

United States Court of Appeals, Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Thomas Cameron KINCADE, Defendant-Appellant.
No. 02-50380.

Argued and Submitted March 23, 2004.
Filed Aug. 18, 2004.

Background: Defendant appealed after the United States District Court for the Central District of California, [Dickran Tevrizian](#), J., sentenced defendant to four months' imprisonment, and two years' supervised release, for violating terms of his supervised release by refusing to submit blood sample for deoxyribonucleic acid (DNA) testing, pursuant to DNA Analysis Backlog Elimination Act. The Court of Appeals reversed, [345 F.3d 1095](#).

Holding: On rehearing en banc, the Court of Appeals, [O'Scannlain](#), Circuit Judge, held that requirement under Act that certain federal offenders who were on parole, probation, or supervised release submit to compulsory deoxyribonucleic acid (DNA) profiling, in absence of individualized suspicion that they had committed additional crimes, was reasonable and did not violate Fourth Amendment.

Affirmed.

[Gould](#), Circuit Judge, concurred and filed opinion.

[Reinhardt](#), Circuit Judge, dissented and filed opinion in which [Pregerson](#), [Kozinski](#), and [Wardlaw](#), Circuit Judges, joined.

[Kozinski](#), Circuit Judge, dissented and filed opinion.

[Hawkins](#), Circuit Judge, dissented and filed opinion.

GOULD, Circuit Judge, concurring:

I agree with the majority that Thomas Kincade's conviction should be affirmed. I write separately because I believe that we should affirm under a "special needs" theory rather than the totality of the circumstances theory. I further pose a caveat on the limits of what we can properly decide today.

I

The majority affirms based on extension of [United States v. Knights](#), 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001), and does not reach the issue whether the Supreme Court's "special needs" doctrine sustains the search. I would affirm based on the "special needs" of monitoring convicts on supervised release and deterring their possible recidivism. Each method of analysis has support in Supreme Court doctrine and support from our sister circuits. But in my view it would be better to follow the special needs approach because with it extant precedents control. [Griffin v. Wisconsin](#), 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987), held that state parolees may be subject to a warrantless search based on a special needs theory. [Ferguson v. City of Charleston](#), 532 U.S. 67, 81 n. 15, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001) harmonized [Griffin](#) in the context of a suspicionless search. Thus the Supreme Court has shown that the special needs doctrine permits the search in this case.^{FN1}

FN1. In [Knights](#), the Supreme Court left open whether a suspicionless search of a parolee was reasonable under the Fourth Amendment's totality of the circumstances analysis. [Knights](#), 534 U.S. at 120 n. 6, 122 S.Ct. 587.

The deterrent felt by a person on supervised release who must participate in the DNA program and the CODIS database serves the special needs of a supervised release system. Stated succinctly, the 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. Stated another way, the Supreme Court's reluctance to apply special needs analysis to endorse warrantless searches aimed at general law enforcement cautions against applying this doctrine to general law enforcement aimed at past crime. It does not mean that special needs analysis cannot be applied to DNA collection from those on supervised release with the purposes to deter future crime, to give a tool to avoid consecutive or repetitive crime on supervised release, and, when such crime occurs, to let law enforcement act to return the releasee to prison custody as soon as practicable. These goals lie at the heart of supervised release, which properly aims at reintegration of the releasee through deterrence. This special need of supervised release looks forward to crime in the

future while the felon is on supervised release; any use of the CODIS database to solve past crimes is incidental to the special and forward-looking penological need that justifies the program.^{FN2} That such deterrence *841 is a special need permitting suspicionless searches of parolees has been cogently advanced by Judge Trott in his concurring opinion in [United States v. Crawford](#), 372 F.3d 1048, 1066-1077 (9th Cir.2004) (Trott, J., concurring). As applied in the context of DNA extraction, this theory of special need has been adopted by three of our sister circuits. See [Green v. Berge](#), 354 F.3d 675, 679 (7th Cir.2004); [United States v. Kimler](#), 335 F.3d 1132, 1146 (10th Cir.2003); [Roe v. Marcotte](#), 193 F.3d 72, 79-82 (2d Cir.1999); see also Opinion of Judge O'Scannlain at 830-831 (listing other courts that have reached this conclusion).

^{FN2}. Judge Reinhardt in dissent at footnote 17 argues that even if deterrence of supervised releases is the ultimate goal, the immediate objective of the search is to get evidence of past crime. I do not agree. Increasing the likelihood of solving future crime, a key purpose of the DNA Act, serves a deterrence goal at the heart of supervised release. The DNA Act was made applicable to those on supervised release, as opposed to the public at large, demonstrating a Congressional intent to ensure successful rehabilitation through deterrence. I do not grasp at a "special needs" straw to justify the search of Kincade; more precisely, I recognize the special need of supervised release that Congress has identified and that the Supreme Court has approved.

Judge Reinhardt, with an advocate's flair, reads too much into the point I made, which he quotes, in my article co-authored with Dr. Simon Stern, entitled [Catastrophic Threats and the Fourth Amendment](#), 77 S. Cal. L.Rev. 777, 814 & n. 160 (2004). That article takes a flexible approach to special needs doctrine that I think wholly consistent with my analysis here. While we there noted that the specific deterrence that indirectly arises from the prosecution of an ordinary criminal is not the main aim of a prosecution, our point there has no bearing on determining the controlling purposes of the DNA Act. The DNA Act applies only after a person has been prosecuted. Thus, unlike a prosecution, where the main goal is to vindicate the state's interest in law enforcement,

DNA profiling a person on supervised release in my view is best seen as serving a different main goal. That goal, as I see it, is rehabilitation through deterrence.

Judge Reinhardt in his dissent also misses the mark in his all-or-nothing approach to the DNA Act in footnote 19. Because circumstances that arise when a releasee has completed supervised release and is no longer in the criminal justice system are not now before us, we cannot definitively discuss the legality of the DNA Act beyond its immediate application to Kincade in the case now presented. Indeed, outside of the First Amendment, we do not lightly entertain facial challenges to Congressional acts. See [Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co.](#), 226 U.S. 217, 33 S.Ct. 40, 57 L.Ed. 193 (1912) (generally precluding consideration of a statute's constitutionality as applied to the facts of other cases); Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 180-84 (5th ed.2003) (noting that the Supreme Court generally refuses to adjudicate facial challenges). The dissent errs by focusing overmuch on facts not here presented.

Finding these authorities most persuasive, I reach the same conclusion as the majority, and I concur in the judgment.

II

I also write to emphasize what we do not decide today. Thomas Kincade is now on supervised release, and was in that status when his DNA was demanded. While he is on supervised release, there is a special need to have his DNA extracted and stored in the CODIS database. This serves the penological purpose of deterring him from committing a new crime while on supervised release, and of course it will also aid in catching him if he does so notwithstanding. What we do not have before us is 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. In that case, the special need that I identify to maintain the DNA is gone, but the record of the felon's DNA in the CODIS database is not. Once those previously on supervised release have wholly cleared their debt to society, the question may be raised, "Should the CODIS entry be erased?"

Although it might seem counter-intuitive to law enforcement that a record once gleaned might be lost, there is a substantial *842 privacy interest at stake.^{FN3} In a proper case where this issue is presented, we would presumably need to weigh society's benefit from retention of the DNA records of a felon against that person's right, in a classical sense, to privacy. See generally Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L.Rev. 193 (1890). In our age in which databases can be "mined" in a millisecond using super-fast computers, in which extensive information can, or potentially could, be gleaned from DNA (even the "junk" DNA currently used), 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. A related concern was voiced more than two decades ago, long before the advent of DNA profiling. See generally Arthur R. Miller, *The Assault on Privacy* 24-54 (1971). With monumental increases in technologies, Professor Miller's alarm about technology's assault on privacy must be seriously pondered. A nice question, if and when properly presented, would be 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.^{FN4} Once the special need for the DNA sample has gone, does the government have sufficient reason to retain the sample in order to overcome the felon's privacy interest? Kincade's case does not call upon us to answer this question. I express no view on the question of the future retention of a felon's DNA after supervised release is terminated, nor do I understand the majority opinion to express any view on this question.

^{FN3}. Fingerprints, of course, are routinely maintained in law enforcement files once taken, and perhaps this is an arguable analogy for DNA databases. But, unlike fingerprints, DNA stores and reveals massive amounts of personal, private data about that individual, and the advance of science promises to make stored DNA only more revealing in time. Like DNA, a fingerprint identifies a person, but unlike DNA, a fingerprint says nothing about the person's health, propensity for particular disease, race and gender characteristics, and perhaps even propensity for certain conduct.

^{FN4}. A similar issue might be raised by former soldiers who had a DNA sample taken for purposes of "identification of human remains," and who might be concerned to know that these DNA samples, though taken for use in identifying remains of fallen soldiers, now are routinely used in law enforcement investigations. See Patricia A. Ham, *An Army of Suspects: The History and Constitutionality of the U.S. Military's DNA Repository and Its Access for Law Enforcement Purposes*, 2003-AUG Army Law. 1; [62 Fed.Reg. 51835, 51835 \(Oct. 3, 1997\)](#). Possibly such a practice is justifiable under a balancing test, but in a proper case the privacy issues will be confronted. I express no view on the proper resolution of this question.

[REINHARDT](#), Circuit Judge, with whom [PREGERSON](#), [KOZINSKI](#), and [WARDLAW](#), Circuit Judges, join, dissenting:

"They that can give up essential liberty to obtain a little safety deserve neither liberty nor safety."
BENJAMIN FRANKLIN, HISTORICAL REVIEW of PENNSYLVANIA (1759).

Today this court approves the latest installment in the federal government's effort to construct a comprehensive national database into which basic information concerning American citizens will be entered and stored for the rest of their lives—although no majority exists with respect to the legal justification for this conclusion.^{FN1}*843 My colleagues claim to authorize merely the "compulsory DNA profiling of certain conditionally-released federal offenders," as authorized by the DNA Analysis Backlog Elimination Act of 2000 ("DNA Act"), [Pub.L. No. 106-546, 114 Stat. 2726 \(2000\)](#). We would be lucky indeed if it were possible to so limit the effect of their opinions. For, under the rationales they espouse, especially the plurality's, all Americans will be at risk, sooner rather than later, of having our DNA samples permanently placed on file in federal cyberspace, and perhaps even worse, of being subjected to various other governmental programs providing for suspicionless searches conducted for law enforcement purposes.

^{FN1}. The plurality consists of five judges, including the author, who have joined Judge

O'Scannlain's opinion. They adopt a sweeping totality of the circumstances test, as I will explain, blatantly eviscerating the constitutional requirement of individualized suspicion for law enforcement searches. One judge, Judge Gould concurs on a different basis, making the necessary six votes to affirm. Judge Gould's rationale, the "special needs" test, is on its face more limited than the plurality's, but in the end its application here would also have drastic adverse consequences for our Fourth Amendment protections. Five judges, the same number who compose the plurality, dissent. Four of those judges join this opinion, including the author. The fifth, Judge Hawkins, dissents for similar reasons.

Neither Supreme Court precedent nor any established rule of Fourth Amendment law supports today's plurality or concurring opinion. Never has the Court approved of a search like the one we confront today: a programmatic search designed to produce and maintain evidence relating to ordinary criminal wrongdoing, yet conducted without any level of individualized suspicion. Never has the Court approved of the government's construction of a permanent governmental database built from general suspicionless searches and designed for use in the investigation and prosecution of criminal offenses.

