, murderers, tax evaders, etc., through remote listening and recording devices, wire tapping, breaking into computer records, and particularly through mechanized fingerprint matching”); Manning A. Connors, III, Comment, *DNA Databases: The Case for the Combined DNA Index System*, 29 WAKE FOREST L. REV. 889, 889 (1994) (calling DNA analysis “a revolutionary prosecutorial weapon for law enforcement”); Michael J. Markett, Note, *Genetic Diaries: An Analysis of Privacy Protection in DNA Data Banks*, 30 SUFFOLK U. L. REV. 185, 185 (1996) (declaring that the “world is in the midst of . . . the genetic revolution”); see also Melba Newsome, *Rape Is Never Fair, Especially If the Rapist Is Untouchable*, L.A. TIMES MAGAZINE, Jan. 27, 2002, at 10 (declaring that the “use of DNA evidence can revolutionize the way crime is fought [and] [n]ot since fingerprinting has law enforcement had such a powerful ally”).

order to identify criminals accurately.³ These DNA artifacts contain the genetic “blueprint” of life that is unique to each individual and thus to the perpetrator of a given crime.⁴ DNA evidence can not only identify a criminal offender, but it can also reveal an enormous amount of personal information about that particular individual.⁵ Nevertheless, it is the “uniqueness” of DNA evidence that has enabled it to become an essential part of criminal investigations and an extremely reliable source of

³ See Hibbert, *supra* note 2, at 768. For further background, see the report of the House of Representatives on the DNA Analysis Backlog Elimination Act of 2000, H.R. REP. NO. 106-900(I) (2000) [hereinafter DNA Act House Report], *as reprinted in* 2002 U.S.C.C.A.N. 2323, 2323 (noting that “[t]he emergence of DNA identification technology is one of the most significant advances in criminal identification methods since the advent of fingerprinting”); Virna M. Manuel, Note, *State DNA Data Base and Data Bank Expansion Laws: Is It Time for California To Expand Its DNA Data Base Law To Include All Convicted Felons?*, 31 W. ST. U. L. REV. 339, 339 (2004) (highlighting the advent of DNA technology as an “essential part” of criminal investigations due to its “potential and . . . importance . . . for solving crimes”); Rutt Bridges, *Catching Criminals in the DNA Web*, BLUEPRINT MAGAZINE, Sept. 1, 2000, available at <http://www.ndol.org/print.cfm?contentid=2154> (commenting that currently “some of the nation’s most effective crime fighters don’t wear blue uniforms,” but rather “white lab coats [to] study DNA fingerprinting”). DNA evidence “can be found almost everywhere” because a single cell provides enough DNA to be analyzed and duplicated into a DNA “fingerprint.” *Id.* For example, “[b]urglars leave blood samples when breaking and entering[, a]ssailants shed hair and skin cells in fights[, t]errorists and kidnappers inadvertently convict themselves by licking the envelope of a ransom note[, and c]riminals of every ilk deposit saliva on glasses, telephones, and cigarette butts and leave spittle and sweat stains.” *Id.* The first conviction in America in a case that used DNA evidence occurred in 1987, when DNA samples of semen retrieved at a crime scene matched blood drawn from serial rapist Tommie Lee Andrews, who is now serving a twenty-two years prison sentence for rape, aggravated burglary, and burglary. See Hibbert, *supra* note 2, at 773. In 1987, no state had a DNA databank, but “just ten years after the *Andrews* case was decided, all fifty states had laws requiring DNA samples from at least convicted sex offenders.” See *id.* at 773–74.

⁴ See Manuel, *supra* note 3, at 339. DNA is considered “the fundamental building block for an individual’s entire genetic makeup.” NATIONAL INSTITUTE OF JUSTICE, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: USING DNA TO SOLVE COLD CASES 5 (2002). DNA evidence is extremely reliable “because each person’s DNA is unique (with the exception of identical twins)” who share the exact same genetic makeup. See *id.* See generally GEORGE J. ANNAS ET AL., U.S. DEP’T OF ENERGY, THE GENETIC PRIVACY ACT AND COMMENTARY, at I (1995), available at <http://dcc2.bumc.bu.edu/LW/GPA/GENEINTR.pdf> (describing DNA as “containing an individual’s ‘future diary’ . . . because it describes an important part of a unique and personal future”).

⁵ See Hibbert, *supra* note 2, at 790 (noting that one’s DNA profile can reveal vast amounts of information about one’s “physical traits or mental status”); see also *infra* note 153 and accompanying text (describing the many different categories of information that can be derived from an individual’s DNA).

evidence—that is, of course, if law enforcement officials discover to whom this DNA evidence belongs.⁶ To expedite this challenge for law enforcement officials, the federal government authorized the Federal Bureau of Investigation (“FBI”) in 1994 to establish a nationwide, “massive centrally-managed database,”⁷ called the Combined DNA Index System (“CODIS”), where DNA samples collected from crime scenes, crime victims, convicted offenders, and unidentified human remains could be stored.⁸ The amount of DNA samples stored on CODIS was greatly expanded when

⁶ See Hibbert, *supra* note 2, at 791 (“DNA analysis maps immutable, lifelong characteristics of an individual. Indeed, immutability is what makes DNA such an ideal identifier.”) (quoting Robert Craig Scherer, *Mandatory Genetic Dogtags and the Fourth Amendment: The Need for a New Post-Skinner Test*, 85 GEO. L.J. 2007, 2021 (1997)). The accuracy of DNA evidence also makes convictions more reliable and “less likely to be overturned.” See Manuel, *supra* note 3, at 343. The reliability of DNA evidence has been estimated to pinpoint an individual within a probability of one in several billion. See Bridges, *supra* note 3; see also DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106–546, § 11(a)(1)–(2), 114 Stat. 2726, 2735 (2000) (codified as amended at 42 U.S.C. § 14135(a)(1)–(2) (2000)) (indicating that DNA testing “has emerged as the most reliable forensic technique for identifying criminals when biological material is left at a crime scene” and due to this “scientific precision, DNA testing can, in some cases, conclusively establish the guilt or innocence of a criminal defendant”).

⁷ *Kincade II*, 379 F.3d at 819 (plurality opinion).

⁸ See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 210304(b), 108 Stat. 1796, 2070 (codified as amended at 42 U.S.C. § 14132); see also *Violent Offender DNA Identification Act of 1999, DNA Backlog Elimination Act and Convicted Offender DNA Index System Support Act: Hearing on H.R. 2810, H.R. 3087, and H.R. 3375 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 89 (2000) (statement of Dwight E. Adams, Deputy Assistant Director, Forensic Analysis Branch of the FBI [hereinafter Adams Testimony], available at http://commdocs.house.gov/committees/judiciary/hju65302.000/hju65302_0F.htm (recounting the history of CODIS’s development). CODIS was expanded to include federal crimes with the passage of the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”). See *infra* note 96 and accompanying text. Under the AEDPA, however, no legal authority was granted to the executive branch to collect DNA samples from federal offenders. See *infra* note 97 and accompanying text. CODIS uses DNA evidence in two different ways. See generally U.S. DEP’T OF JUSTICE, FACT SHEET: LEGISLATION TO ADVANCE JUSTICE THROUGH DNA TECHNOLOGY (2003), available at <http://www.usdoj.gov/ag/dnalegislation.htm>. First, it allows law enforcement to connect unsolved crimes through a common perpetrator by matching one forensic crime scene sample to another. See *id.* Second, CODIS can monitor the criminal activity of known offenders by matching evidence gathered at a crime scene to a particular offender’s posted profile. See *id.* A cold hit occurs when DNA analysis of a crime scene sample with no suspect matches a profile in a database of previously convicted offenders, a database of samples from those individuals arrested for specified crimes, or a database of other crime scene profiles. See *id.*

Congress passed the DNA Analysis Backlog Elimination Act of 2000 ("DNA Act"),⁹ which gave law enforcement the authority under federal law to require the extraction of DNA from any individual in prison or on probation, parole, or supervised release, so long as he or she had been convicted of a "qualifying [f]ederal offense."¹⁰ Pursuant to this authority, the FBI requires those in federal custody who are subject to the DNA Act to submit to compulsory blood sampling.¹¹ This forcible blood

⁹ 42 U.S.C. § 14135 (2000). "[A]ll 50 states [had] legislation authorizing the collection of DNA samples from [certain] categories of convicted offenders" before the DNA Act was passed. See Adams Testimony, *supra* note 8. Thus, the DNA Act was passed largely to address the significant backlog of unanalyzed DNA samples within the states' DNA database programs. See *id.* (indicating that "the majority of states' analyses efforts are unable to keep pace with the collection of these convicted offender samples" and that "[f]ederal legislation would correct this imbalance"); see also *Violent Offender DNA Identification Act of 1999, DNA Backlog Elimination Act and Convicted Offender DNA Index System Support Act: Hearing on H.R. 2810, H.R. 3087, and H.R. 3375 Before the Subcomm. on Crime of the Comm. of the Judiciary*, 106th Cong. 51 (2000) (testimony of Rep. Benjamin A. Gilman) [hereinafter Gilman Testimony], available at http://commdocs.house.gov/committees/judiciary/hju65302.000/hju65302_0.htm (explaining that "the high volume of convicted offender samples awaiting to be analyzed, expansion efforts by the states and a lack of support for our nation's DNA laboratories, have resulted in a growing nationwide backlog of approximately 700,000 unanalyzed convicted offender DNA samples" and have further caused "a backlog of evidence for cases for which there are no suspects). See generally U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, NATIONAL FORENSIC DNA STUDY REPORT, (2003), available at http://www.ojp.usdoj.gov/nij/pdf/dna_studyreport_final.pdf. Because all fifty states required DNA collection from designated convicted offenders by 2000, the DNA Act was viewed as a way to "close [the] loophole" by requiring DNA samples from federal offenders as well. See *id.*

¹⁰ 42 U.S.C. § 14135a(a)(1)–(2); see *infra* notes 102–08 and accompanying text (discussing and listing some of the qualifying offenses). Once the blood sample is taken, it is turned over to the FBI for analysis. See 42 U.S.C. §§ 14132(a), 14133. The FBI utilizes the profiling technology called Short Tandem Repeats ("STR"), which measures DNA only at thirteen specific sites that are "highly variable from one person to another." Bridges, *supra* note 3; see also Manuel, *supra* note 3, at 339–40. "[A] unique DNA fingerprint" can be created based on the count of these stuttered repeats. See Bridges, *supra* note 3; see also NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, *supra* note 4, at 5–7 (detailing the different forms of DNA analysis, including STR technology). The results of this analysis are then posted on the CODIS database and are "permanently available for future use in connection with the investigation and prosecution of crimes." *Kincade I*, 345 F.3d at 1097. Federal, state, and local law enforcement officials conducting investigations can then compare profiles on CODIS with DNA evidence found at crime scenes in order to identify and prosecute the perpetrator. See *infra* note 91 and accompanying text (explaining the structure of the CODIS database and the interaction between each hierarchal tier).

¹¹ See *Kincade II*, 379 F.3d at 817 (plurality opinion). The DNA Act does not prescribe any particular method for collecting the DNA samples, but defines a "DNA

sampling for DNA profiling “unquestionably implicates [an individual’s] right to personal security,”¹² and thus, constitutes a search under the Fourth Amendment.¹³ Because this search does not require any suspicion that an individual “will commit or has committed another offense,”¹⁴ serious concerns have been raised over whether this process violates the Fourth Amendment right of those subject to the DNA Act “to be secure in their persons . . . against unreasonable searches and seizures.”¹⁵ Recently, in *United States v. Kincade* (“*Kincade II*”),¹⁶ the United States Court of Appeals for the Ninth Circuit addressed this issue and concluded that the compulsory DNA profiling of qualified convicted offenders comports with the requirements of the Fourth Amendment, and thus upheld searches pursuant to the DNA Act as constitutional.¹⁷

In *Kincade II*, the appellant-probationer, Thomas Cameron

sample” as “a tissue, fluid, or other bodily sample of an individual on which a DNA analysis can be carried out.” 42 U.S.C. § 14135a(c)(1). Sources of DNA that may be analyzed “include saliva, skin cells, bone, teeth, tissue, urine, and feces.” See *Kincade I*, 345 F.3d at 1099 n.11. The federal government’s nationwide formal policy that all those covered by the DNA Act be subject to compulsory blood extraction is largely based on the rationale that DNA information derived from blood samples is more reliable and easier to test and preserve than DNA extracted by other methods. See *Kincade II*, 379 F.3d at 817 (plurality opinion). See generally Nancy Beatty Gregoire, *Federal Probation Joins the World of DNA Collection*, 66 FED. PROBATION 30, 30 (2002). It is interesting to consider whether the analysis of the constitutionality of this search would remain the same if the search were less intrusive—for example, via a hair sample or a swab of mouth cells. This, however, is beyond the scope of this Comment.

¹² *Kincade II*, 379 F.3d at 821 n.15 (plurality opinion).

¹³ See *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 616 (1987) (“We have long recognized that a ‘compelled intrusio[n] into the body for blood . . .’ must be deemed a Fourth Amendment search.”) (alteration in original) (quoting *Schmerber v. California*, 384 U.S. 757, 767–68 (1966)); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (“[Blood] testing procedures plainly constitute searches of ‘persons’ . . . within the meaning of [the Fourth] Amendment.”). Because blood extraction is considered a search, it is subject to normal Fourth Amendment requirements. See *United States v. Wright*, 215 F.3d 1020, 1025 (9th Cir. 2000) (“Intrusions into the human body, including the taking of blood, are searches subject to the restrictions of the Fourth Amendment.”); see also Bonnie L. Taylor, Comment, *Storing DNA Samples of Non-Convicted Persons and the Debate Over DNA Database Expansion*, 20 T.M. COOLEY L. REV. 509, 516 (2003) (“DNA sampling—like any other form of search and seizure—is subject to the constraints of reasonableness.”).

¹⁴ See *Kincade I*, 345 F.3d at 1097.

¹⁵ U.S. CONST. amend. IV.

¹⁶ 379 F.3d 813 (9th Cir. 2004).

¹⁷ *Id.* at 832, 839–40.

Kincade, challenged the constitutionality of the DNA Act by arguing that its authorization of forcible blood extraction violated his Fourth Amendment guarantee against unreasonable searches and seizures.¹⁸ In 1993, the appellant pleaded guilty to and was convicted of armed bank robbery, which is an offense listed in the DNA Act as grounds for DNA extraction,¹⁹ and was sentenced to ninety-seven months incarceration followed by a three-year term of supervised release.²⁰ Toward the end of his period of supervised release, the appellant was ordered by his probation officer to submit to a blood extraction pursuant to the DNA Act.²¹ He refused, and was then arrested and imprisoned for violating his supervised release²²—a punishment that he soon contested on constitutional grounds.²³ The district court rejected his

¹⁸ *Id.* at 821.

¹⁹ See 42 U.S.C. § 14135a(d)(1)(E) (2000).

²⁰ *Kincade II*, 379 F.3d at 820 (plurality opinion). Supervised release, which is a form of government supervision after a term of imprisonment, was established under the Federal Sentencing Guidelines as a reform to parole. See generally Harold Baer, Jr., *The Alpha and Omega of Supervised Release*, 60 ALB. L. REV. 267 (1996). Unlike parole, which has the effect of reducing an inmate's term of imprisonment, supervised release is an additional term of supervision that follows the period of imprisonment imposed by a court. See *id.* at 269. The terms of Kincade's supervised release included requirements "to participate in [a] . . . substance abuse program; [to refrain from] commit[ting] another federal, state, or local crime; and to follow the instructions of his probation officer." *Kincade II*, 379 F.3d at 820 (plurality opinion). The enactment of the DNA Act took place at about the same time that Kincade was being released from prison. See Milton Hirsch & David Oscar Markus, *Fourth Amendment Forum: Involuntary Blood Testing: United States v. Kincade*, 27 CHAMPION 40, 40 (2004).

²¹ *Kincade II*, 379 F.3d at 820 (plurality opinion).

²² *Id.* at 821. The failure "to cooperate in the collection of [a] sample" under the DNA Act is a class A misdemeanor punishable by up to one year's imprisonment and a fine of as much as \$100,000. See 42 U.S.C. § 14135a(a)(5)(A) (Supp. 2004); 18 U.S.C. §§ 3571(b)(5) & 3581(b)(6) (Supp. 2001). By refusing to submit to DNA sampling under the DNA Act, Kincade breached two mandatory conditions of his supervised release. The first condition was that he shall not commit an additional federal, state, or local offense. See 18 U.S.C. §§ 3563(a)(1), 3583(d) (Supp. 2001); see also U.S. SENTENCING GUIDELINES MANUAL §§ 5B1.3(a)(1), 5D1.3(a)(1). The second condition was that he submit to DNA sampling. See 18 U.S.C. §§ 3563(a)(9), 3583(d) (Supp. 2001); see also U.S. SENTENCING GUIDELINES MANUAL §§ 5B1.3(a)(10), 5D1.3(a)(8) (2004). If an individual violates his or her terms of probation or supervised release, the sentencing court is authorized to revoke or to extend the conditions of his or her release. See 18 U.S.C. §§ 3564(d)–(e), 3565(a), 3583(e)(2)–(3) (Supp. 2001).