The approval of such a program carries with it all of the dangers inherent in allowing the government to collect and store information about its citizens in a centralized place. J. Edgar Hoover terrorized leaders of the civil rights movement by exploiting the information he collected in his files. Our government's surveillance and shameful harassment of suspected communists and alleged communist-sympathizers in the middle of the twentieth century depended largely on the centralization of information collected about countless numbers of non-communist members of our citizenry-often by means that violated the Fourth Amendment. The same was true of the Palmer Raids a few decades earlier and of our roundup of Japanese Americans and their placement in internment camps during World War Two. See generally Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. Cal. L.Rev. 1083 (2002).

Even governments with benign intentions have proven unable to regulate or use wisely vast stores of information they collect regarding their citizens. The problem with allowing the government to collect and maintain private information about the intimate details of our lives is that the bureaucracy most often in charge of the information "is poorly regulated and susceptible to abuse. This [] has profound social effects because it alters the balance of power between the government and the people, exposing individuals to a series of harms, increasing their vulnerability and decreasing the degree of power that they exercise over their lives." *Id.* at 1105. To allow such information to be collected through the compulsory extraction of blood from the bodies of non-consenting Americans runs contrary to the values on which this country was founded. My colleagues who endorse the judgment do so despite the fact that the search *844 regime they approve, and the manner in which they approve it, encourages the very centralization of government authority that has repeatedly resulted in the sacrifice of our liberties in the name of law enforcement. Proper attention to constitutional doctrine and history would have led to a contrary result.

To justify the suspicionless searches authorized by the DNA Act, the plurality sweeps away the traditional Fourth Amendment requirement that law enforcement officials conduct searches only when predicated on some level of suspicion that the individual being searched has committed a crime. In place of this time-honored principle, the plurality has employed an opaque "totality of the circumstances" test. See *ante* at 832. It should come as no shock that under this malleable standard, my colleagues have concluded that the forcible extraction of blood samples from probationers and parolees, and the permanent maintenance of profiles constructed from those samples in a federal databank, is constitutionally reasonable. The "totality" of the circumstances relied upon by the plurality is as follows: Those who commit crimes have reduced expectations of privacy, *ante* at 834-835, and, because the forcible extraction of blood is a constitutionally insignificant invasion of privacy, *ante* at 836-837, and the weight of the government interest in DNA profiling "is monumental," *ante* at 839, suspicionless searches are constitutionally reasonable.

Under the test the plurality employs, any person who experiences a reduction in his expectation of privacy would be susceptible to having his blood sample extracted and included in CODIS-attendees of public high schools or universities, persons seeking to obtain drivers' licenses, applicants for federal employment, or persons requiring any form of federal identification, and those who desire to travel by airplane, to name just a few. Already, all members of the Armed Forces must submit to the involuntary extraction of blood for the purpose of providing DNA samples. Indeed, given the "monumental" government interest and the "insignificant" invasion of privacy described by the plurality, it is difficult to imagine that the balancing of interests it then performs would not justify the government's including data regarding *all* Americans in the system regardless of the level of the expectation of privacy they might possess. This is not what the Framers of our Constitution intended.

The sixth vote for the judgment is based on a narrower and far different legal theory—the more respectable "special needs" doctrine. Unfortunately, my respected colleague who opts for the special needs standard obliterates the distinction between law enforcement and non-law enforcement purposes and in so doing undermines the protections the Fourth Amendment is designed to afford, almost to the same extent as those in the plurality.

Thomas Jefferson once warned that "[t]he time to guard against corruption and tyranny is before they shall have gotten hold of us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered." THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 121 (William Peden ed., 1955). The plurality has failed to heed this warning, and instead opens the door to multifarious law enforcement programs involving suspicionless searches by employing a legal standard that imposes no significant limits on arbitrary and invasive government actions; in effect, the plurality simply asks us to trust those in power. The rationale employed in the concurring opinion, while more obedient to traditional legal concepts, would in the end likely result in a similar elimination of constitutional⁸⁴⁵ restraints on the excessive exercise of governmental power. Because I cannot join in my colleagues' willingness to accept so

dangerous and drastic a limitation on our individual liberties, I respectfully dissent.

I. The Scope of the DNA Act and the Combined DNA Index System

The federal program which for all practical purposes is approved today is not nearly as limited as the one initially enacted by Congress. The federal DNA database at issue in this litigation, the Combined DNA Index System ("CODIS"),^{FN2} contains more information about vastly more individuals than it did when it was first created. A brief examination of the origins and development of CODIS helps demonstrate why further limitless expansion of the scope and reach of this nationwide database is inevitable, and helps explain why I find it so unlikely that today's decision is good for "this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669, 64 S.Ct. 757, 88 L.Ed. 987 (1944) (Roberts, J., dissenting).

^{FN2}. CODIS is a three-tiered hierarchical system of information sharing. The FBI's National DNA Index System (NDIS) constitutes the highest level in the CODIS hierarchy, all participating laboratories at the local and state level have access to the NDIS database. All DNA profiles in the CODIS system are collected at the local level (LDIS) before flowing to operative state databases (SDIS). SDIS "allows laboratories within states to exchange DNA profiles." See *CODIS Mission Statement and Background*, available at <http://www.fbi.gov/hq/lab/codis/program.htm> (last visited June 20, 2004) [hereinafter *CODIS Mission Statement and Background*]. "The tiered approach allows state and local agencies to operate their databases according to their specific legislative or legal requirements." *Id.*

A. The Expansion of CODIS

Even a brief glance at the manner in which the federal government has developed and expanded CODIS makes plain that the scope of the system is broad and that future growth is inevitable. CODIS began in 1990 as a pilot program serving just 14 state and local laboratories. See *CODIS Mission Statement and Background*. Its enlargement began shortly

thereafter and has not stopped since. Congress made CODIS a program with nationwide reach in the 1994 Violent Crime Control and Law Enforcement Act, which authorized the FBI to create a national database of DNA samples collected from crime scenes and crime victims, convicted offenders, and unidentified human remains. *See DNA Analysis Backlog Elimination Act of 2000, H.R.Rep. No. 106-900(I)*, at 8[hereinafter DNA Act House Report]. It was not until passage of the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), *Pub.L. 104-132, 110 Stat. 1214 (1996)*, however, that Congress authorized the FBI to “expand CODIS to include federal crimes.” DNA Act House Report, at 8. Despite this legislation, the Department of Justice concluded that Congress had not yet provided the executive branch with sufficient legal authority to collect DNA samples from federal offenders. Consequently, Congress enacted the DNA Act of 2000, which states that “the probation office responsible for the supervision under Federal law of an individual on probation, parole, or supervised release shall collect a DNA sample from each individual who is, or has been, convicted of a qualifying Federal offense.” [42 U.S.C. § 14135a\(a\)\(2\)](#).

The DNA Act requires samples ^{FN3} from all individuals who have been convicted of *846 “certain federal crimes.” *See ante*, at 816 & n. 1. And, as the plurality rightly notes, the DNA Act of 2000 contained a narrow list of qualifying offenses, including crimes such as arson, voluntary manslaughter, and murder. What the plurality and concurring opinion fail to mention, however, is that the most recent list of qualifying offenses, contained at [28 C.F.R. § 28.2](#), includes a laundry list of federal crimes that is vastly more expansive than the list approved by the 2000 DNA Act.^{FN4}

^{FN3}. The DNA Act itself defines a DNA 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\(c\)\(1\)](#). However, the record in this case reveals, and neither party before us has disputed, that the FBI has required all participating CODIS laboratories to construct DNA profiles by obtaining blood samples.

^{FN4}. This is not to say that the enumerated qualifying crimes are not serious. Indeed, many of the crimes listed at [28 C.F.R. § 28.2](#) are among the most heinous crimes in the federal code. Some of the more severe qualifying crimes include murder, [18 U.S.C. § 1111](#); sexual abuse and assault, [18 U.S.C. §§ 2241-45](#); the willful destruction of aircrafts and terrorist attacks, generally, and against mass transportation systems, [18 U.S.C. §§ 32, 1993, 2332f, 2332b](#); the development, stockpiling, or use of chemical, biological, or nuclear weapons, [18 U.S.C. §§ 175, 229, 831, 2232a](#); the commission of genocide, [18 U.S.C. § 1091](#), torture, [18 U.S.C. § 2340A](#), or other war crimes, [18 U.S.C. § 2441](#); threats against the President, [18 U.S.C. § 871](#); and the assassination or attempted assassination of high-level government officials, [18 U.S.C. § 351, 1751](#).

The current list of qualifying crimes is so broad and eclectic that it is difficult to name, absent an intimate familiarity with the intricacies of the federal criminal code, any discernible categories of criminal activities that remain beyond the reach of the DNA Act. The list of qualifying offenses includes crimes compiled from more than 200 separate sections of the United States Code, resulting in countless possible permutations of qualifying crimes. For example, one's DNA could be stored on file with the federal government forever upon a conviction for “willfully injur[ing] or commit[ting] any depredation against any property of the United States,” such as spray painting graffiti on a government building or tearing apart a \$1 bill in protest against a perceived arbitrary governmental policy. *See* [18 U.S.C. § 1361](#). Similarly, an individual might have a DNA sample forcibly taken if he interferes with a mailman in the course of his duties, or forcibly opposes a federal employee on account of his performance of official duties. *See* [18 U.S.C. § 111\(a\)\(1\)](#) (making it illegal for any person to, *inter alia*, oppose or interfere with any officer or employee of the United States “while engaged in or on account of the performance of official duties”); *see also* [18 U.S.C. § 2116](#) (criminalizing the interference with any postal clerk in the discharge of his duties in connection with a postal car or steamboat). If an owner of a boat destroys his vessel in order to obtain an insurance payment, he may be forced to provide a DNA sample, *see* [18 U.S.C. §](#)

[2272](#), and any non-owner of a boat who “maliciously cuts, spoils, or destroys any cordage, cable, buoys, buoy rope, head fast, or other fast, fixed to the anchor or moorings belonging to any vessel” will suffer a similar fate, [18 U.S.C. § 2276](#); *cf.* [18 U.S.C. § 2281](#) (criminalizing violence against maritime fixed platforms).

If the above examples do not sufficiently demonstrate that the federal government has not simply chosen to collect DNA samples from the most hardened criminals or most likely recidivists, consider the following *non-exhaustive* sample of enumerated crimes listed at [28 C.F.R. § 28.2](#): resisting arrest, [18 U.S.C. § 2231](#); various forms of “civil disorder,” [18 U.S.C. § 231](#); participation, promotion, or incitement of a riot, [18 U.S.C. § 2101](#); advocating the overthrow of the United States government, [18 U.S.C. § 2385](#); interference with access to *[847](#) reproductive health service facilities, [18 U.S.C. § 248](#); interference with an aviation flight crew member or flight attendant, [49 U.S.C. § 46504](#); interference with or intimidation of federal meat, poultry, or poultry products inspectors, [21 U.S.C. § 461\(c\)](#), [675](#); the harming of any animal used by law enforcement officials, [18 U.S.C. § 1368](#); the receipt of kick-backs from public works employees, [18 U.S.C. § 874](#); personal theft and robbery, [18 U.S.C. §§ 2111-12](#); conspiracies “to threaten, or intimidate any person,” [18 U.S.C. § 241](#); interference with the right to vote, [18 U.S.C. § 594](#); attempts to intimidate or command any employee of the federal government to engage or not engage in political activity, [18 U.S.C. § 610](#); various forms of extortion and “mailing threatening communications,” and “making extortionate extensions of credit” or collecting extensions of credit by “extortionate means,” [18 U.S.C. §§ 875-78, 892, 894](#); being a felon-or a member of the Armed Forces who has been dishonorably discharged-in possession of a firearm, [18 U.S.C. § 922\(g\)](#); computer fraud, [18 U.S.C. § 1030](#); attempted manslaughter, [18 U.S.C. § 1113](#); incest committed by an Indian in Indian country, [18 U.S.C. § 1153](#); the use of a hazardous or injurious device on federal land or an Indian reservation, [18 U.S.C. § 1864](#); tampering with a witness, [18 U.S.C. § 1512](#); piracy under the law of nations, [18 U.S.C. § 1651](#); the obstruction or delay of the movement of any article or commodity in commerce, [18 U.S.C. § 1951](#); various racketeering crimes, [18 U.S.C. §§ 1952\(a\)\(2\), 1958-59, 1962](#); breaking and entering into a post office, [18 U.S.C. § 2115](#); cruelty to seamen on a vessel in the jurisdiction

of the United States, [18 U.S.C. § 2191](#); “Shanghaiing sailors” by force or threat, [18 U.S.C. § 2194](#); misuse of a vessel by a person in command of the vessel within the territorial waters of the United States, [18 U.S.C. § 2274](#); tampering with, or breaking and entering into, another person's vessel, [18 U.S.C. §§ 2275-76](#); destruction or removal of property to prevent seizure, [18 U.S.C. § 2232\(a\)](#); any action designed to impair a federal court's continuing in rem jurisdiction over a particular property, [18 U.S.C. § 2232\(b\)](#); production of sexually explicit depictions of minors, [18 U.S.C. § 2260](#); the transfer of any obscene material to a minor, [18 U.S.C. § 1470](#); interstate stalking or violation of a protective order, [18 U.S.C. §§ 2261A, 2262](#); persuading or enticing any individual to travel across state lines to engage in prostitution, [18 U.S.C. § 2422](#); importation of any alien to the United States for any immoral purpose, [8 U.S.C. § 1328](#); and the removal or alteration of the serial number on a firearm, or the receipt of a firearm with a removed or altered serial number, [26 U.S.C. § 5861](#). The Act even applies to several sections of the federal criminal code that have long been repealed. *See, e.g.,* [18 U.S.C. §§ 2031, 2032](#). And, in case the provided list is insufficient, the DNA Act is also triggered by the catchall “attempt or conspiracy” provision, which covers “[a]ny offense that is an attempt or conspiracy to commit any of the foregoing offenses.” [28 C.F.R. § 28.2\(I\)](#).

The power to assemble a permanent national DNA database of all offenders who have committed any of the crimes listed above has catastrophic potential. If placed in the hands of an administration that chooses to “exalt order at the cost of liberty,” *Whitney v. California*, 274 U.S. 357, 374, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., dissenting), the database could be used to repress dissent or, quite literally, to eliminate political opposition. Many of the qualifying offenses in the DNA Act are crimes that involve conduct closely related to the exercise of First Amendment rights to free speech and assembly,*[848](#) such as incitement, civil disorder, and the various forms of “interference” crimes listed above. Other offenses are so vaguely or broadly described that they cover almost any conduct that can be described as unlawful. Even if the list of qualifying offenses in the DNA Act remains static, future governments might use the Act's already wide reach to monitor, intimidate, and incarcerate political opponents and disfavored minorities.

Giving us a concrete sense of how broad the reach of the current Act is, the plurality opinion notes that CODIS currently contains over 1.6 million DNA profiles drawn from offenders. But that population is certain to rise even without statutory assistance. With nearly 6.9 million individuals under some form of correctional supervision in recent years, *see* Lauren E. Glaze & Seri Palla, U.S. Dep't of Justice, Bureau of Justice Statistics, Probation and Parole in the United States, 2003, *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus03.pdf>, CODIS has the immediate potential for exponential growth. It is no secret, incidentally, that minorities are disproportionately represented in this population and that many whites receive no sentence at all when they commit offenses for which blacks or Hispanics receive prison time or probation. *See generally* MAUER, RACETOINCARCERATE (1999).

CODIS' potential for expansion, however, is not limited to the population of convicted federal offenders. Even before passage of the 2000 DNA Act, all fifty states had adopted some form of legislation mandating the collection of DNA samples for inclusion in CODIS. *See* Nancy Beatty Gregoire, [Federal Probation Joins the World of DNA Collection](#), 66 *FED. PROBATION* 30, 30 (2002). Today, Mississippi is the only state that does not provide its DNA profiles for inclusion in the national database, NDIS, via CODIS. *See* Federal Bureau of Investigation, *NDIS Participants*, *available at* <http://www.fbi.gov/hq/lab/codis/partstates.htm> (last visited June 20, 2004). The FBI has noted approvingly that the states are "rapidly expanding the scope and size of their CODIS databases" and has stated its hope that "eventually, all 50 states will include all felony offenses" in their lists of qualifying crimes. Federal Bureau of Investigation, *The FBI's Combined DNA Index System Program: A Federal/State Partnership Fighting Violent Crime*, *available at* <http://www.fbi.gov/hq/lab/codis/brochure.pdf> (last visited June 20, 2004).

Recent legislation in several states has authorized the federal government to store and access DNA profiles of individuals who have been convicted of run-of-the-mill non-violent crimes such as felonious possession of food stamps, *see* Br. of Amicus Curiae Public Defender Service for the District of Columbia

[hereinafter: PDS Brief], at 6 (citing [Ala.Code §§ 36-18-24, 13A-9-91 \(2003\)](#)). CODIS also contains profiles of individuals who have been convicted of *no crime whatsoever* but have merely had the misfortune of *being arrested* in Louisiana, Texas, or Virginia. *See id.* at 7 (citing [LA. REV. STAT. ANN. § 15:609\(A\) \(West Supp.2003\)](#); [TEX. GOV'T CODE ANN. § 411.1471\(a\)\(2\) \(West 2003\)](#); [Va. St. § 19.2-310.2:1 \(2003\)](#)). California will likely be next in this group—a popular and well-funded ballot initiative is on the November ballot that would expand the State's collection of DNA samples to include arrestees. *See* John Wildermuth, *Proposition to Take DNA at Arrest Stirs Privacy Fears*, S.F. CHRON., June 12, 2004, at A1. California's propositions frequently are emulated by *849 other less imaginative jurisdictions.^{FN5} If the expansion of the DNA Act's reach continues to follow its current trajectory, it will not be long before CODIS includes DNA profiles from misdemeanants, arrestees, and other suspected criminals throughout the nation. *See* Mark Hansen, *DNA Dragnet*, ABA JOURNAL, May 2004, at 43 (noting that Congress is soon likely to approve legislation authorizing DNA profiling of juvenile offenders and adult arrestees). And, once that step is made, there will undoubtedly be pressure to expand the database even further to include profiles of individuals who wish to obtain drivers licenses^{FN6} or federal passports, applicants for federal jobs or admission to public universities, children who attend public elementary or secondary schools, all newborns, and ultimately, under the rationale adopted by the plurality, the entire population.^{FN7} The increasing use of DNA "dragnets," in which police officers encourage all individuals in a particular community to provide DNA samples to local law enforcement officials in order to assist an ongoing criminal investigation despite the absence of any individualized suspicion, serves as a concrete example of the type of practices which may shortly become commonplace unless the gradual erosion of Fourth Amendment protections now set in place is reversed. *See id.* at 42-43 (noting that DNA dragnets have become increasingly common since the early 1990s and questioning the efficacy of these suspicionless searches). Unfortunately, given the plurality's ill-considered holding that the government interest is "monumental" and the infringement on privacy rights is minimal, that erosion is simply the beginning, not the end.

^{FN5}. California's ballot initiatives have often served as models for other states.

Proposition 227, [CAL. EDUC. CODE § 300 \(1998\)](#), to take just one example, which eliminated bilingual education in the state and replaced it with English language immersion courses, almost immediately became a prototype for similar legislation in other states. *See generally* Charu A. Chandrasekhar, *The Bay State Buries Bilingualism: Advocacy Lessons Learned from Bilingual Education's Recent Defeat in Massachusetts*, 24 *CHICANO-LATINO L. REV.* 43 (2003). So too did Proposition 209, the anti-affirmative action measure, and Proposition 13, the tax reduction measure that placed drastic limitations on local governmental taxing powers, especially with regard to property taxes.

[FN6](#). Some states have already passed legislation authorizing police to collect blood samples, with or without consent, from any driver reasonably suspected of drunk driving. *See* Joseph T. Hallinan, *Police Draw Blood, Literally, as They Fight to Put a Stop to Intoxicated Drivers*, *L.A. DAILY*, Mar. 24, 2004, at 4 (noting that Alaska, Arizona, Florida, Indiana, Iowa, Michigan, Nevada, and Texas have all passed legislation authorizing forcible extraction of blood samples).

[FN7](#). Some scholars currently advocate extending CODIS to cover 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). As noted *supra*, at 844, all members of the Armed Forces are already required to provide DNA samples.

B. Junk DNA and the Potential for Expansion

CODIS's potential to expand is not confined to its likely future inclusion of more and more categories of persons to be subjected to DNA profiling. The system also has the ability to identify an increasing amount of information about each of its profiled subjects as our understanding of DNA continues to develop at lightning speed. The plurality is correct that the DNA profiles currently on file in CODIS are

based on analyses of "junk DNA." *See ante* at 818-819. It takes comfort in the fact that scientists have long assumed that junk DNA is "non-genic," that junk DNA *850 samples taken contain only an identifying "fingerprint," and nothing else. *Id.* That understanding of junk DNA has been disputed for some time. *See* Justin Gillis, *Genetic Code of Mouse Published; Comparison With Human Genome Indicates "Junk DNA" May Be Vital*, *WASH. POST*, Dec. 5, 2002, at A1 (noting that studies in 2002 revealed that junk DNA contains valuable information about how the body uses genes and that the "instruction set [contained within junk DNA] is at least as big as the gene set, and probably bigger"). Moreover, new discoveries are being made by the day that challenge the core assumption underlying junk DNA's name—regions of DNA previously thought to be "junk DNA" may be genic after all. *See* Clive Cookson, *Regulatory Genes Found in "Junk DNA"*, *FIN. TIMES*, June 4, 2004, at 11; *Function Found for Junk DNA*, *L.A. TIMES*, June 5, 2003, at A14.

The fact that scientists currently lack the capacity to comprehend the full significance of the data stored within junk DNA samples is irrelevant. As Judge Gould notes in his concurrence, CODIS retains individual DNA profiles forever—even if convicted offenders have completed their debt to society. *See* Gould concurrence, at 842. Moreover, the FBI encourages all laboratories to retain portions of the evidence samples they collect, *see* Federal Bureau of Investigation, *Standards for Forensic DNA Testing Labs*, at ¶ 7.2, available at <http://www.fbi.gov/hq/lab/codis/forensic.htm>, affording the federal government the opportunity to re-test and re-analyze a virtually limitless number of samples as science progresses. *See also* PDS Brief, at 10 ("The Act also neither requires, nor even recommends, destruction of samples after analysis."). Thus, as Judge Gould perceptibly observes, "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." *See* Gould concurrence, at 842 n.3.