²³ In briefing to the district court, Kincade argued that the DNA Act violated the Ex Post Facto Clause, the Fourth Amendment, and the separation of powers principles embodied in Article III and the Due Process Clause of the Constitution.

constitutional challenge and ruled that his refusal to submit to a compulsory blood extraction violated his supervised release condition to obey his probation officer.²⁴ A three-judge panel of the Ninth Circuit Court of Appeals voted 2–1 to reverse, concluding that forcible²⁵ blood extractions pursuant to the DNA Act violated the Fourth Amendment because they are conducted in the absence of individualized suspicion.²⁶ In January 2004, the Ninth Circuit voted to rehear the case en banc and reconsider whether searches of probationers²⁷ pursuant to the DNA Act violated the Fourth Amendment.²⁸

In reaching its decision as to whether the Fourth Amendment permits compulsory DNA profiling of certain conditionally released federal offenders in the absence of individualized suspicion that they have committed additional crimes, the Ninth Circuit was primarily guided by *United States v. Knights*,²⁹ a recent Supreme Court case that held that a warrantless search of a probationer's apartment by law

See Kincade II, 379 F.3d at 821 (plurality opinion). On appeal, however, Kincade only raised the Fourth Amendment objection. *See id.* at 821 n.13.

²⁴ *See id.* at 821. Because Kincade violated his supervised release, the district court sentenced him to four months imprisonment and a prolonged two year period of supervised release. *See id.* While the appeal was pending and while Kincade was serving his additional period of supervised release, he tested positive for drug use. *See id.* As a result, he was taken into custody and forced to give a DNA sample. *See id.*

²⁵ The blood extraction authorized by the DNA Act certainly has the potential to be just that—forcible. *See, e.g., Ryncarz v. Eikenberry*, 824 F. Supp. 1493, 1496 (E.D. Wash. 1993) (illustrating the chaotic situation that results when a prisoner refuses to give a blood sample, which involves the prisoner being directed to a strip search room without being notified why, placed in wrist, ankle, and waist restraints, and then subjected to forcible blood extraction).

²⁶ *Kincade I*, 345 F.3d at 1113.

²⁷ It is important to note that courts do not distinguish between parolees, probationers, and supervised releasees while analyzing a Fourth Amendment search or seizure. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 873–74 (1987); *Green v. Berge*, 354 F.3d 675, 680 (7th Cir. 2004) (Easterbrook, J., concurring); *United States v. Hebert*, 201 F.3d 1103, 1104 (9th Cir. 2000); *United States v. Hill*, 967 F.2d 902, 909 (3d Cir. 1992); *see also United States v. Harper*, 928 F.2d 894, 896 n.1 (9th Cir. 1991) (“[W]e see [no] constitutional difference between probation and parole for purposes of the fourth amendment.”).

²⁸ *See United States v. Kincade*, 354 F.3d 1000, 1000 (9th Cir. 2004). For a concise summary of the procedural history of the case, see Electronic Privacy Information Center, *United States v. Kincade: Introduction & Procedural History*, <http://www.epic.org/privacy/kincade/> (last visited Aug. 28, 2005).

²⁹ 534 U.S. 112 (2001).

enforcement did not violate the Fourth Amendment,³⁰ and *Rise v. Oregon*,³¹ a 1995 Ninth Circuit decision that upheld the constitutionality of a similar state DNA collection statute.³² Using the same analytical approach employed in these two cases, the Ninth Circuit embraced the “totality of the circumstances” test, which balances the level of the searched individual’s expectation of privacy, the extent of intrusion caused by the search, and the governmental and public interests in conducting the search.³³ The Ninth Circuit applied this “totality of the circumstances” test to the facts of *Kincade II* and concluded that: (1) a probationer has a diminished expectation and right of privacy because he or she has been convicted of violating the law;³⁴ (2) a blood extraction is a minimally intrusive search

³⁰ *Id.* at 121–22. In *Knights*, the Supreme Court used the “totality of the circumstances” test to balance the invasion of Knight’s interest in privacy against the state’s interest in conducting a warrantless search of his home. *See id.* at 118–19. The Supreme Court found that the “probation condition . . . significantly diminished Knights’ reasonable expectation of privacy.” *Id.* at 119–20. Furthermore, the Court found that since a probationer is more likely than the ordinary citizen to violate the law, the state has an interest in conducting warrantless searches upon his or her home in order to protect better potential victims of crime. *See id.* at 120–21. The Court concluded that the government needs “no more than reasonable suspicion to conduct a search of [a] probationer’s house.” *Id.* at 121.

³¹ 59 F.3d 1556 (9th Cir. 1995).

³² *Id.* at 1562. In *Rise*, a state DNA collection statute, which is very similar to the federal DNA Act, was upheld by the Ninth Circuit using a “pure totality of the circumstances analysis.” *Kincade II*, 379 F.3d at 831 (plurality opinion); *see also infra* Part III (discussing this methodology). The plurality in *Kincade II* did not discuss *Rise* in depth, but made clear that it was evaluating *Kincade II* in light of Ninth Circuit precedent, which arose from the results of the *Rise* decision. *See Kincade II*, 379 F.3d at 832 (plurality opinion).

³³ *See infra* Part III for an in-depth discussion of this analytical approach.

³⁴ *See Kincade II*, 379 F.3d at 833 (plurality opinion) (citing *McKune v. Lile*, 536 U.S. 24, 36 (2002)). The plurality also contended that the probation system “render[s] all kinds of individual choices—choices that otherwise would be privately considered, privately determined, and privately undertaken—matters of legitimate government concern and investigation.” *Id.* at 834. Due to a probationer’s diminished right to privacy, the plurality concluded that “the government has a far more substantial interest in invading [his or her] privacy than it does in interfering with the liberty of law-abiding citizens.” *Id.* The plurality, however, makes sure to point out that its “holding in no way intimates that conditional releasees’ diminished expectations of privacy serve to extinguish their ability to invoke the protections of the Fourth Amendment’s guarantee against unreasonable searches and seizures.” *Id.* at 835. Thus, if a conditional releasee is subject to a search that does not satisfy the “totality of the circumstances” test, then that individual is offered constitutional relief, “just like any other citizen.” *Id.*

because such tests are “commonplace” in our society,³⁵ involve “virtually no risk, trauma, or pain,”³⁶ and reveal only a record of one’s identity;³⁷ and (3) society has an “overwhelming,”³⁸ “undeniably compelling,”³⁹ and “monumental”⁴⁰ interest in searches under the DNA Act because they ensure that a probationer complies with the requirements of his or her release,⁴¹ reduce recidivism by deterring probationers from committing future crimes,⁴² and aid in solving past crimes in order to “bring closure to countless victims.”⁴³ By balancing these three factors, the Ninth Circuit concluded that DNA profiling of qualified federal offenders is reasonable given the “totality of the circumstances.”⁴⁴ Therefore, the Ninth Circuit held that the DNA Act satisfied the requirements of the Fourth Amendment, and affirmed the judgment and accompanying sentence of the district court.⁴⁵

Judge Ronald M. Gould, concurring, believed that the court should have affirmed under a “special needs” theory,⁴⁶ rather

³⁵ *Id.* at 836 (citing *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 625 (1989) (quoting *Schmerber v. California*, 384 U.S. 757, 771 (1966))).

³⁶ *Id.*

³⁷ *Id.* at 837 n.32. (“Those who have suffered a lawful conviction lose an interest in their identity to a degree well-recognized as sufficient to entitle the government permanently to maintain a verifiable record of their identity”); see also *Rise*, 59 F.3d at 1560 (“Once a person is convicted of one of the felonies included as predicate offenses under [a DNA profiling act], his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sampling.”). *But cf. infra* note 153 and accompanying text (explaining that a DNA sample reveals more about a person than simply his or her identity).

³⁸ *Kincade II*, 379 F.3d at 838 (plurality opinion).

³⁹ *Id.*

⁴⁰ *Id.* at 839.

⁴¹ See *id.* at 838.

⁴² See *id.* at 839.

⁴³ *Id.*

⁴⁴ *Id.* The Ninth Circuit stressed the “limited nature of [its] holding” as applying only to those on supervised release and urged the dissenting judges to “recognize the obvious and significant distinction between the DNA profiling of law-abiding citizens . . . and lawfully adjudicated criminals whose proven conduct substantially heightens the government’s interest in monitoring them.” *Id.* at 835–36.

⁴⁵ See *id.* at 839–40. Monica Knox, Kincade’s attorney, publicly stated that she would ask the Supreme Court for review. See Jeff Chorney, *As 9th OKs DNA Profiling, Dissent Cries Big Brother*, RECORDER, Aug. 19, 2004, at 1. Unfortunately, the Supreme Court denied Kincade’s petition for a writ of certiorari. *Kincade v. United States*, 544 U.S. ___, 125 S.Ct 1638 (2005).

⁴⁶ The “special needs” doctrine first appeared in *New Jersey v. T.L.O.*, 469 U.S.

than under the “totality of the circumstances” approach.⁴⁷ Judge Gould argued that the DNA Act authorizes searches that serve the “special needs” of a supervised release system by “monitoring convicts on supervised release and deterring their possible recidivism.”⁴⁸ Therefore, because searches pursuant to the DNA Act help to ensure that the “goals [that] lie at the heart of supervised release”⁴⁹ are realized, Judge Gould felt that they meet the exception to the Fourth Amendment that permits warrantless searches when there is a sufficient showing of “special needs, beyond the normal need for law enforcement.”⁵⁰

Judge Reinhardt wrote the first of three dissents. He firmly maintained that the Constitution requires individualized suspicion for law enforcement searches, such as those authorized by the DNA Act.⁵¹ In addition, as Judge Gould opined, Judge Reinhardt believed that the “special needs” analysis, rather than the “totality of the circumstances” test, should have governed the analysis of the case.⁵² Judge Reinhardt, however, concluded that

325 (1985), in Justice Blackmun’s concurrence, where he stated that there are certain cases that would allow for exceptions to the warrant and probable-cause requirement of the Fourth Amendment. *See id.* at 351 (Blackmun, J., concurring). This situation, however, would only present itself “in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” *Id.*; *see also infra* Part IV for a more in depth analysis of the “special needs” doctrine.

⁴⁷ *See Kincade II*, 379 F.3d at 840 (Gould, J., concurring). In addition, Judge Gould pointed out the limits of the plurality’s decision by noting that the Ninth Circuit did not have before it “a petitioner who has fully paid his or her debt to society, who has completely served his or her term, and who has left the penal system.” *Id.* at 841. Judge Gould commented that this situation raises “[a] nice question”—that is, “whether DNA samples, though lawfully obtained from a felon on supervised release, may properly be retained by the government after the felon has finished his or her term and has paid his or her debt to society.” *Id.* at 842; *see infra* Part V (proposing a solution to this dilemma).

⁴⁸ *Kincade II*, 379 F.3d at 840 (Gould, J., concurring) (“[T]he DNA program is likely to deter future crime of the supervised releasee because it increases the chance that a person on supervised release will be caught if he or she commits a new crime.”).

⁴⁹ *Id.*

⁵⁰ *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring). *See infra* Part IV.A (discussing the evolution of the “special needs” doctrine).

⁵¹ *See Kincade II*, 379 F.3d at 851–53 (Reinhardt, J., dissenting). Because searches pursuant to the DNA Act are conducted without any heightened level of suspicion that the searched individual has committed or will commit a crime in the future, Judge Reinhardt urged that the requirement of individualized suspicion was not met. *See id.*

⁵² *See id.* at 863. Judge Reinhardt believed that applying the “special needs”

searches pursuant to the DNA Act do *not* meet the narrow “special needs” exception because they are suspicionless searches exercised with the immediate objective of furthering the general needs of law enforcement.⁵³ Furthermore, Judge Reinhardt argued that even if the plurality was correct in applying the “sweeping”⁵⁴ and “malleable”⁵⁵ “totality of the circumstances” test, it yielded the wrong outcome because: (1) probationers and parolees still maintain a reasonable expectation of privacy, not a complete diminution of privacy;⁵⁶ (2) forcible blood extraction for DNA profiling is extremely intrusive, given the physical puncture of the skin and, more importantly, the enormous amount of information that it can provide about the searched individual for the rest of his or her life;⁵⁷ and (3) governmental interest in this search, which is to aid in the “normal, everyday needs of law enforcement,” was completely overstated by the plurality.⁵⁸ Therefore, the “totality of the circumstances” test should have revealed that the search at issue was not constitutionally reasonable under the Fourth Amendment.⁵⁹ Lastly, Judge Reinhardt passionately warned about the many dangers that arise from both the plurality’s “boundless”⁶⁰ methodology and the approval of a regime of suspicionless searches used for general

exception to justify the search at issue “would also have drastic adverse consequences for our Fourth Amendment protections,” *id.* at 843 n.1, because it “obliterates the distinction between law enforcement and non-law enforcement purposes.” *Id.* at 843–44.

⁵³ *See id.* at 855–60. These general needs of law enforcement, according to Judge Reinhardt, include “produc[ing] and maintain[ing] evidence relating to ordinary criminal wrongdoing.” *Id.* at 843. A search with the immediate objective of furthering the general needs of law enforcement is not permissible under the “special needs” exception to the Fourth Amendment. *Id.* at 860; *see also infra* Part IV.

⁵⁴ *Kincade II*, 379 F.3d at 842 n.1 (Reinhardt, J., dissenting).

⁵⁵ *Id.* at 844.

⁵⁶ *See id.* at 868.

⁵⁷ *See id.* at 867–68.

⁵⁸ *See id.* at 868–69.

⁵⁹ *See id.* at 869.

⁶⁰ *Id.* at 860. By “boundless,” Judge Reinhardt meant that under the “totality of the circumstances” test, “any person who experiences a reduction in his expectation of privacy would be susceptible to having his blood sample extracted and included in CODIS.” *Id.* at 844; *see also infra* notes 180–82 and accompanying text (listing the numerous groups of individuals deemed by case law to have reduced expectations of privacy). Furthermore, this legal standard “imposes no significant limits on arbitrary and invasive government actions.” *Kincade II*, 379 F.3d at 844 (Reinhardt, J., dissenting).

law enforcement purposes.⁶¹ He believed that this methodology abolishes the Fourth Amendment's general requirement that searches be based on individualized suspicion and leaves us all at risk of being subject to involuntary DNA profiling, among other forms of government intrusion, in the very near future.⁶² Furthermore, Judge Reinhardt envisioned that the ramifications of approving such a search include "all of the dangers inherent in allowing the government to collect and store information about its citizens in a centralized place,"⁶³ such as discrimination, exploitation, surveillance, and harassment.⁶⁴

The dissenting opinions of both Judge Kozinski and Judge Hawkins reiterated many of the same concerns addressed by Judge Reinhardt. Judge Kozinski remained "skeptical" of the searches authorized by the DNA Act in order to help solve future crime because the searched individuals' DNA profiles are kept on file for the rest of their lives—far after they have "paid [their] debt to society."⁶⁵ Instituting the search at issue with the goal of solving future crime, in Judge Kozinski's opinion, is a "huge end run around the Fourth Amendment."⁶⁶ In addition, Judge Kozinski pointed out that the Fourth Amendment intrusion at issue is not merely the extraction of blood, but rather the seizure of a DNA profile and its inclusion in a database for the rest of the searched person's life, which has far more serious ramifications.⁶⁷ Furthermore, he explained that under the "mushy" "totality of

⁶¹ See *Kincade II*, 379 F.3d at 843–45, 850–51, 860, 863–66, 869–71 (Reinhardt, J., dissenting).

⁶² See *id.* at 843. Judge Reinhardt found this argument especially compelling given that CODIS today is not nearly as limited as the one initially enacted by Congress and that further expansion is inevitable due to the increasing pressures to put DNA stored on CODIS to wider and better use. See *id.* at 845–51.

⁶³ *Id.* at 843. Judge Reinhardt also felt that the approval of searches pursuant to the DNA Act "encourages the very centralization of government authority that has repeatedly resulted in the sacrifice of our liberties in the name of law enforcement." *Id.* at 844.

⁶⁴ See *id.* at 843; see also *infra* note 116 and accompanying text (discussing dangerous implications that may result from an expansion of CODIS). See generally Julia Scheeres, *Fears About DNA Testing Proposal*, WIRED NEWS, Mar. 31, 2003, available at <http://www.wired.com/news/politics/0,1283,58270,00.html> (noting that genetic discrimination in the United States has a historical precedent from the early twentieth century when those who were considered mentally unfit to reproduce were involuntarily sterilized).

⁶⁵ See *Kincade II*, 379 F.3d at 872 (Kozinski, J., dissenting).