What type of information might the government eventually be able to extract from samples of junk DNA? Even today, as the plurality admits, "DNA profiles derived by STR may yield probabilistic evidence of the contributor's race or sex." *Ante* at

818. Yet that seems to be a dramatic understatement. The DNA “fingerprint” entered into CODIS likely has the potential to reveal information about an individual’s “genetic defects, predispositions to diseases, and perhaps even sexual orientation.” See Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 *Tex. L.Rev.* 49, 95-96 (1995) (cited in Br. of Amicus Curiae Protection & Advocacy, Inc., at 6 [hereinafter Protection & Advocacy Br.]). DNA analysis can reveal the presence of traits for thousands of known diseases, and countless numbers of diseases which are currently unknown. Protection & Advocacy Br., at 6. More ominously, some have predicted that the DNA profiles entered into CODIS will someday be able to predict the likelihood that a given individual will engage in certain types of criminal, or non-criminal but perhaps socially disfavored, behavior. *Id.* at 7-8 (citing studies raising the specter that DNA profiles might be used to study the links between particular genes and the propensity for social deviance).

To say that CODIS profiles might actually be used for such purposes is hardly far-fetched. A report by the Office of Technology Assessment [hereinafter: OTA] of the U.S. Congress has warned that the “possibility exists to test DNA acquired specifically for identification purposes for disease information in a database,” and worse, that “[t]his option may become more attractive over time, especially as the number and types of probes *851 for genetic orders increase.” OTA, *Genetic Witness: Forensic Uses of DNA Tests*, July 1990, at 10 (cited in Protection & Advocacy Br. at 12-13). The pressures will only increase as CODIS produces more “hits,” linking unsolved crime scene evidence to newly entered DNA profiles. The permanent maintenance of this type of information about untold millions of Americans, if not indeed about all of our citizens, affords the government monumental powers to intrude into the core of those intimate concerns which lie at the heart of the right to privacy.

It is true, as some of my colleagues argue, that today we are confronted only with the question of the constitutionality of the program before us. Yet the current CODIS database, when it is compared to its modest beginnings, represents an

alarming trend whereby the privacy and dignity of our citizens [are] being whittled away by []

imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen—a society in which government may intrude into the secret regions of man’s life at will.

Osborn v. United States, 385 U.S. 323, 343, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966) (Douglas, J., dissenting). And when such a policy’s constitutionality is determined merely by whether it seems reasonable under the “totality of the circumstances,” we all have reason to fear that the nightmarish worlds depicted in films such as *Minority Report* and *Gattaca* will become realities. This is especially the case given the potentially endless duration of our current “war on terror,” in the course of which we have already seen that war-time government seeks rapidly to expand its law enforcement powers and to increase its authority to take action against its citizens free from the ordinary rigors of judicial supervision. See, e.g., The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA-PATRIOT) Act, Pub.L. No. 107-56, 115 Stat. 272, §§ 206 (roving wiretaps), 215 (library records searches), 213 (“sneak and peak” searches) (2001). In such times, the pressures to expand CODIS further than ever before are certain to increase.

II. The Reasonableness of the Search

The Fourth Amendment provides that “[t]he 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.” U.S. CONST. amend. IV. “The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which is basic to a free society.” *Camara v. Mun. Court of City and County of San Francisco*, 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) (internal quotation marks omitted). To serve these purposes, the Constitution generally requires that searches be supported by

probable cause and be approved prior to execution by a warrant issued by an impartial magistrate.

A. The Constitution Requires Individualized Suspicion for Law Enforcement Searches

The Fourth Amendment's requirement that searches be supported by reasonable and particularized suspicion and a warrant *852 is deeply rooted in our history. The historical background of that amendment demonstrates that our Framers' were steadfastly committed to the ideal that general warrants and searches conducted in the absence of reasonable and particular suspicion were intolerable in a democratic society. See [Henry v. United States](#), 361 U.S. 98, 100, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959). As the Henry Court noted,

The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of "probable cause" before a magistrate was required. The Virginia Declaration of Rights, adopted June 12, 1776, rebelled against that practice: "That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted." The Maryland Declaration of Rights (1776), Art. XXIII, was equally emphatic.

...

That philosophy later was reflected in the Fourth Amendment. 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. at 100-102, 80 S.Ct. 168 (internal footnotes and citations omitted). "[T]he particular way the Framers chose to curb the abuses of general warrants-and by implication, *all* general searches-was ... to retain the individualized suspicion requirement contained in the typical general warrant, but to make that requirement

meaningful and enforceable, for instance, by raising the required level of individualized suspicion to objective probable cause." [Vernonia Sch. Dist. 47J v. Acton](#), 515 U.S. 646, 670, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) (O'Connor, J., dissenting) (emphasis in original).

In particular, the Framers feared blanket searches, whereby law enforcement officials would go door-to-door to conduct searches of every house in an area, regardless of suspicion. See *id.* (noting that the Framers may have considered blanket "area searches" even "more worrisome than the typical general search"). They knew that the use of suspicionless blanket searches and seizures for investigatory purposes would "subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention." [Davis v. Mississippi](#), 394 U.S. 721, 726, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969). It is plain that "the Fourth Amendment was meant to prevent [such] wholesale intrusions upon the personal security of our citizenry." *Id.*

Fourth Amendment jurisprudence has evolved considerably over the years. The Court has recognized, for example, a number of reasonable departures from the warrant requirement and in some instance has relaxed the level of suspicion required before a law enforcement official may conduct a search. See, e.g., [Terry v. Ohio](#), 392 U.S. 1, 24-25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (upholding "stop and frisk" searches upon reasonable suspicion as a general exception to the warrant requirement); [Chimel v. California](#), 395 U.S. 752, 762, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) (upholding searches conducted incident to arrest as a general exception to the warrant*853 requirement). The Court has even approved certain limited categories of non-law enforcement searches conducted in the absence of any suspicion at all. See, e.g., [United States v. Ramsey](#), 431 U.S. 606, 616, 97 S.Ct. 1972, 52 L.Ed.2d 617 (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"); [New York v. Burger](#), 482 U.S. 691, 702, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (upholding warrantless inspections of closely-regulated businesses as a special need beyond the need for normal law enforcement); [Treasury Employees v. Von Raab](#), 489

[U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 \(1989\)](#) (upholding suspicionless drug testing of high-risk United States customs officials as a special need beyond the need for normal law enforcement); [Chandler v. Miller, 520 U.S. 305, 323, 117 S.Ct. 1295, 137 L.Ed.2d 513 \(1997\)](#) (affirming, without deciding explicitly, the constitutionality of blanket suspicionless searches at airports and entrances to federal buildings when such searches are carefully calibrated to meet a “substantial and real” risk to public safety).^{FN8} However, the existence of the Warrant Clause in the Fourth Amendment demonstrates beyond doubt that there are some categories of searches “for which individualized suspicion is nonnegotiable.” [Vernonia, 515 U.S. at 673, 115 S.Ct. 2386](#) (O'Connor, J., dissenting). And whether one attempts to manufacture neat categories with clever names, *see ante*, at 830-832, or groups them all into one large category of cases involving “special needs,”^{FN9} *see Burger, 482 U.S. at 702, 107 S.Ct. 2636*, 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.^{FN10}

^{FN8}. None of those exceptions serves to justify the present search regime, which, as I describe below, is intended for the primary purpose of assisting in the everyday investigation and prosecution of crimes. *See infra*, at 856-857.

^{FN9}. The term “special needs” first appeared in Justice Blackmun's concurrence in [New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 \(1985\)](#), in which he stated that certain cases would allow for exceptions to the warrant and probable-cause requirements when the balance of governmental and private interests supported such a departure, but that such balancing would be appropriate only “in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” *Id.* at 351, 105 S.Ct. 733.

On several occasions, the Supreme Court has upheld suspicionless non-law enforcement search regimes without using the words “special needs.”

See, e.g., Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) (prisons); [United States v. Ramsey, 431 U.S. 606, 97 S.Ct. 1972, 52 L.Ed.2d 617 \(1977\)](#) (border searches); [Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 \(1967\)](#) (administrative inspections). But nearly all of those cases pre-dated the Court's first use of the phrase “special needs.” *See T.L.O., 469 U.S. at 353, 105 S.Ct. 733*. Moreover, later Courts have categorized the group of cases involving suspicion-less searches and needs beyond the need for normal law enforcement as “special needs” cases. *See, e.g., Indianapolis v. Edmond, 531 U.S. 32, 37-38, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000)* (explaining that the border search line of cases and the previous traffic stop case, [Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 \(1990\)](#), were special needs cases because they involved suspicionless search programs “whose primary purpose was [not] to detect evidence of ordinary criminal wrongdoing”); [Burger, 482 U.S. at 702, 107 S.Ct. 2636](#) (explaining that the administrative search line of cases falls under situations of “special need”).

^{FN10}. This basic Fourth Amendment tenet was reiterated this term in [Hiibel v. Sixth Judicial District Court, 542 U.S. 177, 124 S.Ct. 2451, 159 L.Ed.2d 292 \(2004\)](#). There, the Court explicitly reaffirmed its holding in [Brown v. Texas, 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 \(1979\)](#), that it is unconstitutional to require individuals to identify themselves to police officers without reasonable suspicion. Some level of individualized suspicion, therefore, remains the *sine qua non* of cases involving searches undertaken for law enforcement purposes, even when the only identifying information sought is a person's name.

***854B. The Special Needs Doctrine**

Never once in over two hundred years of history has the Supreme Court approved of a suspicionless search designed to produce ordinary evidence of criminal wrongdoing for use by the police.^{FN11} The constitutional tradition described in Henry has been reaffirmed over time, most prominently in recent

years by the majority opinion in [Indianapolis v. Edmond](#), 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). In *Edmond*, the Court explained that

FN11. I recognize that several Circuits have recently done so in affirming the DNA Act on one theory or another. *See ante*, at 830-832. I respectfully disagree with those decisions for the reasons set forth in this dissent.

A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. While such suspicion is not an “irreducible” component of reasonableness, we have recognized *only limited circumstances* in which the *usual rule* does not apply. For example, we have upheld certain regimes of suspicionless searches where the program was designed to serve special needs, beyond the normal need for law enforcement.

Id. at 37, 121 S.Ct. 447 (emphasis added); *see also* [Vernonia](#), 515 U.S. at 671, 115 S.Ct. 2386 (O'Connor, J., dissenting) (“The view that mass, suspicionless searches, however evenhanded, are generally unreasonable remains inviolate in the criminal law enforcement context.”). *Edmond* held that the only recognized exception to the general rule that searches be based on some type of individualized suspicion is when the search is justified by “special needs, beyond the normal need for law enforcement,” that render inoperative the Framers' historic mistrust of excessive power in the hands of the police. [Edmond](#), 531 U.S. at 37, 121 S.Ct. 447. Therefore, no programmatic suspicionless search is reasonable unless the special need is “divorced from the State's general interest in law enforcement.” [Ferguson v. City of Charleston](#), 532 U.S. 67, 79, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001) (holding unconstitutional a state hospital program that tested pregnant women for drug use and then made available to the police the results of the tests on the grounds that the “immediate objective of the [suspicionless] searches was to generate evidence for law enforcement purposes”).

Although the “general interest in law enforcement” does not refer to every law enforcement objective, *see, e.g.*, [Illinois v. Lidster](#), 540 U.S. 419, ---, 124 S.Ct. 885, 889, 157 L.Ed.2d 843 (2004) (upholding a suspicionless traffic stop under the special needs

doctrine when the searches were designed to elicit information not about the occupants of the vehicle, “but other individuals”), valid special needs, as the Court most recently explained in *Lidster*, may not include efforts to obtain information related to possible crimes that the searched individual may have committed. *See* [540 U.S. at ---, 124 S.Ct. at 889](#). Further support for this principle comes from the cases involving school drug testing. In those cases, the Court has drawn a clear distinction between searches conducted for the purpose of solving and/or punishing crime and those searches conducted without the involvement of punitive consequences or law enforcement officials. *855 *See, e.g.*, [Bd. of Educ. v. Earls](#), 536 U.S. 822, 833, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002) (emphasizing that “the test results are not turned over to any law enforcement authority”); *see also* [Vernonia](#), 515 U.S. at 658 n. 2, 115 S.Ct. 2386 (stressing that the “search here is undertaken for prophylactic and distinctly nonpunitive purposes”) (emphasis added); [Von Raab](#), 489 U.S. at 666, 109 S.Ct. 1384 (noting that test results “may not be used in a criminal prosecution of the employee without the employee's consent”).

In short, the Court has never, ever, upheld a regime of suspicionless searches based on the government's desire to pursue ordinary law enforcement objectives. *See* [Edmond](#), 531 U.S. at 41, 121 S.Ct. 447 (noting that the Court had “never approved [a general program of suspicionless seizures] whose primary purpose was to detect evidence of ordinary criminal wrongdoing”); *see also* [Vernonia](#), 515 U.S. at 658, 115 S.Ct. 2386; [Von Raab](#), 489 U.S. at 679, 109 S.Ct. 1384; [Skinner](#), 489 U.S. at 620-621, 109 S.Ct. 1402. To the contrary, the Court explicitly disapproved such searches in *Edmond* and explained that permitting suspicionless searches to be justified by “the general interest in crime control” would allow such intrusions to become “a routine part of American life.” [531 U.S. at 42, 121 S.Ct. 447](#).^{FN12}

FN12. For the most part, the Court has required law enforcement officials to have *probable cause* in order to invade individuals' bodily integrity for the purpose of assisting ordinary criminal investigations. *See* [Cupp v. Murphy](#), 412 U.S. 291, 295-96, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973) (holding that police could require a suspect to give scrapings from his fingernails as

evidence only because of the “existence of probable cause”); *Davis v. Mississippi*, 394 U.S. 721, 727-28, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969) (holding that police could not force “suspects” to give fingerprints to aid in a criminal investigation absent probable cause).

When we are evaluating the reasonableness of a suspicionless search, conducted pursuant to a programmatic search regime, “we consider all the available evidence in order to determine the relevant primary purpose.” *Ferguson*, 532 U.S. at 81, 121 S.Ct. 1281. No matter what the “ultimate goal” of the statute itself may be, the question we ask is whether “the immediate objective of the searches was to generate evidence for law enforcement purposes.” *Id.* at 83, 121 S.Ct. 1281 (emphasis in original).^{FN13} If so, the search is unconstitutional. See *id.* at 86, 121 S.Ct. 1281; see also *Lidster*, 540 U.S. at ---, 124 S.Ct. at 890.

^{FN13}. The plurality's contention that the purpose of the searches is irrelevant confuses the subjective intent of the individual officer conducting the search, which is irrelevant under *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), with the objective purpose of the programmatic search regime, which the special needs doctrine requires us to evaluate. See *Ferguson*, 532 U.S. at 81, 83-84, 121 S.Ct. 1281 & n. 20.

The unequivocal purpose of the searches performed pursuant to the DNA Act is to generate the sort of ordinary investigatory evidence used by law enforcement officials for everyday law enforcement purposes. The government maintained from the outset of this litigation that the purpose of the searches authorized by the DNA Act is to “help law enforcement solve unresolved and future cases.”^{FN14} Moreover, it is plain *856 that in passing the DNA Act, Congress's primary concern was the swift and accurate solution and prosecution of crimes as a general matter. The legislative history is littered with approving references to DNA evidence's ability to solve past and future crimes and thereby assist prosecutions. See, e.g., DNA Act House Report, at 8-11, 23-27, 32-36 (2000). For example, the Department of Justice argued to Congress 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.” *Id.* at 27. Members of Congress made similar arguments. See 146 CONG. REC. S11645-02, at S11647 (daily ed. Dec. 6, 2000) (arguing that the purpose of adding DNA profiles into CODIS is to “solve crimes and prevent further crimes”) (statement of Sen. Leahy); 146 CONG. REC. H8572-02, at H8575-6 (daily ed. Oct. 2, 2000) (statement of Rep. Canady) (“The purpose of [CODIS] is to match DNA samples from crime scenes where there are no suspects with the DNA of convicted offenders. Clearly, the more samples we have in the system, the greater the likelihood we will come up with matches and solve cases.”).^{FN15}

^{FN14}. The government's supplemental en banc brief attempts to recast the purpose of the DNA Act purely in terms of meeting the supervisory needs of the parole and probation systems. See Supplemental En Banc Br. for the United States, at 13-14. This assertion, while clever, is belied by the government's arguments made before the initial panel in this case. The government's contention is even less credible when compared against the express purpose as stated in the legislative history of the DNA Act. Moreover, as I discuss *infra*, the collection of DNA samples is not a part of the supervisory function of federal or state probation systems, and the Act is not primarily directed at probationers, parolees, or conditional releasees but at all persons convicted of designated crimes.

^{FN15}. The executive branch's interpretation of the DNA Act and CODIS supports the understanding advanced by the legislative history. See, e.g., Dep't of Justice, *Using DNA to Solve Cold Cases* 4 (July 2002) (stating that the DNA database system is a “powerful tool for law enforcement”); Dep't of Justice, *No Suspect Casework DNA Backlog Reduction Program* (FY 2001), at 1 (August 2001) (“DNA evidence used in conjunction with the Combined DNA Index System (CODIS) is a powerful investigative tool beginning at the crime scene with the collection of evidence and ending with a

judicial conclusion.”); *see also Justice Dep't. Acts to Clear DNA Backlog*, MIAMI HERALD, Aug. 2, 2001, at 19A (quoting Attorney General Ashcroft as saying “DNA technology can operate as a kind of truth machine, ensuring justice by identifying the guilty and clearing the innocent.”).

There can be no question that the government's primary purpose in conducting searches pursuant to the DNA Act is to generate evidence capable of assisting ordinary law enforcement investigations. The searches are designed to reveal at some point in time whether the individuals whose blood samples are involuntarily extracted have “committed some crime.” *Lidster*, 540 U.S. at ---, 124 S.Ct. at 889. This is the paradigmatic search condemned by the special needs doctrine.

Some, including the Government and Judge Gould in his concurring opinion, maintain that the DNA Act serves a constitutionally valid “special need” because the Fourth Amendment intrusion serves the state's need to supervise its conditional releasees. In *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987), the Court held constitutionally reasonable the search of a probationer conducted pursuant to a Wisconsin probation regulation that permitted probation officers to conduct warrantless searches of probationers' homes so long as “‘reasonable grounds’ to believe the presence of contraband” supported the search. *Id.* at 870-71, 107 S.Ct. 3164. The regulation was not made a special condition of Griffin's probation, but instead applied to all probationers statewide. The Court held that the operation of the probation system presented a “special need” beyond that of normal law enforcement—the state's need to “exercise [] supervision to assure that [probation] restrictions are in fact observed.” *Id.* at 875, 107 S.Ct. 3164; *see id.* (holding that probation is “a ‘special need’ *857 of the State, permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large”).

For several reasons, *Griffin* does not support the validation of the search regime prescribed by the DNA Act. First and foremost, as I have already explained, the primary purpose of the DNA Act is to collect information for ordinary law enforcement purposes—to help law enforcement authorities

determine whether specific individuals have committed particular crimes. It is not to assist in the supervision of releasees, the purpose the *Griffin* Court identified. ^{FN16}

^{FN16}. Claiming that DNA profiles are designed to “identify” the releasee, much like fingerprints, is disingenuous. *See ante*, at 837. Kincaide, for instance, was identified and booked with fingerprints, and his identification was confirmed by a criminal conviction before a court of law, long before his DNA sample was taken. The collection of a DNA sample thus does not “identify” a conditional releasee any more than a search of his home does—it merely collects more and more information about that releasee that can be used to investigate unsolved past or future crimes.

Second, although *Griffin* involved probationers, one of the classes of persons covered by the DNA Act, the similarities end there. Unlike in *Griffin*, the DNA Act involves surveillance that extends far beyond conditional releasees' periods of supervision. Contrary to the plurality's suggestion, the government's alleged interest in *Griffin*-supervision was not, according to the Court, a “clear law enforcement” objective. *See ante*, at 824. Instead, the purpose of the search regime in *Griffin* was to facilitate the supervision of probationers during the finite term of their probation period; certainly, it was not to produce unbounded evidence of past or future crimes for inclusion in a permanent governmental database. *Griffin* explained its departure from the warrant and probable cause requirement by referring repeatedly to the special supervisory interests at the heart of the probation system.

A warrant requirement would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires. Moreover, the delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct, and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create.... Although a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen.... In

such a setting, we think it reasonable to dispense with the warrant requirement.

[483 U.S. at 876-77, 107 S.Ct. 3164.](#)

By contrast, the purpose of the DNA Act is to obtain material for inclusion in a permanent databank to help solve crimes that may have been committed prior to the individual's term of supervised release but, most often, will be committed at some time after his term of supervision is complete.^{FN17} Although probation officers are *858 forced to collect the blood samples under the Act, they are required immediately thereafter to turn them over to the FBI for analysis, permanent storage in CODIS, and future use by law enforcement officials for law enforcement purposes. *See* [42 U.S.C.A. § 14135a\(b\)](#). Any use of the DNA samples to solve crimes committed during the period of supervised release is thus incidental to the primary purpose of the Act. And, under the special needs doctrine, it does not matter that an ancillary benefit of the Act may be to make the task of supervising conditional releasees somewhat easier. Even the presence of a “benign” motive cannot “justify a departure from Fourth Amendment protections, given the pervasive involvement of law enforcement” interests. [Ferguson, 532 U.S. at 84-85 & n. 22, 121 S.Ct. 1281.](#)

^{FN17}. Judge Gould contends that the DNA Act serves the special needs of a supervised release system simply by deterring future crime. *See* Gould concurrence, at 840. That, however, is not the purpose of the Act. *See* text preceding and following this note; *see also* Kozinski dissent, at 874-875. Moreover, even if deterrence were a conscious goal of the CODIS system, the special needs doctrine would not apply. The concurrence confuses an alleged ultimate goal of the programmatic search regime with the “immediate objective of the search [],” a distinction that “is critical.” *See Ferguson, 532 U.S. at 82-83, 121 S.Ct. 1281* (holding that the relevant consideration is whether the direct and primary purpose of the search is to “generate evidence for law enforcement purposes”). The forced extraction of blood is not designed to scare the releasee into avoiding crime—it is designed to permit the construction of a national database aimed at

solving past and future crimes. *See supra* at 830-832. That an ultimate objective of the Act, the reduction of crime through the incarceration of dangerous criminals or deterrence, is compatible with the goals of the probation system is irrelevant. As *Ferguson* explained, “law enforcement involvement always serves some broader social purpose or objective, [and] under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment.” [532 U.S. at 84, 121 S.Ct. 1281](#); *see also* Ronald M. Gould & Simon Stern, *Catastrophic Threats and the Fourth Amendment*, 77 S.C.L.R. 777, 814 n. 160 (2004) (“The indirect interdiction of criminals from committing future crimes is inchoate in each prosecution, but it is not the main point.”).