⁶⁶ *Id.*

⁶⁷ See *id.* at 873.

the circumstances” test, it is difficult to imagine that searches pursuant to the DNA Act would *ever* violate anyone’s Fourth Amendment rights, which creates the very real possibility that CODIS will one day easily expand to include the entire population.⁶⁸ Judge Hawkins added that the “special needs” doctrine should have applied in this case,⁶⁹ and, more importantly, that the forcible extraction of blood involved in the search at issue was constitutionally questionable because, based on Supreme Court precedent, “no one is required to submit to ‘intrusions beyond the body’s surface’ absent a ‘clear indication’ that the desired evidence would be found by such a search.”⁷⁰ Finally, Judge Hawkins opined that the governmental needs identified by the plurality simply do not justify such an intrusive, suspicionless search, the results of which are retained indefinitely.⁷¹

It is submitted that the Ninth Circuit erred in holding that searches pursuant to the DNA Act comport with the Fourth Amendment. This Comment argues that these searches, as currently prescribed by the DNA Act, are unreasonable under the Fourth Amendment, and thus are unconstitutional. The forcible extraction of blood for DNA profiling for permanent inclusion on CODIS is primarily carried out for law enforcement purposes, which, under Supreme Court precedent, cannot justify a search conducted in the absence of individualized suspicion. In addition, the chief justifications used by the Ninth Circuit plurality to authorize these searches, most notably the reduced expectation of privacy of probationers and the need to deter recidivism, are completely inconsistent with the DNA Act as currently structured and implemented. Furthermore, the confusion among circuit courts with respect to which method of analysis governs this legal issue—the “special needs” approach or the “totality of the circumstances” test—creates many disastrous ramifications,

⁶⁸ See *id.* at 872. Judge Kozinski addressed those who are doubtful that CODIS will expand by pointing to the advent and subsequent aggressive growth of fingerprinting in America. See *id.* at 873–74 (tracing the use of fingerprinting from only “those who had at some point passed through the criminal justice system” to all civil servants to over forty-seven million people, including those printed during background checks for non-criminal justice purposes).

⁶⁹ See *id.* at 875 (Hawkins, J., dissenting).

⁷⁰ *Id.* at 875 (quoting *Schmerber v. California*, 384 U.S. 757, 769–70 (1966)).

⁷¹ See *id.*

especially given the extreme flexibility of the “totality of the circumstances” test. This Comment urges the Supreme Court to address this issue before more intrusive searches like those authorized by the DNA Act are justified by a “totality of the circumstances” balancing test. In addition, although this Comment concludes that the “special needs” analysis should have governed *Kincade II* based on precedent, either method of analysis should lead to the conclusion that searches conducted pursuant to the DNA Act are unreasonable and unconstitutional. Lastly, if a compromise must be reached between the conflicting legal precedents and the immense desire for DNA databases, some changes to the DNA Act are desperately needed. These changes will prevent us all from sliding down the “slippery slope”⁷² and being subject to DNA profiling in the very near future, and will satisfy both the passionate protectors of civil liberties and the zealous devotees of law enforcement power.

Parts I and II of this Comment provide essential background information describing the evolution of Fourth Amendment jurisprudence and the history of the CODIS database, respectively. Part III discusses the “totality of the circumstances” approach and argues both that precedent does not support its application to resolve the case at hand and that the Ninth Circuit’s conclusion after conducting this balancing test was incorrect. Part IV analyzes the “special needs” doctrine

⁷² See *id.* at 873 (Kozinski, J., dissenting) (explaining that the evolution of Fourth Amendment searches reflect present values and mold future values by “altering what we come to expect from our government,” which enables the government to keep taking “small step[s] beyond the last thing [it] approved”); see also *United States v. 12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 127 (1973) (“Each step, when taken, appear[s] a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance.”); *Violent Offender DNA Identification Act of 1999, DNA Backlog Elimination Act and Convicted Offender DNA Index System Support Act: Hearing on H.R. 2810, H.R. 3087, and H.R. 3375 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 178 (2000) (prepared testimony of Barry Steinhardt, Associate Director, American Civil Liberties Union) [hereinafter Steinhardt Testimony], available at http://commdocs.house.gov/committees/judiciary/hju65302.000/hju65302_0.htm (“Our country has a long history of function creep—of databases, which are created for one discrete purpose and, which despite the initial promises of the [sic] their creators, eventually take on new functions and purposes.”). See generally Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1077–1114 (2003) (discussing how “attitude-altering slippery slopes” develop through legislative and judicial actions).

and its application to searches conducted pursuant to the DNA Act and further contends that the “special needs” doctrine should have been applied in *Kincade II*, which would have yielded the conclusion that the forcible extraction of blood to be used for law enforcement purposes does not meet this narrow exception. Part V concludes that searches pursuant to the DNA Act, as currently written and implemented, should be prohibited as unconstitutional and recommends, in the alternative, several changes to the DNA Act in order to comport more successfully with the requirements of the Fourth Amendment.

I. THE EVOLUTION OF FOURTH AMENDMENT JURISPRUDENCE

The Fourth Amendment provides the following:

The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁷³

The primary purpose of the Fourth Amendment is to “safeguard the privacy and security” of American citizens “against arbitrary invasions by government officials.”⁷⁴ The “reasonableness” of a search depends on adherence to the general constitutional requirement that it be supported by “probable cause” and formally approved by an impartial magistrate via issuance of a warrant prior to its execution.⁷⁵ Under certain conditions, however, law enforcement may execute a search without obtaining a warrant.⁷⁶ The general rule is that these warrantless searches still must be supported by probable cause, although modern Fourth Amendment jurisprudence has evolved

⁷³ U.S. CONST. amend. IV (emphasis added).

⁷⁴ *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985); *see also* *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 528 (1967).

⁷⁵ *See Camara*, 387 U.S. at 528; *see also* *United States v. United States Dist. Court*, 407 U.S. 297, 315–16 (1972).

⁷⁶ *See T.L.O.*, 469 U.S. at 340 (noting this general rule). The limited circumstances when law enforcement may execute a search without obtaining a warrant include situations when the warrantless search is necessary to yield evidence that might be destroyed in the time it takes to obtain a warrant, *see, e.g.*, *Thornton v. United States*, 541 U.S. 615, 623 (2004), or to search an arrestee for weapons that may threaten police safety, *see, e.g.*, *Chimel v. California*, 395 U.S. 752, 762–63 (1969).

considerably over the years and has recognized certain limited circumstances that allow a more relaxed degree of individual suspicion than probable cause to justify a search, namely reasonable suspicion.⁷⁷ Additionally, there is an even more narrow and discrete category of searches that are free from the warrant and individualized suspicion requirements, yet that have been held to comport with the Fourth Amendment requirement of reasonableness.⁷⁸ This category is the most limited because the historical background of the Fourth Amendment demonstrates that the Framers of the Constitution faithfully believed that general warrants and searches conducted in the absence of reasonable and particular suspicion were intolerable in a democratic society.⁷⁹ Nevertheless, this category of searches is the most relevant to the discussion of *Kincade II* because searches pursuant to the DNA Act are conducted both without a warrant and absent any suspicion that the searched individual has committed or will commit another crime.⁸⁰

It is helpful to further divide this category of lawful warrantless and suspicionless searches into three sub-groups.⁸¹ The first category involves searches in “exempted areas,”

⁷⁷ See, e.g., *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (authorizing a warrantless protective pat-down of individuals who police encounter so long as their concerns are justified by reasonable individualized suspicion of possible danger); see also *T.L.O.*, 469 U.S. at 340–41.

⁷⁸ See *infra* notes 82–90 and accompanying text (discussing cases that fall within the three subcategories of this group); see also *infra* notes 191–94 and accompanying text (providing more examples of lawful warrantless and suspicionless searches).

⁷⁹ See *Henry v. United States*, 361 U.S. 98, 100–01 (1959). In *Henry*, the Court noted that the general warrant requirement “perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. . . . And as the early American decisions both before and immediately after its adoption show, common rumor or report, suspicion, or even ‘strong reason to suspect’ was not adequate to support a warrant for arrest.” *Id.* (footnotes and citation omitted). More specifically, the Framers were afraid of blanket suspicionless searches where law enforcement would go door-to-door and search every house in a given area, which would subject unlimited numbers of innocent people to harassment, and possibly even involuntary detention. See *Davis v. Mississippi*, 394 U.S. 721, 726 (1969) (summarizing that “the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry”); see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 670 (1995) (O’Connor, J., dissenting) (adding that the Framers may have considered “blanket searches” even “more worrisome than the typical general search”).

⁸⁰ See *supra* note 14 and accompanying text.

⁸¹ See *Kincade II*, 379 F.3d at 822 (plurality opinion) (noting that these categories “help [to] organize the jurisprudence” in this area).

including national borders,⁸² prisons,⁸³ airports, and entrances to government buildings,⁸⁴ which by virtue of their location create substantial risks to public safety or destroy the right of privacy of those confined within these areas. The second category can be identified as “administrative searches,” which include inspections of closely regulated businesses and other routine regulatory investigations.⁸⁵ The final category of permissible warrantless and suspicionless searches can be referred to as “special needs,” which describes the analytical doctrine that the Supreme Court has devoted much attention to developing in recent years.⁸⁶ The “special needs” line of cases will be discussed in more detail later in this Comment;⁸⁷ however, it is important to note that these cases typically involve searches “conducted for important *non-law enforcement purposes* in contexts where adherence to the

⁸² See *United States v. Ramsey*, 431 U.S. 606, 616 (1977) (upholding suspicionless border searches “pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country”); see also *United States v. Flores-Montano*, 541 U.S. 149 (2004); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985).

⁸³ See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (holding that the Fourth Amendment protections against unreasonable searches do not apply within the confines of a prison cell because “society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell”).

⁸⁴ See, e.g., *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (affirming blanket suspicionless searches at airports and entrances to federal buildings as “reasonable” when such searches are carefully regulated to meet a “substantial and real” risk to public safety); *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (weighing the need of carry-on bag searches at airports to prevent airplane hijacking against the minimal offensiveness of the intrusion to conclude that these suspicionless searches were reasonable and in conformity with the Fourth Amendment).

⁸⁵ See, e.g., *New York v. Burger*, 482 U.S. 691, 702 (1987) (holding that a warrantless inspection of commercial premises is reasonable under the Fourth Amendment due to the weakened privacy interests of the owner and the heightened governmental interest in regulating particular businesses); *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 535–39 (1967) (authorizing municipal “area inspections” designed to monitor compliance with building safety codes).

⁸⁶ See *Kincade II*, 379 F.3d at 823 (plurality opinion). The “special needs” doctrine is derived primarily from two Supreme Court decisions. See *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); see also *infra* notes 199–209 and accompanying text (analyzing the effect of these two cases). In both cases, the Supreme Court held that the searches at issue were unconstitutional because they did not address “special needs” that are beyond the normal need for law enforcement. See *Ferguson*, 532 U.S. at 82–84; *Edmond*, 531 U.S. at 42–43.

⁸⁷ See *infra* Part IV (describing and advocating for the use of the “special needs” approach in *Kincade II*).

warrant-and-probable cause requirement would be impracticable.”⁸⁸ Because these three categories of lawful warrantless and suspicionless searches are limited, there remains an extremely large group of searches “for which individualized suspicion is nonnegotiable,”⁸⁹ notably, searches of individuals for the purpose of obtaining evidence of ordinary criminal wrong-doing.⁹⁰

II. CODIS'S HISTORY PROVES THAT ITS EXPANSION IS INEVITABLE

In order to appreciate and understand fully the dangerous implications of the Ninth Circuit's decision in *Kincade II*, one must consider that the present federal CODIS database⁹¹ is not

⁸⁸ *Kincade II*, 379 F.3d at 823 (plurality opinion) (emphasis added). This proposition, however, was complicated when, shortly after the “special needs” rationale was articulated, the Supreme Court applied it in what appeared to be a clear law enforcement context. See *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (upholding the constitutionality of a warrantless search of a probationer's home under the direction of law enforcement due to the finding that the operation of a probation system presents a “special need” justifying a departure from the usual warrant-and-probable cause requirement). *But see infra* Part IV.C (proposing a distinction to account for the Court's application of the “special needs” exception in this context).

⁸⁹ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 673 (1995) (O'Connor, J., dissenting).

⁹⁰ See *Kincade II*, 379 F.3d at 853 (Reinhardt, J., dissenting) (indicating that no matter how these groups are categorized the “overriding lesson is clear: when the government wishes to search individuals in order to obtain evidence of ordinary criminal wrongdoing, some level of individualized suspicion is required”); see also *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177 (2004) (reiterating the requirement of individualized suspicion in searches undertaken for law enforcement purposes by holding that it is unconstitutional to require individuals to identify themselves to police officers absent reasonable suspicion).

⁹¹ See NATIONAL INSTITUTE OF JUSTICE, U.S. DEPT OF JUSTICE, *supra* note 4, at 9–10 (2002); see also FBI, U.S. DEPT OF JUSTICE, COMBINED DNA INDEX SYSTEM PROGRAM: CODIS—MISSION STATEMENT AND BACKGROUND [hereinafter FBI's CODIS Program], available at <http://www.fbi.gov/hq/lab/codis/program.htm> (last visited Sept. 16, 2005) (explaining that CODIS “blends forensic science and computer technology into an effective tool for solving violent crimes”). CODIS is a computer software program that consists of three hierarchical levels—local, state, and national—which operate in tandem as a nationally distributed database. See *id.* The National DNA Index System (“NDIS”) is the highest level that enables laboratories participating in the CODIS Program to exchange and compare DNA profiles on a national scale. *Id.* The State DNA Index System (“SDIS”) is the middle tier, which allows the interstate exchange of DNA profiles, and the Local DNA Index System (“LDIS”) is the bottom tier, at which all DNA profiles originate. *Id.* According to the U.S. Department of Justice, “[t]he tiered approach allows state and

nearly as limited as the one initially enacted by Congress.⁹² CODIS began as a pilot program in 1990,⁹³ but was made a nationwide program in 1994 with the passage of the Violent Crime Control and Law Enforcement Act of 1994,⁹⁴ which authorized the FBI to create a national database of DNA samples collected from crime scenes, crime victims, convicted offenders, and unidentified human remains.⁹⁵ In 1996, CODIS was expanded to include federal crimes with the passage of the Antiterrorism and Effective Death Penalty Act of 1996.⁹⁶ The Department of Justice, however, concluded that despite this legislation, Congress had not given the executive branch

local agencies to operate their databases according to their specific legislative or legal requirements.” *Id.* Thus, because all fifty states have enacted laws authorizing the collection of DNA samples from convicted offenders for inclusion in DNA databases, the DNA profiles stored on CODIS are not limited to those of federal offenders. *See id.*; *see also* Taylor, *supra* note 13, at 513 n.22 (listing all fifty states’ laws). CODIS even contains DNA profiles of individuals who have been convicted of no crime but have been arrested in Louisiana or Texas. *See* Sandra J. Carnahan, *The Supreme Court’s Primary Purpose Test: A Roadblock to the National Law Enforcement DNA Database*, 83 NEB. L. REV. 1, 4–5 (2004) (noting that Louisiana and Texas have laws that require a DNA sample from all those arrested); *see also* LA. REV. STAT. ANN. §§ 15:601–609 (Supp. 2005); TEX. GOV’T CODE ANN. § 411.1471 (Vernon 1998 & Supp. 2003). Due to this trend within the states, Barry Steinhardt, Associate Director of the American Civil Liberties Union’s Program on Technology and Liberty, stated:

While DNA databases may be useful to identify criminals, I am skeptical that we will ward off the temptation to expand their use In the last ten years alone we have gone from collecting DNA only from convicted sex offenders to now including people who have been arrested but never convicted of a crime.

Press Release, Am. Civil Liberties Union (ACLU), DNA Databases Hold More Dangers Than Meet the Eye, ACLU Says (Mar. 23, 2000), *available at* <http://www.aclu.org/Privacy/Privacy.cfm?ID=7886&c=129>.

⁹² *See Kincaid II*, 379 F.3d at 845 (Reinhardt, J., dissenting) (explaining that CODIS currently “contains more information about vastly more individuals than it did when it was first created” and that continual “growth is inevitable”).

⁹³ *See* FBI’s CODIS Program, *supra* note 91.

⁹⁴ Pub. L. No. 103-322, § 210304(a), 108 Stat. 1796, 2069–70 (codified as amended at 42 U.S.C. § 14132). Included in this act was the DNA Identification Act, which had three main objectives: (1) to create a DNA advisory board to recommend quality assurance standards to the FBI; (2) to establish a national DNA identification index; and (3) to provide funding for the CODIS program and for state and local laboratories to enhance their DNA testing capabilities. *See* Adams Testimony, *supra* note 8.

⁹⁵ *See* Violent Crime Control and Law Enforcement Act § 210304(a) (codified as amended at 42 U.S.C. § 14132).

⁹⁶ Pub. L. No. 104-132 § 811(a)(2), 110 Stat. 1214, 1312 (codified as amended at 28 U.S.C. § 531).

sufficient legal authority to collect DNA samples from federal offenders.⁹⁷ Thus, it was not until the passage of the DNA Act in 2000 that probation officers had the power under federal law to forcibly extract DNA samples from any individual on probation, parole, or supervised release, so long as he or she had been convicted of a “qualifying federal offense.”⁹⁸ It is the enormous increase in qualifying federal offenses that provides the best indication that the DNA Act is bound to expand further to include more and more classes of offenders—or even to extend to the entire population by eliminating the “qualifying offense” requirement entirely—in the very near future.⁹⁹

In April of 2000, shortly after the DNA Act was enacted, there were only 210,000 DNA profiles stored on CODIS.¹⁰⁰ Startlingly, as of August, 2004—just over four years later—there were 91,759 forensic profiles and 1,853,404 convicted offender profiles in the National DNA Index System (“NDIS”) tier of CODIS.¹⁰¹ This almost exponential growth can be attributed to the fact that the DNA Act originally included only a narrow list of “qualifying offenses,” but currently “includes a laundry list of [qualifying] federal crimes . . . compiled from more than 200 separate sections of the United States Code.”¹⁰² The former

⁹⁷ See *Kincade II*, 379 F.3d at 845 (Reinhardt, J., dissenting).

⁹⁸ See 42 U.S.C. § 14135(a)(2) (Supp. 2004); 28 C.F.R. § 28.2 (2004); see also DNA Act House Report, *supra* note 3 (recounting the history of the CODIS database); *infra* notes 100–11 and accompanying text (proving that “qualifying federal offenses” under the DNA Act have vastly expanded). CODIS uses two indexes: the forensic index, which contains DNA profiles gathered from crime scenes, and the offender index, which contains DNA profiles of individuals convicted of violent crimes (although many states are now expanding legislation to include other felonies). See FBI’s CODIS Program, *supra* note 91; see also DNA Act House Report, *supra* note 3, at 33.

⁹⁹ This view is supported by many civil rights organizations, most notably the American Civil Liberties Union (“ACLU”). See Liza Porteus, FOXNews.com, Supporters, Critics Debate DNA Database Expansion (May 9, 2003), http://www.foxnews.com/printer_friendly_story/0,-3566,-86390,-00.html (“We are steadily heading toward a situation where the government takes everybody’s DNA without any controls.” (quoting Jay Stanley, Communications Director of the Technology and Liberty Program at the ACLU)). But see *infra* note 114 and accompanying text (noting the views of those who support expanding DNA databanks to the entire population).

¹⁰⁰ See FBI’s CODIS Program, *supra* note 91.

¹⁰¹ See *id.*

¹⁰² *Kincade II*, 379 F.3d at 846 (Reinhardt, J., dissenting). See 28 C.F.R. § 28.2 (2004) for the most recent list of qualifying federal offenses for purposes of DNA sample collection under the DNA Act.

narrow list of qualifying offenses included severe and violent crimes, such as rape, murder, voluntary manslaughter, kidnapping, and sexual exploitation and other abuse of children;¹⁰³ however, the current list provides evidence that the government “has not simply chosen to collect DNA samples from the most hardened criminals or most likely recidivists,”¹⁰⁴ but rather has preferred to exploit and increase the number of DNA profiles on the database to the fullest extent possible.¹⁰⁵ For example, an extremely limited sampling of current qualifying offenses under the DNA Act includes spray-painting graffiti on government property, interfering with or assaulting a mailman in the course of his or her duties, intentionally cutting, spoiling or destroying various parts of a vessel, violently impeding reproductive health service facilities, forcing or intimidating public works employees to give kickbacks, conspiring in severe cases of threats or intimidation against any person, engaging in computer fraud, and interfering with the right to vote.¹⁰⁶ In addition, many present qualifying crimes pertain to the valued First Amendment rights of free speech and assembly, such as rioting, incitement, and civil disorder.¹⁰⁷ Furthermore, other existing qualifying offenses are so far-reaching that they have the potential to cover an endless range of unlawful conduct.¹⁰⁸ Based on the current list of qualifying federal offenses, it is difficult to find “any discernible categories of criminal activities” that would *not* qualify an individual for forcible DNA extraction under the DNA Act.¹⁰⁹ Was this the original intention of the DNA Act? This Comment asserts that the answer to this

¹⁰³ See DNA Act House Report, *supra* note 3, § 3(d).

¹⁰⁴ *Kincade II*, 379 F.3d at 846 (Reinhardt, J., dissenting).

¹⁰⁵ *Id.* (claiming that this list results “in countless possible permutations of qualifying crimes”).

¹⁰⁶ See 18 U.S.C. §§ 1361, 111(a)(1), 2276, 248, 874, 241, 1030, 594 (2000), respectively; 28 C.F.R. § 28.2 (citing each of the aforementioned sections of Title 28 of the United States Code). For a more extensive, but non-exhaustive sampling of other qualifying offenses, see *Kincade II*, 379 F.3d at 846–47 (Reinhardt, J., dissenting).

¹⁰⁷ See, e.g., 18 U.S.C. § 231 (applying to various forms of “civil disorder”); *id.* § 2231 (resisting arrest); *id.* § 2101 (participating in, promoting, or inciting a riot).

¹⁰⁸ See, e.g., 28 C.F.R. § 28.2(i) (including as a “qualifying offense” under the DNA Act “[a]ny offense that is an *attempt* or *conspiracy* to commit any of the foregoing [qualifying] offenses” (emphasis added)).

¹⁰⁹ *Kincade II*, 379 F.3d at 846 (Reinhardt, J., dissenting).

question is a resounding “no.”¹¹⁰ The current state of the DNA Act has moved very far away from its original intent to aid in the prosecution of violent, high-recidivism-rate crimes.¹¹¹

The vastly expanded number of qualifying offenses under the DNA Act indicates that CODIS is certain to continue its exponential expansion, especially when considered together with the alarming number of individuals awaiting DNA extraction in the federal system¹¹² and the promotional efforts of the federal government and individual states to increase DNA collection. More specifically, there is a current attempt underway, both within state legislatures and Congress, to expand the DNA Act to all adult arrestees, as well as juvenile offenders.¹¹³ This type of expansion will breed more pressure to expand until the public becomes so desensitized with DNA extraction that applying the

¹¹⁰ The legislative history of the DNA Act asserts that one of its goals was to reduce the “backlog of hundreds of thousands of DNA samples taken from convicted offenders” given the trend at the state level towards “broader offense coverage for purposes of DNA sample collection and indexing.” DNA Act House Report, *supra* note 3, at 27, 33 (noting that a recent review of state systems found that “all states covered sex offenses, 40 states covered offenses against children, 29 states covered assault/battery offenses, 22 states covered robberies, 20 states covered burglaries, and seven states covered all felonies” (footnotes omitted)). This original focus of the federal DNA Act seems inconsistent with the current enormous number of qualifying federal offenses under the DNA Act, which would only increase the number of unanalyzed samples, bringing the original backlog problem back to square one.

¹¹¹ See Hibbert, *supra* note 2, at 769 (observing that DNA databases were originally created to help solve crimes involving certain classes of offenders with statistically high recidivism rates, such as sex offenders and violent felons).

¹¹² See Press Release, U.S. Dep’t of Justice, Bureau of Justice Statistics, Probation and Parole in the United States, 2003 (July 25, 2004), *available at* <http://www.ojp.usdoj.gov/bjs/pub/press/ppus03pr.htm> (indicating that almost 6.9 million individuals have come under some form of correctional supervision in recent years).

¹¹³ See Mark Hansen, *DNA Dragnet*, A.B.A. J., May 2004, at 43 (noting that Congress is likely to approve legislation authorizing DNA profiling of juvenile offenders and adult arrestees). In addition, the state of California is currently trying to enact “Proposition 69, The DNA Fingerprint Initiative,” which would extend its DNA database laws to apply to all arrestees. See John Wildermuth, *Proposition To Take DNA at Arrest Stirs Privacy Fears*, S.F. CHRON., June 12, 2004, at A1; Press Release, Californians for the DNA Fingerprint Yes on 69, Governor Arnold Schwarzenegger Endorses Prop. 69, the DNA Fingerprint Initiative (July 7, 2004), <http://www.forrelease.com/D20040707/sfw100.P2.07072004170737.16606.html>. This proposition has met considerable opposition. See *generally* LEAGUE OF WOMEN VOTERS OF CALIFORNIA EDUCATION FUND, IN DEPTH ANALYSIS OF PROPOSITION 69 (Nov. 2004), *available at* <http://ca.lwv.org/lwvc/edfund/elections/2004nov/id/prop69.html> (listing, inter alia, proposition opponents and their arguments).

DNA Act to the entire population will easily pass muster with the public and the courts.¹¹⁴ Add the current “war on terror” into the mix and there is even greater incentive to expand the scope of the DNA Act at the expense of privacy.¹¹⁵ The current trend toward even further expansion of CODIS has severely dangerous implications¹¹⁶ and, accordingly, demands cautious scrutiny of

¹¹⁴ See Hibbert, *supra* note 2, at 814–15. This is likely to come in the form of a chain effect—applying the DNA Act to all arrestees will lead to applying it to those wishing to obtain driver licenses or passports, to extracting DNA from all children at birth, and then, ultimately, extracting DNA from the entire population. See DANIEL J. SOLOVE & MARC ROTENBERG, INFORMATION PRIVACY LAW 268 (2003); OFFICE OF TECH. ASSESSMENT, 101ST CONG., GENETIC WITNESS: FORENSIC USES OF DNA TESTS 10 (Comm. Print 1990) (indicating that there is pressure to put DNA stored on CODIS to greater and better use). See generally NAT’L COMM’N ON THE FUTURE OF DNA EVIDENCE, U.S. DEP’T OF JUSTICE, THE FUTURE OF FORENSIC DNA TESTING: PREDICTIONS OF THE RESEARCH AND DEVELOPMENT WORKING GROUP 35 (2000) (“Inevitably, there will be the increasing possibility of broadening the database to include the general public.”). There are legal scholars, prominent politicians, and journalists who advocate extending CODIS to the entire population. See, e.g., D.H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413 (2003); Akhil Reed Amar, *A Search for Justice in Our Genes*, N.Y. TIMES, May 7, 2002, at 31 (pushing to extend DNA databases to all citizens); David Seifman, *Getting DNA Samples at Birth Fine with Rudy*, N.Y. POST, Dec. 17, 1998, at 34 (discussing former New York City Mayor Rudy Giuliani’s approval of a requirement for every newborn born in the state to donate a DNA sample to the state databank for use if the child grows into a criminal).

¹¹⁵ See, e.g., *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act*, Pub. L. No. 107-56, §§ 206, 213, 215, 115 Stat. 272, 282, 285–88 (2001) (providing examples of the government successfully enhancing its investigatory and surveillance authority in the form of roving wiretaps, “sneak and peak” searches, and business record searches, respectively, in the absence of judicial supervision and intervention).

¹¹⁶ See Steinhardt Testimony, *supra* note 72 (asserting that the huge potential for DNA technology carries “significant risks that highly personal and sensitive information will fall into the wrong hands, leading to a loss of privacy and genetic discrimination”). More specifically, these dangers include monitoring, intimidating, and incarcerating political opponents and disfavored minorities, as well as divulging genetic profiles to schools, employers, and insurance companies. See *supra* notes 63–64 and accompanying text; see also Press Release, Associated Press, Alaska To Expand DNA Collection (Mar. 7 2001), available at <http://www.aclu.org/news/newsprint.cfm?ID=6981&c=129> (“Once the government has this information about you they keep finding neat new ways to use it.” (quoting Jennifer Rudinger, Executive Director of the Alaska Civil Liberties Union)); Amar, *supra* note 114, at 31 (noting that our DNA code can be used in “sinister ways,” including threatening a person’s health insurance or blackmailing a person due to information derived about paternity). In addition, searches pursuant to the DNA Act also threaten the genetic privacy of all those blood-related to the searched offender. See Hibbert, *supra* note 2, at 782–87 (illustrating some complications created during law enforcement

court decisions—like the plurality's in *Kincade II*—that carry far greater repercussions than initially meet the eye.

III. THE SWEEPING "TOTALITY OF THE CIRCUMSTANCES" TEST

Courts confronted with constitutional challenges to the federal DNA Act and its state law equivalents are divided over which of two approaches governs this analysis: (1) the "totality of the circumstances" test; or (2) the "special needs" approach.¹¹⁷ The Second, Seventh, and Tenth Circuits, various federal district courts, and at least two state supreme courts, have chosen to uphold the constitutionality of DNA collection statutes using the "special needs" approach.¹¹⁸ On the other hand, "the Fourth and Fifth Circuits, a Seventh Circuit Judge, numerous federal district courts, and various state courts have approved compulsory DNA profiling" by employing the "traditional assessment of reasonableness"¹¹⁹ via the "totality of the circumstances" test.¹²⁰ This Comment asserts that Supreme Court precedent does not support the application of the "totality of the circumstances" test to decipher the constitutionality of suspicionless searches

investigations by the similarity of genes among siblings).

¹¹⁷ See *infra* notes 118 and 120 and accompanying text (listing the various courts using each approach).

¹¹⁸ See *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003); *Roe v. Marcotte*, 193 F.3d 72, 79–82 (2d Cir. 1999); *Vore v. United States Dep't of Justice*, 281 F. Supp. 2d 1129, 1133–37 (D. Ariz. 2003); *Miller v. United States Parole Comm'n*, 259 F. Supp. 2d 1166, 1175–77 (D. Kan. 2003); *United States v. Sczubelek*, 255 F. Supp. 2d 315, 319–23 (D. Del. 2003); *United States v. Reynard*, 220 F. Supp. 2d 1142, 1165–69 (S.D. Cal. 2002). See *Kincade II*, 379 F.3d at 830–31 (plurality opinion), for a listing of state court decisions utilizing the "special needs" analysis.

¹¹⁹ *Kincade II*, 379 F.3d at 831 (plurality opinion).

¹²⁰ See *Green*, 354 F.3d at 680–81 (Easterbrook, J., concurring); *Groceman v. United States Dep't of Justice*, 354 F.3d 411, 413–14 (5th Cir. 2004); *Velasquez v. Woods*, 329 F.3d 420, 421 (5th Cir. 2003); *Jones v. Murray*, 962 F.2d 302, 306–07 (4th Cir. 1992); *Nicholas v. Goord*, No. 01 Civ. 7891, 2004 U.S. Dist. LEXIS 11708 (S.D.N.Y. June 23, 2004); *Padgett v. Ferrero*, 294 F. Supp. 2d 1338, 1343–44 (N.D. Ga. 2003); *United States v. Stegman*, 295 F. Supp. 2d 542, 548–50 (D. Md. 2003); *United States v. Meier*, No. 97-72, 2002 U.S. Dist. LEXIS 25755 (D. Or. Aug. 6, 2002); *United States v. Lujan*, No. 98-480-02, 2002 U.S. Dist. LEXIS 25754 (D. Or. July 9, 2002); *Shelton v. Gudmanson*, 934 F. Supp. 1048 (W.D. Wis. 1996); *Kruger v. Erickson*, 875 F. Supp. 583 (D. Minn. 1995); *Vanderlinden v. Kansas*, 874 F. Supp. 1210 (D. Kan. 1995); *Sanders v. Coman*, 864 F. Supp. 496 (E.D.N.C. 1994); *Ryncarz v. Eikenberry*, 824 F. Supp. 1493 (E.D. Wash. 1993). See *Kincade II*, 379 F.3d at 831 (plurality opinion), for a listing of state court decisions utilizing the "totality of the circumstances" test.

pursuant to the DNA Act; thus, the Ninth Circuit erred in utilizing this analysis in *Kincade II*.¹²¹ Furthermore, even if the Ninth Circuit was correct in applying the “totality of the circumstances” test, it reached the wrong outcome.¹²² Lastly, employing the “totality of the circumstances” test in the arena of suspicionless searches would lead to the downfall of many of the precious protections of the Fourth Amendment—one huge reason why it truly matters which approach is applied by courts when considering the constitutionality of this search regime.¹²³

A. Precedent Does Not Support Use of the “Totality of the Circumstances” Test

The Supreme Court has never used the “totality of the circumstances” test to justify suspicionless law enforcement searches like those pursuant to the DNA Act.¹²⁴ The underlying similarity in cases using the “totality of the circumstances” approach to analyze searches is the existence of *some* level of individualized suspicion.¹²⁵ The “totality of the circumstances” test is sometimes referred to as the “general Fourth Amendment approach” because it is used as a guide for courts to determine whether a search met the minimum level of suspicion required under the Fourth Amendment, meaning whether a search was supported by the requisite level of probable cause.¹²⁶ Because searches pursuant to the DNA Act are conducted in the absence of *any* level of suspicion, they are not “normal” Fourth Amendment cases to be governed by the “totality of the circumstances” test.¹²⁷ For programmatic, suspicionless searches like those under the DNA Act to be upheld, they must fall into one of the extremely limited categories warranting an exception

¹²¹ See *infra* Part III.A.