Third, CODIS is not limited to or even designed primarily to cover federal probationers or parolees. By the terms of the DNA Act, CODIS covers *all* persons convicted of the Act's qualifying offenses regardless of whether they are incarcerated in penal institutions or placed on supervised release. The overwhelming majority of individuals convicted of federal offenses are not sentenced to probation; they are sentenced to prison, where, under the Act, the compulsory extraction of blood samples occurs.^{FN18} *See generally* U.S. Dep't of Justice Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2001, available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0105.pdf> (last visited July 7, 2004) (noting that in 2000-2001, 74.5% of convicted offenders were sentenced to prison while only 17.5% were sentenced to probation).^{FN19} CODIS now *859 also includes DNA profiles of members of the armed forces, despite the fact that the army's DNA repository was originally promised to be used only “for the identification of human remains.” *See* Br. of Amicus Curiae Pub. Defender Serv. for the Dist. of Columbia, at 13 (citing [62 Fed.Reg. 51835, 51835 \(Oct. 3, 1987\)](#)). Thus, the relevance of an individual's conditional release status to the CODIS program is highly attenuated. Only a very small percentage of persons covered by the Act are subjected to compulsory

blood extraction while on conditional release, and the use of the information collected is not limited to that period of time. In no way can it fairly be said that, like *Griffin*, CODIS is a program designed to aid in the supervision of conditional releasees.

[FN18](#). Ironically, that is where Kincade's blood sample was eventually extracted. The fact that his incarceration was to be followed by a period of supervised release was irrelevant. The DNA would have been taken in prison and placed permanently in CODIS whether or not a subsequent period of conditional release had been imposed.

[FN19](#). Judge Gould attempts to limit our inquiry to the sole question whether it is legitimate to take blood from probationers and/or parolees and to disregard the use to which the samples will inevitably be put. That is not the way in which the Court evaluates the programmatic purpose, and thus the constitutionality, of a search regime in special needs cases. We must look directly to the Act and its purpose. *See Ferguson*, 532 U.S. at 81, 83-84 & n. 20, 121 S.Ct. 1281 (examining use to which urine samples were put); *see also ante*, at 837-838 (explaining that “our job is limited to resolving the constitutionality of the program before us, as it is designed and as it has been implemented”). Moreover, under today's prevailing view, it is highly unrealistic to suggest as Judge Gould does, that individuals whose blood samples are stored in CODIS may be free to sue to destroy their DNA records after the period of their release has expired. Doing so would vitiate the very purpose underlying the adoption of the DNA Act. Furthermore according to the plurality, the Fourth Amendment violation in this case is limited to the extraction of blood. They believe that what is done with that information once it is taken is irrelevant for Fourth Amendment purposes. *See ante*, at 837-838. This, of course, is directly contrary to the mode of analysis that *Ferguson* dictates. In any event, according to the plurality, an individual who has completed his period of supervised release would not be free to show

that the DNA Act authorized an unconstitutional “search” under its interpretation of the Fourth Amendment. Finally, Judge Gould's approach would allow future courts to justify law enforcement programs under any interest related but subordinate to the primary, traditional, law enforcement need served by the search. Including newborns in CODIS could be justified to serve the weighty needs to help prevent child abductions and assist in paternity determinations, even if the primary purpose were to maintain the newborns' records throughout their lives for use in future criminal investigations. This, too, is directly contrary to *Ferguson*. 532 U.S. at 84, 121 S.Ct. 1281.

Last but not least, the *Griffin* Court confronted a search regime which required reasonable suspicion before any search could be conducted. *See* 483 U.S. at 871, 107 S.Ct. 3164; *see also id.* at 880 n. 8, 107 S.Ct. 3164 (holding that “the only regulation upon which we rely for our constitutional decision is that which permits a warrantless search on ‘reasonable grounds.’”). The state's supervisory interests, beyond the normal needs of law enforcement, were implicated in *Griffin* precisely because the searches were designed to check on individual probationers who were suspected of violating the terms of their conditional release. Neither *Griffin* nor any later precedent supports holding constitutional under the special needs doctrine all state regulations relating to the supervision of probationers and parolees without suspicion and notwithstanding the presence of an ordinary law enforcement purpose as the primary factor underlying the search. [FN20](#)

[FN20](#). The plurality contends that *Ferguson* interpreted *Griffin* to mean that the requirements of the special needs doctrine simply do not apply in cases involving searches of probationers and parolees. *Ante*, at 832 n. 26. This reading of *Ferguson* is plainly incorrect. The *Ferguson* footnote to which the plurality refers responded to the argument, made in Justice Scalia's dissent, that the special needs doctrine permits suspicionless searches conducted by law enforcement officials for law enforcement objectives. 532 U.S. at 81 n. 15, 121 S.Ct.

[1281](#). For support, Justice Scalia cited *Griffin*. The *Ferguson* majority responded that “*Griffin* does not support the proposition for which the dissent invokes it.” *Id.* It explained that the special needs cases have approved suspicionless searches only when “there was no law enforcement purpose behind the searches ... and there was little, if any, entanglement with law enforcement.” *Id.* Yet this is exactly what the DNA Act contemplates-probation officers are required under the Act to collect DNA samples and immediately turn them over to federal law enforcement officers for analysis, storage in CODIS, and possible use in future criminal prosecutions. [See 42 U.S.C.A. § 14135a \(b\)](#). The DNA Act thus entangles probation officers with normal law enforcement officers in a collective effort to investigate, solve, and prosecute crimes. This is precisely the type of program that *Ferguson* suggested would violate the Fourth Amendment

The plurality, however, asserts that we reach this result by misreading the facts of *Griffin*. *See ante*, at 832 n. 26. Yet the facts of *Griffin* clearly reflect that although the search was initiated by a police tip and police officers were physically present at the home being searched, every critical juncture of the search process—from the decision to search to the search itself—was carried out and decided upon entirely by the probation officers and not the police. Indeed, *Griffin* relied upon the fact that the probation authorities, who “while assuredly charged with protecting the public interest, [are] also supposed to have in mind the welfare of the probationer,” [id. at 876, 107 S.Ct. 3164](#), were in control of the search rather than the police: “we deal with a situation in which there is an ongoing supervisory relationship—and one that is not, or at least not entirely, adversarial—between the object of the search and the decisionmaker.” [Id. at 879, 107 S.Ct. 3164](#). Therefore contrary to the plurality's claim, *Griffin* did not involve, but rather condemned, as *Ferguson* noted, the entanglement of probation officers with law enforcement objectives.

*860C. Conclusion

The Fourth Amendment forbids blanket suspicionless

searches conducted for ordinary law enforcement purposes. Under the plurality's opinion, the only remaining area of the Fourth Amendment that has been “nonnegotiable” would no longer be safe. Like Judge Gould, I believe that the special needs doctrine controls this case. Unlike Judge Gould, however, I would hold that the DNA Act is plainly designed to generate evidence of ordinary criminal wrongdoing, and not to serve a supervisory need, as was the case in *Griffin*. That is an impermissible purpose under the special needs doctrine. Consequently, I would hold that, under that doctrine, the Act is unconstitutional.

III. The Totality of the Circumstances Test

The plurality takes a far more dangerous course than does Judge Gould in his concurrence. The concurrence simply applies, or misapplies, the special needs doctrine. At least under that doctrine, suspicionless searches are carefully scrutinized and held constitutional only when they serve a valid special need apart from law enforcement. The plurality, however, believes that suspicionless searches do not need to be justified on the traditional basis employed by the Supreme Court. Casting aside the Court's established framework for analyzing blanket suspicionless search regimes, the plurality instead employs a malleable and boundless standard—it asks merely whether the search was reasonable considering “the totality of the circumstances present.” *See, e.g., United States v. Knights*, [534 U.S. 112, 121, 122 S.Ct. 587, 151 L.Ed.2d 497 \(2001\)](#). The approach chosen by the plurality dispenses with the structural guarantees that have guided Fourth Amendment jurisprudence since the Founding. It eliminates the constitutional guarantee that law enforcement searches will not be conducted in the absence of individualized suspicion and opens the door to all kinds of bureaucratic nationwide governmental programs that disregard the Fourth Amendment rights of our citizens, with the only remaining safeguard being the willingness of the judiciary to weigh properly the relative importance of the general law enforcement interests and the individual's privacy right. As I show *infra*, and as today's decision demonstrates, that is a thin reed indeed. The plurality's doctrinal decision to apply a totality of the circumstances test to a suspicionless law enforcement search is just as regrettable, and even more reckless, than its pragmatic decision to find constitutional the mass involuntary extraction,

collection, and permanent storage of DNA samples in CODIS for future use.

***861A. Precedent Does Not Support the Totality of the Circumstances Approach**

No Supreme Court case supports the plurality's use of the totality of the circumstances test for suspicionless searches designed to obtain evidence for use against the persons searched in present or future criminal investigations. The *Knights* decision, the only opinion to which the plurality points, does not support the view that, because the group searched includes conditional releasees, we may simply disregard the principles governing traditional Fourth Amendment law, and conduct law enforcement searches in the absence of individualized suspicion.^{FN21}

^{FN21}. I recognize that even special needs cases employ a balancing test akin to a “totality of the circumstances” approach. But they do so only *after* the search regime in question has been deemed to be a valid, non-law enforcement search. Compare *Ferguson*, 532 U.S. at 84 & n. 21, 121 S.Ct. 1281 (refusing to apply “a balancing test to determine Fourth Amendment reasonableness” because the search was undertaken to generate evidence for use by the police in enforcing general criminal laws); with *Lidster*, 540 U.S. at ---- - ----, 124 S.Ct. at 889-91 (considering the balance of privacy interests versus governmental needs only after determining that the traffic stop in question “was not to determine whether [the individuals searched] were committing a crime, but to ask vehicle occupants, as members of the public, for their help”). Thus, the “general Fourth Amendment” approach to reasonableness is something that has been applied in suspicionless search cases only after the Court has determined that the alleged “special need” consists of a valid non-law enforcement purpose.

Knights upheld a warrantless search of a probationer's home; the defendant's terms of probation included an explicit condition mandating submission to such searches at any given time. 534

U.S. at 116, 122 S.Ct. 587. *Knights* clearly decided the Fourth Amendment question outside of the “special needs” framework. 534 U.S. at 117-18, 122 S.Ct. 587 (stating the question presented as whether warrantless searches of probationers are constitutionally reasonable without reference to the “special needs” of the probation system—the question that the *Griffin* Court found it “unnecessary to consider”). The Court distinguished the “special needs” line of cases, but it did so cautiously, explaining that its departure from that framework was justified only by the combination of *all* of the circumstances present. 534 U.S. at 118, 122 S.Ct. 587. The plurality is correct that those circumstances included the reduced expectation of privacy held by *Knights* on account of the conditions of his probation. But the circumstances also included, as the Court emphasized repeatedly, the fact that the search was supported by reasonable suspicion:

We hold that the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house. The degree of *individualized suspicion required* of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable. Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term ‘probable cause,’ a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable. Those interests warrant a lesser than probable-cause standard here. *When an officer has reasonable suspicion* that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly*862 diminished privacy interests is reasonable. The same circumstances that lead us to conclude that *reasonable suspicion is constitutionally sufficient* also render a warrant requirement unnecessary.