¹²² See *infra* Part III.B.

¹²³ See *infra* Part III.C.

¹²⁴ See *Kincade II*, 379 F.3d at 861 (Reinhardt, J., dissenting).

¹²⁵ See, e.g., *Ohio v. Robinette*, 519 U.S. 33, 38–39 (1996) (explaining that the traditional question of the “totality of the circumstances” approach is not whether a police officer needed to have some level of suspicion before searching the car of a speeding driver, but whether the officer had a sufficient level of suspicion to justify the search).

¹²⁶ See *United States v. Knights*, 534 U.S. 112, 118 (2001); *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (declaring that the “totality-of-the-circumstances analysis . . . traditionally has informed probable-cause determinations”).

¹²⁷ See *Kincade II*, 379 F.3d at 862–63 (Reinhardt, J., dissenting).

to normal Fourth Amendment requirements.¹²⁸ There is a different mode of analysis to apply to suspicionless searches—the “special needs” approach¹²⁹—which is why the plurality in *Kincade II* could not and did not cite to a single case that applied the “totality of the circumstances” test to analyze a suspicionless search.¹³⁰ Therefore, the Ninth Circuit erred in refusing to draw the crucial line between suspicion-based and suspicionless searches, which “is as old as the Fourth Amendment and is fundamental to the preservation of the privacy interests which that provision protects.”¹³¹

The *Kincade II* plurality’s sole reliance on a recent Supreme Court case, *United States v. Knights*,¹³² which applied the “totality of the circumstances” approach in a law enforcement context, is misguided.¹³³ In *Knights*, the Supreme Court considered whether a warrantless search of a probationer’s home was reasonable under the Fourth Amendment.¹³⁴ The facts of *Knights* are particularly important to distinguish this case from *Kincade II*. While the defendant in *Knights* was on probation for

¹²⁸ See *supra* notes 81–90 and accompanying text (explaining these extremely limited categories).

¹²⁹ See *Kincade II*, 379 F.3d at 860 (Reinhardt, J., dissenting) (commenting that “[a]t least under [the special needs] doctrine, suspicionless searches are carefully scrutinized and held constitutional only when they serve a valid special need apart from law enforcement”).

¹³⁰ See *id.* at 861.

¹³¹ *Id.* at 863. The plurality refused to draw this line based on its interpretation of *Knights*, which it felt “made clear” that this is not a line to be drawn—“at least not when it comes to conditional releasees.” *Id.* at 830 (plurality opinion).

¹³² 534 U.S. 112 (2001). The *Kincade II* court admits that there are recent cases that “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,” but counters that the *Knights* decision “signal[s] the existence of [the] possible limitations” of this proposition. *Kincade II*, 379 F.3d at 827 (plurality opinion).

¹³³ See *Kincade II*, 379 F.3d at 861 (Reinhardt, J., dissenting) (adding that *Knights* does not support the view, as implied by the plurality, that since the group searched includes conditional releasees, the principles governing traditional Fourth Amendment law can be disregarded). In response to the plurality’s argument that “conditional releasees’ diminished expectations of privacy may be sufficient to justify the judicial assessment of a parole or probation search’s reasonableness outside the strictures of special needs analysis,” *id.* at 832 (plurality opinion), Judge Reinhardt emphasized that this approach “dispenses with the structural guarantees that have guided Fourth Amendment jurisprudence since the Founding.” *Id.* at 860 (Reinhardt, J., dissenting).

¹³⁴ *Knights*, 534 U.S. at 122.

an unrelated drug offense, law enforcement officers had suspected him to have been involved in an arson resulting in \$1.5 million in damages.¹³⁵ After observing the defendant's suspected accomplice with explosive materials in his car, a law enforcement official promptly executed a warrantless search of the defendant's home, where incriminating evidence was found linking him to the arson.¹³⁶ The defendant tried to suppress the evidence obtained during the search on Fourth Amendment grounds.¹³⁷ After employing the "totality of the circumstances" test, the Supreme Court held that the warrantless search of the probationer's apartment was supported by "reasonable suspicion" and that no more than that degree of suspicion was required to validate the search.¹³⁸ However, the primary reason that the *Knights* Court applied the "totality of the circumstances" test is simple: the warrantless search of the defendant's apartment was supported by *some* level of individualized suspicion.¹³⁹ Of course,

¹³⁵ *Id.* at 114.

¹³⁶ *Id.* at 115.

¹³⁷ *Id.* at 116.

¹³⁸ *See id.* at 122. This is most notable because *Knights* was a probationer faced with a probation condition that required him to submit to warrantless searches. *See id.* at 119 (explaining that "*Knights*' status as a probationer subject to a search condition informs both sides of [the totality of the circumstances] balance" and that "[i]nherent in the very nature of probation is [the idea] that probationers 'do not enjoy the absolute liberty to which every [law-abiding] citizen is entitled'" (internal quotation omitted) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)). The Court balanced *Knights*' interest in privacy against the state's interest in searching his home without a warrant to affirm the validity of this search. *See id.* at 119–21.

¹³⁹ *But see Kincaid II*, 379 F.3d at 829 (plurality opinion) (explaining that the Court should not "be tempted to conclude that the quantum of suspicion supporting the search of *Knights*'s apartment was what pushed the Court beyond special needs analysis" because the "special needs analysis [is] triggered not by a complete absence of suspicion, but by a departure from the Fourth Amendment's warrant-and-probable cause requirements"). The very language of the Supreme Court in *Knights*, however, expressly validates this distinction:

We do not decide whether the probation condition so diminished, or completely eliminated, *Knights*' reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment. The terms of the probation condition permit such a search, but we need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion.

Knights, 534 U.S. at 120 n.6; *see also id.* at 121 (emphasizing the existence of individualized suspicion based on the facts of the case). Hence, the Supreme Court in *Knights* did not reach the question of whether searches of parolees and probationers could lawfully be conducted in the absence of reasonable suspicion—further evidence

this situation is not analogous to the facts of *Kincade II*, in which no level of individualized suspicion was present before the search was conducted. In addition, the plurality pointed to a recent Supreme Court case, *Griffin v. Wisconsin*,¹⁴⁰ which employed the “special needs” approach to a warrantless search of a probationer’s apartment that was supported by reasonable suspicion, to help justify its use of the “totality of the circumstances” approach to a suspicionless search regime.¹⁴¹ The existence of this case, however, does not give courts carte blanche to apply the approach of their choice to a suspicionless search; this would be illogical.¹⁴² Based on Supreme Court precedent, suspicionless searches simply cannot be analyzed under the “totality of the circumstances” approach, but rather must be analyzed under the “special needs” approach.¹⁴³

B. The Ninth Circuit’s Error-Filled Balancing Test

In mistakenly applying the “totality of the circumstances” approach, the Ninth Circuit plurality in *Kincade II* concluded that: (1) those who commit crimes have reduced expectations of privacy; (2) the forcible extraction of blood is a minimal invasion of privacy; and (3) the government’s interest in DNA profiling is “monumental”; thus, searches pursuant to the DNA Act are constitutionally reasonable.¹⁴⁴ This conclusion, however, is both laden with flaws and overly simplistic because when any search is up against “monumental” government interests, it will be a

that this case is not on point. See *Kincade II*, 379 F.3d at 862 (Reinhardt, J., dissenting) (summarizing that the Supreme Court’s “willingness [in *Knights*] to ignore the limitations imposed by the special needs doctrine” was because of “the presence of individualized suspicion”). In fact, the *Kincade I* court interpreted *Knights* to mean that reasonable suspicion *must* exist before the government may compel parolees or probationers to submit to the suspicionless, forcible extraction of blood. See *Kincade I*, 345 F.3d at 1102.

¹⁴⁰ 483 U.S. 868 (1987).

¹⁴¹ See *Kincade II*, 379 F.3d at 824–25 (plurality opinion); see also *infra* Part IV.C. (analyzing the rationale in *Griffin*).

¹⁴² See *Kincade II*, 379 F.3d at 863 (Reinhardt, J., dissenting) (“The fact that a suspicionless search *must* be justified on the basis of special needs in no way means that a suspicion-supported search *cannot* be justified on that basis.”).

¹⁴³ See *infra* Part IV.A. In contrast, when a search is supported by individualized suspicion, either doctrinal approach—the “totality of the circumstances” test or the “special needs” analysis—is appropriate. See *Kincade II*, 379 F.3d at 863 (Reinhardt, J., dissenting).

¹⁴⁴ See *supra* notes 34–45 and accompanying text (explaining this holding).

huge challenge for this balancing test ever to tip in favor of the searched individual's privacy rights. Under the "totality of the circumstances" approach, the forcible extraction of blood from probationers for permanent retention should have been deemed unreasonable under the Fourth Amendment.

1. The Extent of Intrusion Is Far from Trivial

The plurality erroneously defined the Fourth Amendment intrusion at issue in *Kincade II* as the simple physical piercing of an individual's skin to extract his or her blood, and wrongly concluded that this action constituted a "minimal" invasion of privacy.¹⁴⁵ The first problem with these determinations is that although there are many Supreme Court cases that comment on the non-intrusive nature of blood extractions,¹⁴⁶ none remotely address the specific type of extraction at issue in *Kincade II*, whereby the extracted blood is analyzed to create a DNA profile, which is permanently stored on a government database, subjected to unlimited re-testing, and exposed to potentially severe unauthorized use.¹⁴⁷ Obviously, the blood extraction in *Kincade II* went far beyond the confines of the routine, "commonplace"¹⁴⁸ blood extractions discussed in the cases used by the plurality to support its assertion that a blood extraction is "minimally invasive."¹⁴⁹ Furthermore, the Supreme Court has recognized that certain physical intrusions, which require even less bodily invasion than drawing blood, are "'severe . . . intrusion[s] upon cherished personal security' that

¹⁴⁵ *Kincade II*, 379 F.3d at 836, 838 (plurality opinion).

¹⁴⁶ See, e.g., *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 625 (1989) ("[T]he intrusion occasioned by a blood test is not significant . . ."); *Winston v. Lee*, 470 U.S. 753, 762 (1985) (arguing that in "society's judgment [] blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity"); *Schmerber v. California*, 384 U.S. 757, 771-72 (1966) (noting that "[blood] tests are a commonplace in these days of periodic physical examinations" and that there is a low risk of pain and infection resulting from them); *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957) ("The blood test procedure has become routine in our everyday life.").

¹⁴⁷ For example, the intrusion at issue in *Schmerber* involved a blood sample taken for evidence of inebriation at the time of the search. See *Schmerber*, 384 U.S. at 768-69. This one-time use is strikingly different from the permanent retention of an individual's DNA profile on a government database.

¹⁴⁸ *Skinner*, 489 U.S. at 625 (quoting *Schmerber*, 384 U.S. at 771).

¹⁴⁹ *Kincade II*, 379 F.3d at 838 (plurality opinion); see *supra* notes 146-47 and accompanying text.

[are] subject to constitutional scrutiny.”¹⁵⁰

More importantly, the power of technology has made searches pursuant to the DNA Act far more intrusive and telling than ever imaginable by the Founders of the Constitution, and quite possibly, by the enactors of the DNA Act itself—and who knows what potential the future holds?¹⁵¹ The DNA profile derived from a forcible blood extraction does not merely “establish[] . . . a record of the defendant’s identity,”¹⁵² as the plurality contends, but rather has the potential to reveal a multitude of private information about an individual, ranging from his or her medical information, including predisposition to

¹⁵⁰ *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (internal citations omitted) (referring to the fingernail scraping of a murder suspect for the purpose of gathering his DNA without his consent).

¹⁵¹ See Brief for Electronic Privacy Information Center as Amicus Curiae Supporting Defendant/Appellant at 12, *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004) (No. 02-50380) (envisioning that “soon, if not already, scientists will request access to what would serve as [a] preexisting goldmine of DNA data for their research”); Motion of Protection & Advocacy, Inc. for Leave to File Brief of Amicus Curiae Supporting Defendant/Appellant at 24, *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004) (No. 02-50380) (cautioning that “it is inevitable that as technology advances, at some point, [the DNA samples] will be used for other purposes without the consent or knowledge of the individual tested”); Brief for Public Defender Service for the District of Columbia as Amicus Curiae Supporting Defendant/Appellant at 10, *Kincade II*, 379 F.3d 813 (No. 02-50380) (warning that the government’s retention of samples allows it to have at its disposal “the personal medical information of thousands of its citizens, potentially retaining access to those citizens’ biological secrets for however long, and to whatever end, state authorities see fit”); see also *Kincade II*, 379 F.3d at 842 n.3 (Gould, J., concurring) (“DNA stores and reveals massive amounts of personal, private data . . . and the advance of science promises to make stored DNA only more revealing in time.”). Judge Gould further asserted:

In our age in which databases can be “mined” in a millisecond using superfast computers, in which extensive information can, or potentially could, be gleaned from DNA . . . and in which this data can easily be stored and shared by governments and private parties worldwide, the threat of a loss of privacy is real, even if we cannot yet discern the full scope of the problem.

Id. at 842.

¹⁵² *Kincade II*, 379 F.3d at 837 (plurality opinion); see *id.* at 837 n.32 (“Those who have suffered a lawful conviction lose an interest in their identity to a degree well-recognized as sufficient to entitle the government permanently to maintain a verifiable record of their identity”); *Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995) (“Once a person is convicted of one of the felonies included as predicate offenses under [Oregon’s DNA Act], his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sampling.”).

certain diseases and psychological disorders, to his or her race, sex, and even sexual orientation and propensity to engage in criminal behavior.¹⁵³ The government contended, and the plurality agreed, that searches pursuant to the DNA Act are simply a modern version of “fingerprint[ing]”;¹⁵⁴ however, this comparison could not be further from the truth given that DNA profiles, unlike fingerprints: (1) are attained by a physical intrusion beneath the skin; (2) can be used to track an individual

¹⁵³ See Motion of Protection & Advocacy, Inc. for Leave to File Brief of Amicus Curiae Supporting Defendant/Appellant at 10–13, *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004) (No. 02-50380) (citing studies that show that DNA profiles can be used to study the connection between certain genes and the propensity for social deviance, including socially disfavored behavior and criminal behavior); Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 TEX. L. REV. 49, 95–96 (1995) (disclosing that a DNA profile has the potential to reveal “genetic defects, predisposition to diseases, and perhaps even sexual orientation”) (footnote omitted); Taylor, *supra* note 13, at 535 n.203 (noting that many claim there are “genetic markers” in one’s DNA for “aggression, substance addiction, criminal tendencies, and sexual orientation”) (quoting Letter from Peter J. Neufeld, Innocence Project, Cardozo Law School, to Honorable John M. Leventhal 7 (Feb. 27, 2003) in support of Brief for New York Civil Liberties Union and Cardozo Law School Innocence Project as Amici Curiae Supporting Defendant, *State v. Rodriguez*, 2003 WL 21276333 (N.Y. Sup. Ct. 2003) (No. 3177/2002)). The government contends that the profiles stored on CODIS contain only an identifying “fingerprint” and nothing else because only “junk DNA” samples, which have long been assumed to be “non-genic,” are analyzed. *Kincade II*, 379 F.3d at 818 (plurality opinion). Non-genic stretches of DNA are supposedly not recognized as being responsible for trait coding and “were purposely selected because they are not associated with any known physical or medical characteristics.” *Id.* (quoting H.R. REP. NO. 106-900, pt. 1, at 27 (2000)). This declaration, however, has recently been heavily disputed. See, e.g., Clive Cookson, *Regulatory Genes Found in “Junk DNA,”* FIN. TIMES (London), June 4, 2004, at 11; *Function Found for Junk DNA*, L.A. TIMES, June 5, 2004, at A14; W. Wayt Gibbs, *The Unseen Genome: Gems Among the Junk*, SCI. AM., Nov. 2003, at 48; Justin Gillis, *Genetic Code of Mouse Published; Comparison with Human Genome Indicates “Junk DNA” May Be Vital*, WASH. POST, Dec. 5, 2002, at A1. In addition, it is already conceded that “junk DNA” can reveal an individual’s race and sex. See *Kincade II*, 379 F.3d at 818 (plurality opinion).

¹⁵⁴ *Kincade II*, 379 F.3d at 818 (plurality opinion); see Denny Walsh, *Judge Finds DNA Testing Law Unconstitutional*, SCRIPPS HOWARD NEWS SERVICE, Nov. 6, 2002 (noting that a prosecutor even suggested that “[c]omparing fingerprints to DNA is like comparing a slingshot to an atom bomb”). The plurality also uses the fact that parolees and supervised releasees have been subject to “more severe intrusions of their corporeal privacy than a sterile blood draw,” including cavity searches, to support the minimal invasion of the search. *Kincade II*, 379 F.3d at 837 (plurality opinion) (commenting that these individuals leave prison desensitized to such exposure). However, this argument is unconvincing. The search at issue is not merely a “sterile blood draw,” and furthermore, the invasive nature of this search remains static regardless of one’s status or degree of sensitivity to corporeal searches.

anywhere he or she goes;¹⁵⁵ and (3) have the potential to reveal an endless amount of information about an individual.¹⁵⁶ To hold that the search at issue in *Kincade II* is the mere extraction of blood would ignore the escalating advancement of DNA-profiling technology. Thus, the Ninth Circuit should have found that searches conducted pursuant to the DNA Act are extremely invasive.

2. The Plurality Understated Probationers' Expectations of Privacy

The plurality also mistakenly equated a probationer's diminished expectation of privacy with a complete elimination of privacy expectations when it conducted its "totality of the circumstances" balancing test.¹⁵⁷ It is well-established, based on precedent, that probationers and parolees "are not entitled to the full panoply of rights and protections possessed by the general public,"¹⁵⁸ and that due to this reduced privacy right, "the government has a far more substantial interest in invading their privacy than it does in interfering with the liberty of law-abiding citizens."¹⁵⁹ Depriving individuals on parole or supervised release of "some freedoms enjoyed by law-abiding citizens,"¹⁶⁰

¹⁵⁵ See *Kincade II*, 379 F.3d at 838 n.37 (plurality opinion) (noting that it is much more difficult to avoid leaving DNA at a crime scene than it is to avoid leaving fingerprints, as the latter can be prevented simply by wearing gloves); see also *supra* note 3 (explaining different forms of DNA evidence).

¹⁵⁶ See Steinhardt Testimony, *supra* note 72 ("Fingerprints are two-dimensional representations of the physical attributes of our fingertips. They are useful only as a form of identification. DNA profiling may be used for identification purposes, but the DNA itself represents far more than a fingerprint."); Hibbert, *supra* note 2, at 790 (explaining why DNA profiling is drastically different from fingerprinting); Taylor, *supra* note 13, at 534–35 (arguing that a DNA sample reveals far more intimate information than a traditional fingerprint because unlike a fingerprint, a person's DNA profile can subject him or her to "embarrassment, humiliation, public hostility, and even financial harm") (citation omitted).

¹⁵⁷ See *Kincade II*, 379 F.3d at 833–36 (plurality opinion) (discussing a probationer's diminished expectation of privacy).

¹⁵⁸ *Id.* at 833; see also *United States v. Knights*, 534 U.S. 112, 119 (2001) (observing that probationers do not enjoy the same freedoms as law-abiding citizens).

¹⁵⁹ *Kincade II*, 379 F.3d at 834 (plurality opinion) (citing *Knights*, 534 U.S. at 119–20; *Ferguson v. Charleston*, 532 U.S. 67, 79 n.15 (2001); *Griffin v. Wisconsin*, 483 U.S. 868, 874–75 (1987)).

¹⁶⁰ *Knights*, 534 U.S. at 119 (emphasis added).

however, is very different from depriving them of *all* freedoms.¹⁶¹ In upholding searches pursuant to the DNA Act based largely on the “reduced expectations of privacy” of parolees and probationers,¹⁶² the Ninth Circuit devastated this group’s essential Fourth Amendment protections and failed to give sufficient credence to the significant privacy rights that this group retains.¹⁶³

In addition, there exists one critical flaw in the Ninth Circuit’s utilization of *Kincade*’s status as a probationer as “[o]f central importance to [its] decision.”¹⁶⁴ Probationers and parolees recover full privacy rights once they have paid their debts to society and have exited the criminal justice system, yet their DNA profiles are still plastered on CODIS, ready to incriminate them and available for all sorts of re-testing and improper use.¹⁶⁵ The plurality’s analysis of this factor seems to suggest that convicted qualifying offenders under the DNA Act have reduced expectations of privacy *forever*, an assertion that would run contrary to the fundamental principles of the retributivist theory of punishment, which holds that although a criminal is required to pay a debt to restore moral balance to

¹⁶¹ The plurality seems to eliminate completely the autonomy and privacy of parolees and conditional releasees by declaring that the probation system “render[s] all kinds of individual choices—choices that otherwise would be privately considered, privately determined, and privately undertaken—matters of legitimate government concern and investigation.” *Kincade II*, 379 F.3d at 834 (plurality opinion).

¹⁶² *Kincade II*, 379 F.3d at 844 (Reinhardt, J., dissenting) (characterizing the plurality’s view of a releasee’s privacy expectations).

¹⁶³ *But see Kincade II*, 379 F.3d at 835 (plurality opinion) (claiming that the plurality’s holding “in no way intimates that conditional releasees’ diminished expectations of privacy serve to extinguish their ability to invoke the protections of the Fourth Amendment’s guarantee against unreasonable searches and seizures,” especially since this group is afforded constitutional relief when a given search does not satisfy the “totality of the circumstances” test, just as “any other citizen”). The problem with this assertion by the plurality is that under the test and rationale it espoused, it is hard to conjure up one search that would not satisfy the elastic “totality of the circumstances” test.

¹⁶⁴ *Id.* at 827–28.

¹⁶⁵ It is interesting to consider whether each subsequent re-test or re-use of the extracted blood sample would be deemed another search under the Fourth Amendment. Courts have yet to address this issue; however, if each re-use was deemed a subsequent search, and it took place while the probationer or parolee was no longer within the criminal justice system, it seems fairly obvious that the most important factor deemed by the court to tilt the “totality of the circumstances” test in the government’s favor—the reduced expectation of privacy of probationers—would no longer be present. This would likely undermine the “reasonableness” of the test.

society, once that wrongdoer has paid this debt, he or she can return to society “free of moral guilt and stigma.”¹⁶⁶ In sum, the plurality did not afford the privacy rights that probationers and parolees retain, both during their time in the criminal justice system and upon discharge, nearly enough attention.

3. The Plurality Exaggerated the Governmental and Public Interests in DNA Act Searches

The plurality also incorrectly sided with the government when it used very strong adjectives, such as “undeniably compelling,” “overwhelming,” “enormous,” and “monumental,” to describe the government’s and public’s normal, everyday interest in the effectiveness of law enforcement.¹⁶⁷ Society’s interests in deterring crime, encouraging rehabilitation, and bringing closure to victims are the basic fundamental goals of law enforcement.¹⁶⁸ Searches pursuant to the DNA Act may expedite these goals, but they do not change them inherently or make them any more “compelling” or “monumental.”

In addition, the government disingenuously argued and the plurality readily accepted that searches pursuant to the DNA Act serve the noble interest of helping to ensure that innocent people

¹⁶⁶ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.03, at 16–18 (3d ed. 2001). The basic principle of the retributivist theory is that punishment is not a means of crime prevention, but a way to give a wrongdoer his or her “just deserts” for his or her decision to violate society’s mores. *See id.* § 2.03 at 16; 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.5(a), at 42 (2d ed. 2003). *See generally* JOHN KAPLAN & ROBERT WEISBERG, CRIMINAL LAW: CASES AND MATERIALS 27–42, 46–50 (2d ed. 1991) (providing background on this theory of punishment). The DNA Act, as currently structured, brands a kind of “scarlet letter” on those who are subject to its searches by allowing the government to retain their DNA profiles and blood samples forever—long after they have paid their debt to society. *See* NATHANIEL HAWTHORNE, THE SCARLET LETTER 53 (Brian Harding ed., Oxford Univ. Press, 2d ed. 1991) (1850) (using the term “scarlet letter” to describe a large red “A” permanently placed on the dress of heroine Hester Prynne to mark her as an adulteress). Therefore, these offenders do not enter society “free of moral guilt and stigma,” but are burdened and branded forever by the results of the authorized blood extraction under the DNA Act.

¹⁶⁷ *Kincade II*, 379 F.3d at 838–39 (plurality opinion).

¹⁶⁸ *United States v. Snider*, 957 F.2d 703, 707 (9th Cir. 1992) (“[T]he traditional purposes of punishment [are that] it can deter potential offenders, serve[] society’s legitimate interest in peaceful retribution, and . . . be a useful step toward rehabilitation.”) (citing *United States v. Ciambrone*, 602 F. Supp. 563, 568 (S.D.N.Y. 1984)).

are not wrongly convicted.¹⁶⁹ The structure of the DNA Act, however, does not address this goal. There is no provision of the DNA Act aimed at those who seek to prove their innocence through DNA testing, and, additionally, there is no allocation of funding to states or localities to provide this type of service to those who are incarcerated.¹⁷⁰ Furthermore, the DNA Act has the potential to do just the opposite: convict those who are innocent, especially given the inevitable future expansion of CODIS and the “legislative and citizen love affair with crime fighting technology.”¹⁷¹ For example, those running searches through CODIS could become so “match-happy” that once a “hit” occurs, they may believe their search is over because they view a database match as *the* most reliable, conclusive evidence of guilt and, thus, wrongly convict one of the individuals on CODIS of the crime who happened to be at the scene, but was not the actual perpetrator. This situation is even more likely if the crime occurred in a public area.

The deterrent effect of DNA profiling is equally overstated by the plurality.¹⁷² First, the defendant Kincade posed a strong argument about the “far-fetched” nature of the deterrent effect of DNA profiling by stating that criminals will not think seriously enough about the implications of the government’s possession of their DNA profile.¹⁷³ Furthermore, knowledge that law enforcement retains past offenders’ fingerprints does not seem to lead these offenders magically into lives devoid of criminal activity.¹⁷⁴ Second, the very structure of the DNA Act and its massive number of “qualifying offenses” suggest that deterring future crime is an extremely questionable effect. Using a few of the examples of “qualifying offenses” discussed *supra* in Part II, does a person who gets into a fist-fight with his arch-rival, who happens to be a mailman in the middle of his everyday delivery

¹⁶⁹ See *Kincade II*, 379 F.3d at 839 n.38 (plurality opinion) (indicating that the CODIS database can “clear[] thousands of potential suspects”).

¹⁷⁰ See *id.* at 869 (Reinhardt, J., dissenting).

¹⁷¹ Hibbert, *supra* note 2, at 768–69.

¹⁷² See *Kincade II*, 379 F.3d at 839 (plurality opinion) (explaining that DNA profiling as a deterrent helps “to steer conditional releasees toward law-abiding lives as productive members of our society”).

¹⁷³ See *id.* at 838 n.37. It would seem as though the opinion of Kincade himself would be the most convincing and dependable because, after all, he was a convicted criminal.

¹⁷⁴ See *id.*

route, truly need to be deterred from committing a future violent crime? Or, does a college student who gets carried away while engaged in an anti-war protest on the eve of an election really need to be deterred from a future life of crime? The rationale of the Ninth Circuit's plurality opinion implies that these questions would be answered in the affirmative. The government's and plurality's use of the deterrence-based argument is an insincere attempt to boost the public's interest in DNA extraction, especially when considered with the multitude of non-violent "qualifying offenses" under the DNA Act, which, however seriously they may be regarded, hardly necessitate the type of future deterrence warranted for those who commit heinous, violent crimes.

In conclusion, if the "totality of the circumstances" test were to apply to the facts of *Kincade II*, the forcible extraction of blood pursuant to the DNA Act should have been deemed unconstitutional because: (1) the invasion of privacy caused by the search is extensive; (2) probationers and parolees still maintain some level of privacy expectations; and (3) the government interest is no greater than the ordinary interest in solving crimes.

C. Catastrophic Dangers of the "Totality of the Circumstances" Test

If Supreme Court precedent ever established the constitutionality of searches pursuant to the DNA Act under the Ninth Circuit's "totality of the circumstances" approach, the public would unfortunately be left "without the legal tools to halt further abolition of [its] privacy rights."¹⁷⁵ Because the "totality of the circumstances" approach is extremely "malleable and boundless,"¹⁷⁶ citizens would be forced to rely on the judiciary to balance properly the importance of the general law enforcement interest and the searched individual's privacy rights. And, so long as courts, like the Ninth Circuit, deem ordinary law enforcement interests as "monumental,"¹⁷⁷ privacy rights would continue to travel down "a dangerous path."¹⁷⁸ Frighteningly,

¹⁷⁵ *Id.* at 870 (Reinhardt, J., dissenting).

¹⁷⁶ *Id.* at 860.

¹⁷⁷ *Id.* at 839 (plurality opinion).

¹⁷⁸ *Id.* at 863 (Reinhardt, J., dissenting).

under such a limitless legal standard as the “totality of the circumstances” approach, invasive and arbitrary suspicionless government actions would easily pass muster.¹⁷⁹ In addition, given the importance that the Ninth Circuit placed on the searched individual’s reduced expectation of privacy, there would be no reason not to extract blood forcibly from other groups of individuals categorized by case law to possess similar diminished privacy levels, such as public school students,¹⁸⁰ drivers and passengers of vehicles,¹⁸¹ and arrestees,¹⁸² to name a few.

Furthermore, if the “totality of the circumstances” test can justify suspicionless searches, what is left of our Fourth Amendment protections? The most catastrophic potential of the “totality of the circumstances” test is its ability to destroy the Fourth Amendment’s general requirement that searches be based on individualized suspicion, which would then impliedly permit *any* suspicionless law enforcement search.¹⁸³ It is disturbing to imagine the possibilities of this type of regime, especially when compared by Judge Reinhardt to the worlds depicted by George Orwell’s *1984*,¹⁸⁴ and the recent films *Minority Report*¹⁸⁵ and *Gattaca*,¹⁸⁶ all three of which illustrate

¹⁷⁹ *Id.* at 864. Clearly, such arbitrary and invasive suspicionless searches are exactly what the Founding Fathers intended to prevent. *See supra* note 74 and accompanying text.

¹⁸⁰ *See Bd. of Educ. v. Earls*, 536 U.S. 822, 830–32 (2002) (holding that public school students have a diminished expectation of privacy and that students who voluntarily participate in extracurricular activities possess an even lower degree of privacy).

¹⁸¹ *See Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) (holding that drivers and passengers have less privacy rights when traveling on public roadways); *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (holding that automobiles are highly regulated and therefore drivers and passengers have less privacy rights).

¹⁸² *See Chimel v. California*, 395 U.S. 752, 762–63 (1969) (finding arrestees’ privacy rights to be slightly reduced).

¹⁸³ *See Kincaid II*, 379 F.3d at 864 (Reinhardt, J., dissenting).

¹⁸⁴ *See id.*, 379 F.3d at 870 (stating “1984 arrives twenty years later than predicted”). Judge Reinhardt is alluding to George Orwell’s *1984*, a book that depicts a country with a government that censors all of its citizens’ thoughts and behaviors. *See* GEORGE ORWELL, *1984* (Penguin Books 1950), available at <http://www.online-literature.com/orwell/1984/>.

¹⁸⁵ *Kincaid II*, 379 F.3d at 851 (Reinhardt, J., dissenting) (discussing MINORITY REPORT (Twentieth Century Fox and Dreamworks, LLC 2002), a movie that depicts a world where individuals are arrested before they commit a particular crime due to a sort of future-viewing technology).

¹⁸⁶ *Id.* (reviewing GATTACA (Columbia TriStar Studios 1997), a movie that depicts a world in which the government analyzes its citizens’ DNA and determines

the disastrous consequences of authorized and severe governmental access and invasion of the privacy of its citizens. In short, the “totality of the circumstances” approach, if applied to suspicionless searches, would erode our democratic values and protections and leave us helplessly “look[ing] back” and asking “when did this happen—why didn’t we understand before it was too late?”¹⁸⁷

IV. THE “SPECIAL NEEDS” APPROACH—THE BETTER CHOICE

The lack of binding precedent to permit the use of the “totality of the circumstances” test in the context of suspicionless law enforcement searches, considered together with the consequential dangers of employing this approach, establish just a few reasons why another mode of analysis must govern this difficult issue. In contrast to the vague “totality of the circumstances” balancing test, the “special needs” approach is supported by precedent, adheres more closely to the requirements of the Fourth Amendment, and involves much greater constitutional scrutiny of the search at issue. In addition, the principles at the heart of the “special needs” doctrine illustrate why courts use, albeit incorrectly, the “totality of the circumstances” approach to justify searches pursuant to the DNA Act: these searches simply do not fall within the “special needs” exception to the warrant-and-probable cause requirement of the Fourth Amendment.

A. *The Fundamentals of the “Special Needs” Doctrine*

The “special needs” doctrine can be labeled as the established framework used by the Supreme Court to analyze suspicionless searches.¹⁸⁸ There are many cases that predate the first use of the phrase “special needs”¹⁸⁹ in which the Supreme Court has upheld suspicionless *non-law enforcement* search regimes.¹⁹⁰ “Special needs” cases involve searches whose primary

their life expectancies and likelihoods for disease in order to genetically discriminate against them).

¹⁸⁷ *Id.* at 869.

¹⁸⁸ *Id.* at 854.