534 U.S. at 121, 122 S.Ct. 587 (internal citations omitted) (emphasis added); see also *id.* at 119 n. 6, 122 S.Ct. 587 (noting that “we need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion”); *id.* at 122, 122 S.Ct. 587 (“We therefore hold that the warrantless search of *Knights*, supported by reasonable suspicion and authorized by a

condition of probation, was reasonable within the meaning of the Fourth Amendment.”).

The passage from *Knights* quoted above strongly suggests that the Court's willingness to ignore the limitations imposed by the special needs doctrine was based largely on the presence of individualized suspicion. I say suggests because the Court never explained its reasons for applying the totality of the circumstances test. The Court said only that “[w]e need not decide whether *Knights*' acceptance of the search condition constituted consent in the *Schneckloth* sense of a complete waiver of his Fourth Amendment rights, however, because we conclude that the search of *Knights* was reasonable under our general Fourth Amendment approach of ‘examining the totality of the circumstances.’ ”[534 U.S. at 118, 122 S.Ct. 587](#) (quoting *Ohio v. Robinette*, [519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 \(1996\)](#)).^{FN22} It is important to understand this statement in its proper historical context.

[FN22](#). *Robinette*, of course, is an example of the traditional use of the totality of the circumstances approach. In *Robinette*, the Court considered whether an officer had probable cause to ask a driver to get out of his car after he had been pulled over for speeding. The question, as in almost all “general” Fourth Amendment cases, was whether the officer had sufficient suspicion to justify his subsequent search in the absence of a warrant, not whether he needed to have *some* level of suspicion. See [519 U.S. at 38-40, 117 S.Ct. 417](#).

The “general Fourth Amendment approach” described by the *Knights* plurality refers to those Fourth Amendment cases in which the Court has sought either to determine the minimum level of suspicion required to support a particular type of search or to measure whether the quantum of suspicion officers possessed in a given case was sufficient to meet the requisite level. Indeed, the “totality of the circumstances” test was designed to guide the Court in its probable cause and reasonable suspicion determinations. See [Illinois v. Gates](#), [462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 \(1983\)](#) (explaining that the “totality of the circumstances analysis [] has traditionally informed probable cause determinations”). The test has never

been used, however, to justify suspicionless law enforcement searches. To the contrary, in “totality of the circumstances” cases, the presence of *some level* of suspicion has always been a given and a *sine qua non*. Cases involving suspicionless programmatic search regimes are not “general” Fourth Amendment cases. That is why the plurality cannot cite a single case that has applied the totality of the circumstances test to a regime of suspicionless searches.

Despite this history, and despite the strongly suggestive language in *Knights*, the plurality implausibly maintains that drawing a line between suspicion-based and suspicionless searches is unnecessary because “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.” *Ante*, at 829. In support of this proposition, the plurality cites *Griffin*,^{*863} which applied a “special needs” analysis despite the fact that the search of *Griffin* was supported by reasonable suspicion. *Id.* The plurality somehow infers from this that the “totality of the circumstances” test is not limited to searches based on reasonable suspicion. The plurality's logic is faulty. 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. For instance, if the special need of the state to prevent drunk driving on the highways, see [Sitz](#), [496 U.S. at 451, 110 S.Ct. 2481](#), justifies traffic stops where no individualized suspicion exists, certainly that same need would justify such stops based on a reasonable suspicion that particular drivers were in fact drunk.^{FN23} In any event, the line between suspicionless law enforcement searches and searches based upon reasonable individualized suspicion is as old as the Fourth Amendment and is fundamental to the preservation of the privacy interests which that provision protects.

[FN23](#). Additionally, it simply cannot be the case that “special needs” analysis is “triggered ... by a departure from the Fourth Amendment's warrant-and-probable cause requirements.” *Ante*, at 829. If that were the case, special needs analysis would control cases involving protective sweeps, see [Maryland v. Buie](#), [494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 \(1990\)](#), searches

incident to arrest, *see Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), and pat-down searches, *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The departure from the warrant-and-probable cause regime of the Fourth Amendment is not what triggers a special needs analysis; that departure is the *result* of a special needs analysis in which the Court finds a valid programmatic purpose to the search regime—a purpose apart from law enforcement needs. Under the plurality's view, the “trigger” of the special needs doctrine is the same as the result. A far better explanation, in my view, focuses on the reason why the warrant-and-probable cause regime is not appropriate for determining the constitutional validity of the search in question—the answer, is that the Court has held constitutional search regimes where the lack of any role for individualized suspicion (blanket drug testing of all students, random traffic stops of all drivers, random inspections of closely-regulated businesses) is combined with a valid non-law enforcement purpose.

The best way to make sense of *Knights*, in light of *Griffin* and the Court's “special needs” cases, is to recognize that in *Knights* the Court was free to apply the “totality of the circumstances” test because the search was supported by individualized suspicion.^{FN24} True, the *Knights* Court could just as well have followed *Griffin's* lead and justified the search on the basis of the state's special need to operate its probation system. However, given the presence of individualized suspicion, either doctrinal approach was appropriate. Because the DNA Act's authorized blanket searches are not supported by any modicum of individualized suspicion, I would hold that the “special needs” line of cases controls our analysis of this case, and that the totality of the circumstances test may not be applied.

^{FN24}. Whether the state may authorize suspicionless searches of the homes of probationers and parolees remains an unanswered question. *See Knights*, 534 U.S. at 119 n. 6, 122 S.Ct. 587; *see also United States v. Crawford*, 323 F.3d 700 (9th Cir.2003) (holding that suspicionless

searches of probationers and parolees violates the Fourth Amendment), *reh'g granted, vacated by* 343 F.3d 961 (9th Cir.2003); 372 F.3d 1048, 2004 WL 1375521 (9th Cir. Jun 21, 2004) (en banc) (assuming over the objection of several concurring judges, but not deciding, that such searches violate the Fourth Amendment, but holding that the evidence challenged was too attenuated to be deemed a product of the search).

B. The Dangers of Adopting the Totality of the Circumstances

The rationale employed by the plurality would set us on a dangerous path. The *864 plurality claims that the totality of the circumstances analysis applies simply because probationers and parolees have reduced expectations of privacy. If that is the case, it is impossible to see why a similar test would not apply in a multitude of other circumstances in which no individualized suspicion exists. I do not mean to suggest that the application of the totality of the circumstances test is dangerous per se. As I have explained, courts have traditionally balanced all of the relevant circumstances when evaluating the sufficiency of an officer's suspicion to search in the absence of a warrant or determining whether reasonable suspicion rather than probable cause is sufficient. The danger in the plurality's approach lies in its willingness to apply the totality of the circumstances test to uphold law enforcement searches where no suspicion at all exists. Under such an approach, all of us would inevitably have our liberty eroded when our privacy interests are balanced against the “monumental” interests of law enforcement.

The plurality's rationale, if employed in future cases, would result in the end of the Fourth Amendment's general requirement that searches be based on individual suspicion. Under the plurality's reasoning, “the judicial assessment of a parole or probation search's reasonableness outside the strictures of special needs analysis,” *ante* at 832, is justified by the fact that conditional releasees have “diminished expectations of privacy.” If reduced expectations of privacy render inapplicable the requirement of individualized suspicion, then suspicionless searches would be valid in many more situations than the

plurality would presently be willing to admit.

The Court has identified countless groups of individuals who have reduced expectations of privacy. Conditional releasees are obviously one such group. See [Morrissey v. Brewer](#), 408 U.S. 471, 478, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). But they are not the only one. All students who attend public schools have significantly diminished expectations of privacy, [Bd. of Educ. v. Earls](#), 536 U.S. 822, 830-31, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002), and students who voluntarily participate in extracurricular activities have even less of an expectation, see [id.](#) at 831-32, 122 S.Ct. 2559.^{FN25} Drivers and passengers of vehicles have reduced expectations of privacy. See, e.g., [Wyoming v. Houghton](#), 526 U.S. 295, 303, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999); [Pennsylvania v. Labron](#), 518 U.S. 938, 940, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996). Arrestees' privacy expectations, too, appear to be significantly reduced. See [Chimel v. California](#), 395 U.S. 752, 762-63, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). These are but a few examples. Under the analysis engaged in by the plurality, a totality of the circumstances test would apply to any suspicionless search regime involving these groups. Certainly, the totality of the circumstances test would apply when we are forced to review again the DNA Act once it is expanded, as it inevitably will be, to require DNA samples from all arrestees—a particularly frightening prospect when one considers that the Constitution apparently allows police officers to arrest individuals for a nearly limitless range of conduct, including refusing to provide one's name to an inquiring law enforcement official. See [*865 Hiibel v. Sixth Judicial Dist. Court of Nevada](#), 542 U.S. 177, 124 S.Ct. 2451, 159 L.Ed.2d 292, 2004 WL 1373207 (June 21, 2004); see also [Atwater v. City of Lago Vista](#), 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001).

^{FN25} The fact that the school search cases, such as *Earls* and its predecessors, are considered paradigm “special needs” cases is further evidence that the level of privacy an individual, or a group of individuals, expects cannot be the deciding factor in whether a totality of the circumstances analysis applies.

If the totality of the circumstance test could be used to justify suspicionless law enforcement searches, the

Fourth Amendment would be little more than an afterthought as the government seeks to conduct more and more invasive general programs in the name of law enforcement. This would be so even if the searches, at least initially, were confined to persons with reduced expectations of privacy. We have already seen the expansion of CODIS and the DNA Act—an expansion that today is authorized by my colleagues under the Fourth Amendment. Even worse, if such expansion is possible with respect to forcible extractions of blood to be included in CODIS, numerous less or equally intrusive methods of evidence collection—namely, all ordinary searches and seizures except perhaps for those requiring more extensive bodily invasions—will all be valid when justified by the government's “persuasive” law enforcement objectives—at least for the vast majority of us who at some times or others in our lives have a reduced expectation of privacy. Indeed, in the face of “monumental” governmental law enforcement interests, I find it difficult to understand when suspicionless searches would be found to violate the Fourth Amendment.

The plurality's answer to this is not reassuring: “Where a given search or class of searches cannot satisfy the traditional totality of the circumstances test, conditional releasees may lay claim to constitutional relief—just like any other citizen.” *Ante*, at 834-835.^{FN26} The problem with my the plurality's view is that under the balancing analysis it has performed, it is difficult to imagine how privacy interests could ever prevail over law enforcement needs.