¹⁸⁹ See *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

¹⁹⁰ See *supra* notes 81–90 and accompanying text. Although this Comment

purpose is not to detect evidence of ordinary criminal wrongdoing, but rather to address some need “beyond the normal need for law enforcement.”¹⁹¹ For example, under the “special needs” doctrine, the Supreme Court has upheld random, suspicionless, drug testing of public school students who participate in extracurricular activities because the results are not turned over to any law enforcement agency.¹⁹² The Supreme Court has also upheld suspicionless drug testing of certain U.S. Customs officials¹⁹³ because the “results may not be used [against the employee] in a criminal prosecution.”¹⁹⁴ The Supreme Court, however, has never approved a suspicionless search regime designed to pursue normal, ordinary law enforcement objectives; this is the paradigmatic category of searches that are intolerable under the “special needs” doctrine.¹⁹⁵ Stated differently, no

divided lawful suspicionless searches into three categories, the Supreme Court has suggested that the “administrative” and “border search” categories, which are mostly made up of cases that pre-date the use of the “special needs” doctrine, could be classified as “special needs” cases as well. *See, e.g.*, *City of Indianapolis v. Edmond*, 531 U.S. 32, 37–38 (2000) (explaining that the border search line of cases can be deemed “special needs” cases because they involved suspicionless search programs “whose primary purpose was [not] to detect evidence of ordinary criminal wrongdoing”); *New York v. Burger*, 482 U.S. 691, 702–03 (1987) (explaining that the administrative search line of cases present situations of valid “special needs”).

¹⁹¹ *T.L.O.*, 469 U.S. at 351.

¹⁹² *See Bd. of Educ. v. Earls*, 536 U.S. 822, 833 (2002); *cf. Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 n.2 (1995) (upholding a program that subjected student athletes to random, suspicionless drug testing because the search was undertaken for “prophylactic and distinctly *nonpunitive* purposes”) (emphasis added). In *Earls*, the search regime was justified based on the “special need” to ensure the safety and health of students in a setting where adherence to the normal warrant-and-probable cause requirement is impracticable. *See Earls*, 536 U.S. at 829–38.

¹⁹³ *See Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989); *see also Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 620–21 (1989) (upholding compulsory blood and urine testing of railroad employees involved in certain train accidents). The Court upheld the search regimes in *Von Raab* and *Skinner* based on the “special needs” of protecting the integrity of the front lines in the war on drugs and gathering reliable data on train accidents caused by substance abuse, respectively. *See Von Raab*, 489 U.S. at 686–87 (Scalia, J., dissenting); *Skinner*, 489 U.S. at 612, 618–21.

¹⁹⁴ *Von Raab*, 489 U.S. at 666.

¹⁹⁵ *See Edmond*, 531 U.S. at 41; *Acton*, 515 U.S. at 658 (noting that the results of the urinalysis “are not turned over to law enforcement authorities”); *Von Raab*, 489 U.S. at 679 (upholding a testing program because it was “not designed to serve the ordinary needs of law enforcement”); *Skinner*, 489 U.S. at 620–21 (emphasizing safety as a “special need” beyond law enforcement); *see also infra* notes 203–09 and accompanying text (suggesting that there is a distinction under the “special needs”

programmatic suspicionless search is reasonable under the Fourth Amendment unless its purpose is “divorced from the State’s general interest in law enforcement.”¹⁹⁶ This limitation on the “special needs” exception is derived from the Framers’ historic mistrust of placing excessive power in the hands of law enforcement.¹⁹⁷ Accordingly, any effort via a search to obtain information related to a possible crime that the searched individual may have committed or may commit in the future does not fall within the extremely limited “special needs” exception to the warrant-and-probable cause requirement of the Fourth Amendment.¹⁹⁸

With this framework in mind, there are two recent Supreme Court cases from the 2000–2001 term that prove devastating to the constitutionality of searches under the DNA Act: *City of Indianapolis v. Edmond*,¹⁹⁹ which struck down a vehicle checkpoint policy by holding that the usual requirement of individualized suspicion cannot be suspended in situations where the police seek to employ a checkpoint primarily to uncover ordinary evidence of crimes,²⁰⁰ and *Ferguson v. City of Charleston*,²⁰¹ which overturned non-consensual hospital urine drug testing of pregnant women with the purpose of arresting and prosecuting women who tested positive for narcotics violations.²⁰² In these two cases, the Supreme Court established exactly how to analyze a search regime under the “special needs” doctrine. Whether or not a search falls under the “special needs” exception depends on its relevant “primary purpose”²⁰³ or, synonymously, its “immediate objective.”²⁰⁴ If a given warrantless and suspicionless search’s primary purpose or

doctrine between searches conducted for the purpose of solving or punishing crime and those conducted without the involvement of some punitive consequence).

¹⁹⁶ *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001).

¹⁹⁷ See *Edmond*, 531 U.S. at 37, 42 (disapproving of suspicionless searches that are justified by a “general interest in crime control” because, if allowed, such intrusions would become “a routine part of American life”).

¹⁹⁸ *Illinois v. Lidster*, 540 U.S. 419, 423–25 (2004) (explaining this principle as it relates to an “information-seeking stop”).

¹⁹⁹ 531 U.S. 32 (2000).

²⁰⁰ *Id.* at 37–38.

²⁰¹ 532 U.S. 67 (2001).

²⁰² *Id.* at 82–84.

²⁰³ *Id.* at 81; *Edmond*, 531 U.S. at 37–38.

²⁰⁴ *Ferguson*, 532 U.S. at 83.

immediate objective is “to generate evidence *for law enforcement purposes*,”²⁰⁵ then it does not meet the “special needs” exception and is unconstitutional.²⁰⁶ Courts are given the flexibility to consider all available evidence to reach the determination of a search’s primary purpose.²⁰⁷ The Court in *Ferguson* also warned about the “critical” distinction between an alleged ultimate goal of the programmatic search regime and the immediate objective of the search, especially because nearly any “law enforcement involvement always serves some broader social purpose or objective.”²⁰⁸ This “crucial” distinction can be applied neatly to the searches authorized by the DNA Act: their immediate purpose is to solve crime, but their broader goal is to reduce recidivism through deterrence.²⁰⁹ Therefore, based on the Supreme Court precedent set by *Edmond* and *Ferguson*, when applying the “special needs” approach, the immediate purpose of the DNA Act—to solve crime—is the linchpin of the analysis.

Because searches pursuant to the DNA Act are suspicionless and warrantless, the Ninth Circuit—and other courts that

²⁰⁵ *Id.* at 83–84 (indicating that “the extensive involvement of law enforcement officials at every stage of the policy” means that the search “simply does not fit within the closely guarded category of ‘special needs’”); *see also id.* at 81, 83 n.20. The Court in *Edmond* stated that it refused to permit a “general interest in crime control” as justification for a regime of suspicionless stops. *Edmond*, 531 U.S. at 42.

²⁰⁶ *See Ferguson*, 532 U.S. at 84–86; *see also Illinois v. Lidster*, 540 U.S. 419, 423–27 (2004). The Court in *Ferguson* was compelled to emphasize this rule by italicizing the words “law enforcement purposes” to ensure that its reasoning was not “misunderstood” because “[i]n none of [its] previous special needs cases ha[d] [the Court] upheld the collection of evidence for criminal law enforcement purposes.” *Ferguson*, 532 U.S. at 83 & n.20 (citation omitted).

²⁰⁷ *See Ferguson*, 532 U.S. at 81. The Court in *Edmond* concluded that individualized suspicion is required for suspicionless searches “whose primary purpose was to detect evidence of ordinary criminal wrongdoing.” *Edmond*, 531 U.S. at 41. The Court further added:

[I]n determining whether individualized suspicion is required, we must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue. We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.

Id. at 42–43.

²⁰⁸ *Ferguson*, 532 U.S. at 82–84.

²⁰⁹ It can also be argued that both solving crime and reducing recidivism is related to law enforcement, regardless of the distinction between ultimate and immediate purpose. *See Kincade I*, 345 F.3d at 1112 (arguing that the “special needs” exception is inapplicable to DNA Act searches because “[b]oth the ‘immediate purpose’ and the ‘ultimate objective’ . . . are to further law enforcement ends”).

embrace the “totality of the circumstances” test²¹⁰—should have analyzed this issue under the lens of the “special needs” doctrine. In correctly doing so, the Ninth Circuit and its counterparts would have found that searches under the DNA Act are unconstitutional because they are conducted for the primary and immediate purpose of solving crimes.²¹¹ Furthermore, this Comment argues that courts facing this reality, but simultaneously desiring to uphold the DNA Act searches, were forced to find a clever way to avoid the “special needs” doctrine and employ the “totality of the circumstances” approach. It is only under the latter doctrine that these searches had a remote chance of surviving constitutional scrutiny. But, as illustrated in Part III.B of this Comment, even the “totality of the circumstances” test should likewise disclose that searches under the DNA Act are unconstitutional.

B. The Kincade II Plurality Wrongly Defined the Purpose of Searches Under the DNA Act

Although the Ninth Circuit plurality in *Kincade II* did not subscribe to the “special needs” approach, it nonetheless mistakenly defined the purpose of searches under the DNA Act.²¹² The Ninth Circuit, while examining the public interest in DNA Act searches during its “totality of the circumstances” balancing, indirectly asserted its view that the purpose of DNA Act searches is to foster “the rehabilitative goal of our systems of conditional release”²¹³ of “reducing recidivism”²¹⁴ through the “deterrent effect of such profiling.”²¹⁵ Similarly, Judge Gould, while advocating the use of the “special needs” exception to validate this search regime in his concurring opinion, believed that the DNA Act searches serve the “special needs of a supervised release system” by “monitoring convicts on supervised release and deterring their possible recidivism.”²¹⁶ It is obvious

²¹⁰ See *supra* note 118 (listing these courts).

²¹¹ See *infra* Part IV.B.

²¹² See *Kincade II*, 379 F.3d at 838–39 (plurality opinion).

²¹³ *Id.* at 839.

²¹⁴ *Id.*

²¹⁵ *Id.* at 838. The Ninth Circuit continued to say that these interests are “intimately related to the core purposes of conditional release: rehabilitating convicted offenders and sheltering society from future victimization.” *Id.* at 839.

²¹⁶ *Id.* at 840 (Gould, J., concurring).

through examination of the legislative and executive branches' interpretation of the DNA Act, however, that its authorized searches serve the primary purpose of solving past and future crimes—the quintessential law enforcement purpose. In fact, the Ninth Circuit itself tellingly admits in *Kincade II* that searches under the DNA Act “contribut[e] to the solution of past crimes”²¹⁷ and “lay[] a foundation for solving those crimes that are not successfully deterred by the collection of DNA profiles,”²¹⁸ which can easily be simplified to mean that the searches help solve future crimes as well. This contention is well supported by the DNA Act's legislative history, as well as the executive branch's interpretation of the purpose of searches under the DNA Act. These two consistent interpretations will each be considered briefly to reveal the Ninth Circuit's clear error in *Kincade II* by impliedly stating, and expressly maintaining, as in Judge Gould's concurrence, that the primary purpose of searches pursuant to the DNA Act is to foster the rehabilitative goal of the system of supervised release by deterring recidivism.²¹⁹

The legislative history of the DNA Act is replete with evidence that Congress' primary concern was to assist in the solving of crimes.²²⁰ For example, legislators in various congressional hearings have stated that the purpose of adding profiles into CODIS is to “solve crimes and prevent further crimes”²²¹ and “to match DNA samples from crime scenes where there are no suspects with the DNA of convicted offenders.”²²² In addition, one senator praised the DNA Act as “a huge asset for . . . local law enforcers in their day-to-day fight against crime,”²²³ and another applauded this “[m]odern crime-fighting

²¹⁷ *Id.* at 839 (plurality opinion).

²¹⁸ *Id.*

²¹⁹ See *supra* notes 213–15 and accompanying text (summarizing the Ninth Circuit's view).

²²⁰ See DNA Act House Report, *supra* note 3, at 8–11, 23–27, 32–36 (referring to the use of DNA profiles derived from DNA Act searches to solve and prosecute crimes). See generally Carnahan, *supra* note 91, at 37–38 (arguing that the “legislative history of the [DNA] Act overwhelmingly support[s] crime-solving as its primary purpose” and thus, the DNA Act is unconstitutional under the “special needs” doctrine).

²²¹ 146 CONG. REC. S11647 (daily ed. Dec. 6, 2000) (statement of Sen. Leahy).

²²² 146 CONG. REC. H8575–76 (daily ed. Oct. 2, 2000) (statement of Rep. Canady).

²²³ 146 CONG. REC. S11646 (daily ed. Dec. 6, 2000) (statement of Sen. DeWine).

technology” for “mak[ing] law enforcement much more effective.”²²⁴ Furthermore, a House of Representatives committee report on the DNA Act even expressly stated that “one of the underlying concepts behind CODIS is to create a database of convicted offender profiles and use it to solve crimes for which there are no suspects.”²²⁵

The executive branch’s interpretation of searches under the DNA Act further supports the legislative history showing that the DNA Act was implemented to solve crimes. The Department of Justice has stated that CODIS is a “powerful crimefighting tool for law enforcement,”²²⁶ and former Attorney General John Ashcroft has stated that “DNA technology can operate as a kind of truth machine, ensuring justice by identifying the guilty and clearing the innocent.”²²⁷ In addition, an even more persuasive indicator of the executive branch’s interpretation of the DNA Act and the CODIS database is how it chooses to measure the ultimate success of the program: “by the [number of] crimes it helps to solve.”²²⁸

Furthermore, during legislative hearings, the Department of Justice had to address the issue of whether or not the DNA information collected from offenders would be used for insurance

²²⁴ 146 CONG. REC. S11648 (daily ed. Dec. 6, 2000)(statement of Sen. Kohl).

²²⁵ See DNA Act House Report, *supra* note 3, at 27; see also 146 CONG. REC. H12032 (daily ed. Dec. 7, 2000) (statement of Rep. Gilman) (arguing that the CODIS database is essential “to assist . . . in fighting violent crime” and that “DNA evidence is becoming a more important tool to our Nation’s law enforcement in solving crimes”).

²²⁶ NATIONAL INSTITUTE OF JUSTICE, U.S. DEP’T OF JUSTICE, *supra* note 4, at 2; see also *id.* at 4 (adding that DNA databases allow unsolved cases “to remain active” by giving them “the chance to be solved through the DNA database in the future”); *id.* at 9 (commenting that CODIS has “greatly enhanced law enforcement’s ability to solve cold cases with DNA”); FBI’s CODIS Program, *supra* note 91 (stating that CODIS “blends forensic science and computer technology into an effective tool for solving violent crimes”).

²²⁷ *Kincade II*, 379 F.3d at 856 n.15 (Reinhardt, J., dissenting) (quoting *Justice Dep’t. Acts to Clear DNA Backlog*, MIAMI HERALD, Aug. 2, 2001, at 19A); see also *U.S. Attorney General Announces \$95 Million in Grants to Improve DNA Crime Analysis*, PATIENT CARE L. WKLY., Oct. 17, 2004, at 8 (“DNA analysis helps identify the guilty, it helps vindicate the innocent, and at times, it can bring a sense of peace and justice to victims and their families even after a case has seemed to [have] gone cold and hope was all that they had left.” (alteration in original) (quoting former Attorney General John Ashcroft)).

²²⁸ FBI, U.S. DEP’T OF JUSTICE, COMBINED DNA INDEX SYSTEM PROGRAM: CODIS—MEASURING SUCCESS, available at <http://fbi.gov/hq/lab/codis/success.htm> (last visited Sept. 16, 2005).

or medical purposes and responded by saying that “existing legal rules for the DNA identification system generally ensure that DNA samples and indexed information will be used solely *for law enforcement identification purposes*.”²²⁹ In fact, according to Judge Reinhardt’s dissent, at the outset of litigation the government claimed that the purpose of the DNA Act is to “help law enforcement solve unresolved and future cases,” but then changed its tune in a supplemental en banc brief by “recast[ing] the purpose of the DNA Act purely in terms of meeting the supervisory needs of the parole and probation systems.”²³⁰ There are also other federal cases addressing the constitutionality of DNA Act searches in which the government argued that the primary purpose of the DNA Act is to solve past and future crimes.²³¹

To conclude, the government and the Ninth Circuit confuse an ultimate, broad goal of the DNA Act, which is to reduce recidivism through deterrence, with the immediate and primary purpose of searches under the DNA Act, which is to construct a national database aimed at solving past and future crimes.²³² Moreover, the legislative history and executive branch’s interpretation of the DNA Act make the government’s contention and the Ninth Circuit’s conclusion that the DNA Act’s primary purpose is to reduce recidivism through deterrence appear far less credible and simply disingenuous. Finally, given that there

²²⁹ DNA Act House Report, *supra* note 3, at 25 (emphasis added) (quoted in *Kincade I*, 345 F.3d at 1111).

²³⁰ *Kincade II*, 379 F.3d at 856 & n.14 (Reinhardt, J., dissenting) (citation omitted). In *Kincade I*, the Ninth Circuit three-judge panel stated:

The government argues that two purposes of searches pursuant to the [DNA] Act are to “help law enforcement solve unresolved and future cases,” and to increase accuracy in the criminal justice system. The government’s own argument establishes that prototypical law enforcement purposes underlie the DNA searches in question. Under the government’s own theory, the searches are conducted in order to collect DNA evidence samples for CODIS, so that those samples may be used in criminal investigations, to help solve crimes and prosecute the culprits, and to enable law enforcement agencies to be more accurate and effective in achieving their law enforcement objectives.

Kincade I, 345 F.3d at 1110.

²³¹ See, e.g., *United States v. Miles*, 228 F. Supp. 2d 1130, 1138–39 (E.D. Cal. 2002); *United States v. Reynard*, 220 F. Supp. 2d 1142, 1168 (S.D. Cal. 2002).

²³² See Carnahan, *supra* note 91, at 36 (concluding that the primary purpose of CODIS is simply to solve crime).

is “extensive involvement of law enforcement officials at every stage” of the DNA Act’s search regime and that the immediate objective of DNA Act searches is to generate evidence for law enforcement purposes, these searches simply cannot fit “within the closely guarded category of ‘special needs.’”²³³

C. Distinguishing *Griffin*

The Ninth Circuit should have applied the “special needs” analysis to the facts of *Kincade II* without relying in error on the Supreme Court case *Griffin v. Wisconsin*,²³⁴ which upheld a warrantless search of a probationer’s home based on the “‘special needs’ of the state, beyond [that of] normal law enforcement,”²³⁵ to operate its probation system and “to assure that the restrictions [of probation] are in fact observed.”²³⁶ In *Griffin*, a detective contacted the supervisor of appellant Griffin’s probation officer with a tip that Griffin might have had weapons in his apartment.²³⁷ Acting on this information, the supervisor, together with another probation officer and three undercover policemen, conducted a warrantless search of the appellant’s apartment, which uncovered a weapon and led to his arrest.²³⁸ The appellant moved to suppress the evidence due to the warrantless nature of this search, which the Supreme Court rejected after upholding its constitutionality under the “special needs” doctrine.²³⁹ Notwithstanding the fact that *Griffin* was decided before the Supreme Court further clarified the “special needs” doctrine in *Edmond* and *Ferguson*, there are three reasons that *Griffin* simply cannot be used to validate the constitutionality of searches pursuant to the DNA Act.

First, the primary purposes of the searches in *Griffin* and *Kincade II* are entirely different. Unlike the search regime in *Griffin*, whose primary purpose was to assist in the supervision of releasees, the primary purpose of searches under the DNA Act is to collect information to solve and prosecute crimes.²⁴⁰ The

²³³ *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001).

²³⁴ 483 U.S. 868 (1987).

²³⁵ *Id.* at 873–74.

²³⁶ *Id.* at 875.

²³⁷ *See id.* at 871.

²³⁸ *See id.* at 870–72.

²³⁹ *See supra* notes 234–36 and accompanying text.

²⁴⁰ *See supra* Part IV.B.

Court in *Griffin* stated that “[i]n some cases—especially those involving drugs or illegal weapons—the probation agency must be able to act based upon a lesser degree of certainty than the Fourth Amendment would otherwise require in order to intervene before a probationer does damage to himself or society.”²⁴¹ However, based on the facts of *Kincade II*, and most likely any other forcible DNA extraction under the DNA Act, no such emergency or imminent need exists to justify the type of relaxation of the usual warrant-and-probable cause requirement that took place in *Griffin*. Furthermore, unlike the case in *Griffin*, searches under the DNA Act, as in *Kincade II*, are not conducted to investigate a *specific* criminal activity.²⁴²

Second, there is a significant difference in the time-frame of the searches conducted in *Griffin* and in *Kincade II*, which further illustrates that the primary purposes of the search regimes in these two cases are not synonymous. In *Griffin*, the search was temporary and conducted within the finite period of appellant’s probation, while the search in *Kincade II* was permanent and could be performed continuously for an infinite period after Kincade’s exit from the criminal justice system.²⁴³

Lastly, the relevance of an individual’s status within the probation system would not have been as crucial to the analysis of the search regime under the “special needs” approach in *Kincade II* as it was in *Griffin*. The warrantless searches were upheld in *Griffin* largely due to the “special needs” of the probation system to supervise its releasees by ensuring that all of the restrictions of probation are properly obeyed.²⁴⁴ The DNA

²⁴¹ *Griffin*, 483 U.S. at 879.

²⁴² *See id.* at 871 (noting that the Court was confronting a search regime that required reasonable suspicion before any search could be conducted). Thus, searches in *Griffin* were designed to check on individual probationers who were *suspected* of violating the terms of their conditional release. No such suspicion exists in the search regime authorized by the DNA Act.

²⁴³ This is referring to the fact that the extraction of blood for DNA analysis can be re-tested and re-run through the CODIS database forever. *See Kincade II*, 379 F.3d at 870 (Reinhardt, J., dissenting) (contending that once Kincade’s period of supervisory release ends, “the state will cease to have a supervisory interest over [him.] [y]et . . . by the terms of the DNA Act, [he] will effectively be compelled to provide evidence with respect to any and all crimes of which he may be accused for the rest of his life” even though the government may have no reason to suspect him).

²⁴⁴ *See Griffin*, 483 U.S. at 873–75 (noting that a probationer enjoys only “conditional liberty properly dependent on observance of special [probation] restrictions’ . . . meant to assure that the probation serves as a period of genuine

Act cannot be upheld on this basis, however, because it applies to an endless number of individuals who are convicted of its “qualifying offenses,” irrespective of whether they are incarcerated or on parole, probation, or supervised release.²⁴⁵ Thus, there is a “highly attenuated”²⁴⁶ link between an individual’s status as a supervised releasee and the activation of the DNA Act. The search regime authorized under the DNA Act does not solely address the supervision of probationers like the warrantless search of the probationer’s home in *Griffin*. Because *Griffin* is inapplicable to the facts of *Kincade II*, *Ferguson* and *Edmond* remain the most recent and appropriate precedent to guide the “special needs” analysis of searches pursuant to the DNA Act. As previously established by this Comment, these two cases prove that the search regime in *Kincade II* cannot be justified under the “special needs” doctrine.²⁴⁷

V. NECESSARY MEASURES

This Comment seeks to establish that the forcible extraction of blood pursuant to the DNA Act, as currently written and implemented, is unconstitutional under either the “totality of the circumstances” test or the “special needs” approach. However, given the admitted success of the DNA Act in solving some violent and heinous crimes²⁴⁸—those that the DNA Act originally intended to assist²⁴⁹—courts seem to be unwilling to strike down

rehabilitation and that the community is not harmed by the probationer’s being at large” (alteration in original) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

²⁴⁵ In fact, based on the government’s statistics, the majority of blood extractions under the DNA Act take place in prison. See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2002 65 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs02.pdf> (noting that in 2002, seventy-five percent of convicted federal offenders were sentenced to prison, while only seventeen percent were sentenced to probation).

²⁴⁶ *Kincade II*, 379 F.3d at 859 (Reinhardt, J., dissenting).

²⁴⁷ See *supra* Part IV.A–B.

²⁴⁸ See FBI, U.S. DEP’T OF JUSTICE, COMBINED DNA INDEX SYSTEM PROGRAM: CODIS—MEASURING SUCCESS, available at <http://www.fbi.gov/hq/lab/codis/success.htm> (last visited Sept. 16, 2005) (indicating that as of August 2004, CODIS has produced over 16,600 hits assisting in more than 19,600 investigations); see also FBI, U.S. DEP’T OF JUSTICE, COMBINED DNA INDEX SYSTEM PROGRAM: CODIS 5 (2000), available at <http://www.fbi.gov/hq/lab/codis/brochure.pdf> (providing a description of three specific success stories).

²⁴⁹ See *supra* note 103 and accompanying text.

searches made pursuant to it as unconstitutional, and have instead resorted to discovering creative, yet unconvincing, ways to make them consistent with established Supreme Court precedent. The many courts that continue to uphold searches under the DNA Act allow the legislature to ignore the many practical and constitutional problems with this law, and worse, permit the citizens of this country to slide further down the slippery slope reducing their Fourth Amendment protections. Despite these unfortunate effects, there are actions that the Supreme Court could take and improvements to the DNA Act that the legislature could make, which may tame the opponents of the DNA Act and enable the searches to comport better with the requirements of the Fourth Amendment.

First, the Supreme Court must put an end to the use of the “totality of the circumstances” test to analyze the constitutionality of searches under the DNA Act.²⁵⁰ So long as the “totality of the circumstances” test is available to courts due to no express Supreme Court holding to the contrary, circuits will continue to align and uphold the constitutionality of the DNA Act, especially during a time in our history when national security is of paramount concern. Given the severe implications of the “totality of the circumstances” test, the Supreme Court must put its foot down quickly before more individuals are subject to DNA profiling and more intrusive suspicionless government searches are permitted under this limitless test.

To accomplish this goal, the Supreme Court must either strike down these searches as unconstitutional or carve out a new Fourth Amendment exception to the warrant-and-probable cause requirement.²⁵¹ The most likely option would be the latter, given the excessive enthusiasm about DNA profiling technology and, concededly, its success in assisting law enforcement in catching violent criminals. However, if the Supreme Court did create a new exception to the requirements of the Fourth Amendment, which has not been done in decades,²⁵² it must place significant limitations on the extent of its application in order to prevent CODIS from expanding even further, and equally important, to

²⁵⁰ Unfortunately, the Supreme Court passed on this opportunity by denying Kincaid’s petition for a writ of certiorari. *See supra* note 45.

²⁵¹ *See* Carnahan, *supra* note 91, at 35 (considering the latter option).

²⁵² *See id.*

protect our rights against invasive government searches. The legislature should foresee the Supreme Court's imminent predicament and make some essential revisions to the DNA Act to allow for an easier judicial resolution of this issue.

The legislature should first reconstruct the DNA Act to match its legislative history. This means that the "qualifying offenses" under the DNA Act must be redefined to include only the most violent and egregious crimes that have verifiable high rates of recidivism.²⁵³ In addition, the legislature should resist the urge to allow the DNA Act to apply to all arrestees. This measure would not only be contrary to our constitutional guarantee that we are "innocent until proven guilty," but would also be inconsistent with the contention that the DNA Act reduces recidivism through deterrence.²⁵⁴ When an individual is merely arrested for *any* crime, it is completely uncertain whether he or she needs to be deterred from actually committing crimes in the future. Thus, fingerprinting should suffice as our country's standard for identifying arrestees, especially given that blood extraction for DNA profiling is a far greater intrusion on an individual's privacy expectations.²⁵⁵

If the DNA Act continues to expand to apply to more and more offenses, the legislature, together with the Department of Justice, should make CODIS more of a "revolving" database. In other words, the DNA Act should only permit use of qualifying offenders' DNA profiles during their time within the criminal justice system. Once an offender pays his or her debt to society and exits the system, his or her DNA profile *and* blood sample should be promptly and efficiently expunged. This would address

²⁵³ See Press Release, ACLU, DNA Databases Hold More Dangers Than Meet the Eye, ACLU Says (Mar. 23, 2000), *available at* <http://www.aclu.org/privacy/privacy.cfm?ID=7886&c=129> (stating that the ACLU urged the House Judiciary Committee's Subcommittee on Crime "to ensure that any proposal it adopts include[s] measures to guarantee that only persons convicted of serious violent felonies have their DNA entered into CODIS" when it considered the DNA Act). See *generally* Hibbert, *supra* note 2, at 816–17 (suggesting that public policy demands the government to limit DNA databanks only to those who have proven to be a "serious threat to public safety and, as a class, have a high rate of recidivism").

²⁵⁴ See Porteus, *supra* note 99 ("It's very troubling when people who are arrested would have to give up their DNA. Those people are simply innocent until proven guilty." (quoting Larry Kobilinsky, forensic science expert at John Jay College)); see also *supra* notes 213–15 and accompanying text (describing this argument in more detail).

²⁵⁵ See *supra* notes 154–56 and accompanying text.

many of the factors cutting against the constitutionality of the search under the “totality of the circumstances” test. By not allowing the blood sample and DNA profile to be retained forever, the potential for its misuse is reduced and the search itself becomes less intrusive. In addition, this measure seems more consistent with the expectations of privacy experienced by those in prison, or on parole, probation, and supervised release because once these individuals are afforded the complete restoration of their privacy rights, their extracted blood sample, along with the results of the search, can no longer be used against them or by the government for an impermissible purpose. Furthermore, under the “special needs” analysis, this measure would make the government’s contention that the DNA Act addresses the special needs of the probation system through deterrence seem much more sincere because the DNA Act would no longer apply to those who have left the criminal justice system. Concededly, ensuring the proper and speedy expulsion of DNA samples may cost the government more time, money, and resources. If this measure is combined with the last suggestion to reduce the number of “qualifying offenses,” however, testing for fewer crimes will offset this loss. Moreover, if the government wants to invest billions of dollars to create a system that increases the efficiency of law enforcement, surely it should be willing to make some sacrifices to ensure that the Constitution—the very foundation of our country—is respected.

Lastly, the legislature must revise the DNA Act to address more adequately the enormous amount of consequential privacy concerns. The best way to accomplish this is by increasing the criminal penalty for unauthorized use under the DNA Act. Currently, the DNA Act’s only penalty for unauthorized use of a DNA profile or blood sample is a fine “*not more than* \$100,000.”²⁵⁶ Shockingly, the DNA Act sets a ceiling for the amount of the fine that can be imposed for this offense, which means that the penalty can be anything less than this amount, or even just a mere slap on the wrist. At the very least, a \$100,000 fine should be the *minimum* penalty for this type of serious, irreparable crime. Instead, this minute penalty sends a clear message to the public that the government does not take our genetic privacy

²⁵⁶ 42 U.S.C. § 14133(c) (2000) (emphasis added).

rights very seriously. A fine of *not more than* \$100,000 simply does not seem to be enough to deter someone from sharing the DNA profiles or blood samples of others with employers, insurance companies, scientists, or any other group waiting to put them to devastating and discriminating use.

CONCLUSION

It is extremely tempting to wholeheartedly support the DNA Act and decisions like *Kincade II* because of the track record of success that the CODIS database has experienced.²⁵⁷ A law enforcement search regime's success, however, reveals absolutely nothing about its constitutionality. Moreover, it is undeniable that if CODIS contained DNA profiles of the entire population and if "we [were] willing to sacrifice all of our interests in privacy and personal liberty,"²⁵⁸ crimes would be resolved more easily, more efficiently, and more effectively. But, as Judge Reinhardt eloquently stated in his *Kincade II* dissent, "[t]hose who won our independence chose, however, not to follow that course but instead to provide us with the safeguards contained in the Fourth Amendment."²⁵⁹ We must cherish these Fourth Amendment safeguards and try to look past the attempts of decisions such as *Kincade II* to justify DNA profiling to see the bigger, more disturbing picture of a world without these Fourth Amendment protections.

The DNA Act gives society a false feeling of security because its dangers and repercussions have been overlooked or consciously avoided. The government and legislature have fooled us all by portraying the DNA Act as simply being a revolutionary tool to fight the war against crime. They neglect to recognize the DNA Act's lack of adherence to our constitutional protections and established Fourth Amendment precedent, its vastly expanded "laundry list" of federal offenses that qualify an individual for DNA extraction, and its potential to breed misuse of the extracted DNA for purposes like genetic discrimination at the

²⁵⁷ See *supra* note 248; see also *Kincade II*, 379 F.3d at 870 (Reinhardt, J., dissenting) ("We all desire more effective law enforcement, less recidivism, and 'closure' for victims of heinous crimes. But that desire does not justify eviscerating the structural edifices of the Fourth Amendment.").

²⁵⁸ *Kincade II*, 379 F.3d at 869 (Reinhardt, J., dissenting).

²⁵⁹ *Id.*

hands of employers or insurance companies. Most insulting of all, they neglect to inform us that our genes—the genes of law abiding citizens—are the future of CODIS, a system which they admit is only as effective as the number of profiles it contains. For a country that prides itself on liberty—and puts the lives of its citizens on the line to bring liberty to others—this would be an inconsistent and bold step that would place our closely guarded privacy rights in a complete state of disarray. However, this Comment argues that the government does not need to extend CODIS to the entire population to accomplish this result; our privacy rights are *already* in a complete state of disarray because, as *Kincade II* illustrates, “[t]he erosion of conditional releasees’ liberty makes us all less free” and “opt[ing] for comprehensive DNA profiling of the least protected among us . . . has jeopardized us all.”²⁶⁰ This could not have been the intention of our country’s Founding Fathers when they drafted the Fourth Amendment—even if they could have predicted the astonishing advancement and incredible value of the double-edged sword that is technology.

²⁶⁰ *Id.* at 871; *see also* Richard Willing, *White House Seeks To Expand DNA Database*, USA TODAY, Apr. 16, 2003 (“[N]ot too long ago they were saying they’d only take DNA profiles from rapists and murderers, and now they want juveniles. . . . We’re not just on a slippery slope, we’re halfway down it.” (quoting Barry Steinhardt, privacy specialist for the ACLU)).