^{FN26} The plurality also contends that ample protections for conditional releasees remain in the form of “a right of privacy against government searches and seizures that are arbitrary, a right of privacy against searches and seizures that are capricious, and a right of privacy against searches and seizures that are harassing.” *Ante*, at 835 (quoting [United States v. Crawford](#), 372 F.3d 1048 (9th Cir.2004) (en banc) (Trott, J., concurring)). It is no doubt true that conditional releasees retain a right of privacy against arbitrary or harassing searches, just as they retain a right of privacy against government searches based on their race, religion, or ethnicity, or other

factors that might violate the Fourteenth Amendment. [U.S. CONST. amend. XIV](#). The problem with the plurality's view, of course, is that the Fourth Amendment prevents searches that are "unreasonable," not simply searches that are arbitrary, capricious, or harassing. [U.S. CONST. amend. IV](#). And while few suspicionless programmatic searches would count as arbitrary or capricious, many may well be constitutionally unreasonable because of the underlying programmatic purpose. *See, e.g., Ferguson*, 532 U.S. at 81-82, 121 S.Ct. 1281. The fact that conditional releasees will retain their basic equal protection and due process rights is no reason to eviscerate the core of traditional Fourth Amendment protections against unreasonable searches and seizures.

The claim that conditional releasees will somehow be able to file a lawsuit under 28 U.S.C. § 1983 is not credible. Even if the plurality did not assert that there is an "overwhelming" and "monumental" public interest in completing a comprehensive national DNA database, it is utterly implausible to think that any court would find that a search conducted pursuant to a statute like the DNA Act, or a general traffic regulation such as the ones at issue in *Edmond* and *Lidster*, could possibly violate communal standards of "fair play and decency." *Ante* at 834-835 & n. 29. Additionally, the availability of a cause of action under § 1983 is not a justification to deny an individual his Fourth Amendment rights.

Here, the plurality proclaims that the search in question consists only of the physical piercing of an individual's skin in order to extract his blood. Despite the obvious privacy intrusions suffered by *866 those whose data are included in a permanent governmental database, with which the government can conduct repeated searches of the individual's genetic profile forever, the plurality concludes that the Fourth Amendment intrusion constitutes an "insignificant" invasion of privacy. If the invasion were insignificant, the government would not need to do much to show that its interests made the "insignificant" search reasonable. According to the plurality, however, society has an "overwhelming interest" in ensuring that conditional releasees comply with the terms of their release, an "enormous interest in reducing recidivism," and a substantial

interest in contributing to the solution of past offenses in order to bring "closure to countless victims of crime." *Ante*, at 838-839. The combined weight of these interests, we are told, is "monumental." *Id.* at 839. So, likely, would be the law enforcement interests in *any* suspicionless search regime.^{FN27}

^{FN27} The plurality, however, claims that the significant difference between normal citizens and convicted offenders factors heavily in the totality of the circumstances analysis, and therefore that the test is not nearly as expansive as I have claimed. No one should take solace from this assertion. There is no difference in kind, only one of degree, between conditional releasees and the countless other groups of individuals who have been found to possess limited expectations of privacy. And while school children or applicants for federal positions arguably possess *more* privacy than conditional releasees, the plurality is fundamentally unable to explain how higher expectations of privacy which still fall considerably short of a "full" expectation of privacy will be sufficient to trump the awe inspiring law enforcement interests found by the plurality to be advanced by the DNA Act and, undoubtedly, by other statutes designed to provide law enforcement with more effective modern tools. If the totality of the circumstances test really were the "traditional" Fourth Amendment test regardless of the absence of suspicion, and if the special needs doctrine really were made inapplicable when the group targeted by a blanket suspicionless search regime has diminished expectations of privacy, it would be difficult to subject suspicionless searches to serious Fourth Amendment scrutiny in the future.

The impotence of judicial review under the "totality of the circumstances" approach is on full display in the plurality's opinion. The "balancing of interests" does not provide much of a balance-to the contrary, any reasonable reading of the plurality's decision reveals that the "balance" will always tilt in favor of the government. "There have been powerful hydraulic pressures throughout our history that bear

heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.” [Terry v. Ohio, 392 U.S. 1, 39, 88 S.Ct. 1868, 20 L.Ed.2d 889 \(1968\)](#) (Douglas, J., dissenting). The plurality's boundless regime has already buckled under the pressures to strengthen the hand of law enforcement; it will only worsen as the “war on terror” demands more. I see no reason to depart from the workable constitutional framework, supported by generations of considered jurisprudence on the matter, for determining when suspicionless programmatic searches are permissible and when they are not. I would limit our inquiry to the special needs test.

C. Even Under the Totality of the Circumstances Test, the Searches Authorized by the DNA Act Are Unreasonable

Although the test used by the plurality provides no meaningful guidance, I believe that even under that standard a faithful application of the principles central to the Fourth Amendment would require invalidation of the search regime. Under a balancing test, whether a given search is reasonable turns on several factors—the *867 level of the searched individual's expectation of privacy, the character of the intrusion, and the strength of the government's interests—all of which must be balanced against each other in light of the facts of each case. Balancing those factors, I would hold that the totality of the circumstances makes the searches authorized by the DNA Act unreasonable.

1. The Extent of the Intrusion Caused by the Search

The intrusion authorized by the DNA Act is significant. As the Supreme Court explained in [Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 \(1989\)](#), “a compelled intrusion into the body for blood to be analyzed ... must be deemed a Fourth Amendment search. In light of our society's concern for the security of one's person, it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable.” [Id. at 616, 109 S.Ct. 1402](#) (internal quotation marks omitted); see also [Schmerber v. California, 384 U.S. 757, 767, 86 S.Ct. 1826, 16 L.Ed.2d 908 \(1966\)](#); [United States v.](#)

[Wright, 215 F.3d 1020, 1025 \(9th Cir.2000\)](#). Even though the Court has in some cases upheld such searches as constitutional, it has insisted that searches of an individual's body are “severe, though brief, intrusion[s] upon cherished personal security that [are] subject to constitutional scrutiny.” [Cupp v. Murphy, 412 U.S. 291, 295, 93 S.Ct. 2000, 36 L.Ed.2d 900 \(1973\)](#).

It is true that courts have sometimes described the privacy invasion caused by blood tests in less forceful terms. The search in question, however, constitutes far more of an intrusion than the mere insertion of a needle into an individual's body and the consequent extraction of a blood sample.^{FN28} In prior cases dealing with the level of intrusion authorized by the taking of blood samples, courts did not confront a regime in which the samples were turned into profiles capable of being searched time and time again throughout the course of an individual's life. See, e.g., [Schmerber, 384 U.S. at 768-69, 86 S.Ct. 1826](#) (describing the blood test as designed to produce evidence of inebriation at the time of the search). The startling advance of technology has magnified the power of the initial search authorized by the DNA Act, such that the invasion of privacy is vastly more significant than we might have previously assumed. Here, the DNA placed in the CODIS database contains sensitive information, and no one can say today what future uses will be made of it once it is entered into governmental files; certainly, today's restrictions provide no guarantees regarding future governmental uses. To reduce the searches authorized by the DNA Act to the physical act of taking blood would be to ignore the “totality of the circumstances” surrounding the search and to ignore the manner in which “the advance of technology” has affected “the degree of privacy secured to citizens by the Fourth Amendment.” [Kyllo v. United States, 533 U.S. 27, 33-34, 121 S.Ct. 2038, 150 L.Ed.2d 94 \(2001\)](#). We cannot ignore technological developments in the Fourth Amendment context, but instead must confront “what limits there are upon this power of technology to shrink the realm of guaranteed privacy.” [Id. at 34, 121 S.Ct. 2038](#).

^{FN28}. Certainly, it constitutes far more of an intrusion than merely requiring an individual to identify himself. See [Hibel, 542 U.S. 177, 124 S.Ct. 2451, 159 L.Ed.2d 292](#), and [Brown, 443 U.S. at 52, 99 S.Ct.](#)

[2637](#) (requiring reasonable suspicion for such an inquiry).

I would hold that the invasion of privacy required by the DNA Act is substantial. *868 The Act is unprecedented in its scope and threatens only to expand once we have justified its initial forms. With the substantial nature of the invasion in mind, I turn to the reasonable expectations of privacy held by probationers and parolees.

2. *The Expectation of Privacy*

It is by now a banal observation that probationers and parolees have diminished expectations of privacy. See *United States v. Knights*, 534 U.S. 112, 119, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001). As *Knights* explained, probationers' and parolees' expectations of privacy are curtailed, and society may therefore impose "reasonable conditions that deprive the offender of *some* freedoms enjoyed by law-abiding citizens." *Id.* at 119, 122 S.Ct. 587 (emphasis added). But the error the plurality makes is treating a reduction of "some freedoms" as if it were equivalent to the elimination of all. Despite my colleagues' evident views to the contrary, conditional releasees do retain privacy expectations. All of the authorities cited by the plurality discuss the *reduced*, not the "eliminated," expectations of privacy conditional releasees have during their period of supervision by the state. See, e.g., *id.* at 118-19, 122 S.Ct. 587 (emphasizing that the most salient fact in its totality of the circumstances analysis was that *Knights* was subject to a "probation search condition" that "significantly diminished [his] reasonable expectation of privacy"); *Griffin*, 483 U.S. at 874, 107 S.Ct. 3164; *Latta v. Fitzharris*, 521 F.2d 246, 249 (9th Cir.1975) (en banc) (plurality opinion).

Moreover, the impact of the DNA Act is not limited to persons in a conditional release status. It affects individuals who have completed their period of supervision, as well as some who have never been subject to that status. The data of some arrestees are now included in CODIS and there is little doubt that the collection of data from far more will soon be completed. In any event even probationers and parolees have full expectations of privacy once they have paid their dues to society and have completed their terms of conditional release. The plurality, however, has concluded that "such a severe and

fundamental disruption in the relationship between the offender and society, along with the government's concomitantly greater interest in closely monitoring and supervising conditional releasees, is in turn sufficient to sustain suspicionless searches of his person and property even in the absence of some non-law enforcement 'special need' " *Ante*, at 834-835. In other words, convicted offenders' reduced privacy expectations may last forever.

I respectfully disagree with the plurality's assessment of the privacy expectations held by individuals subjected to searches under the DNA Act. I conclude that despite probationers' and parolees' diminished expectations of privacy, those expectations they retain must be given sufficient weight in the balancing process.

3. *The Governmental Interests*

I now turn to the government's interests in conducting the searches in question. The plurality has described these interests as "enormous," "overwhelming," and "monumental." Certainly, one would think that such interests involve the prevention of a terrorist act, the defusing of a ticking bomb, the discovery of the missing weapons of mass destruction, or something similarly weighty. Not so. According to the plurality, these words describe the normal, everyday needs of law enforcement—preventing crimes, encouraging rehabilitation, and bringing closure to victims by solving old crimes. I agree that the government has a very strong interest in solving and deterring crime. But I disagree that the *869 interests sought to be advanced by the DNA Act are anything other than the ordinary needs advanced in favor of every program designed to assist crime control. See *supra*, at 856-857 (describing the Act's primary purpose).

In order to make the government's interests appear stronger than they are, the plurality contends that searches pursuant to the Act serve the commendable purpose of ensuring that the innocent will not be wrongly convicted. See *ante*, at 839 n. 38. I would certainly hope that the Act would be used for such purposes. Recent experience has shown that DNA evidence can help exonerate the wrongfully convicted,^{FN29} and I would be the first to applaud a statute that helped wrongfully accused or convicted individuals obtain DNA analysis for that worthy purpose.

[FN29](#), See [Tolbert v. Gomez](#), 190 F.3d 985, 990 (9th Cir.1999) (Hawkins, J., concurring) (citing instances in which “prisoners [were] released when scientific tests show they could not have committed the crime of which they were convicted”).

Unfortunately, that is not the Act we review today. The DNA Act does nothing to assist the wrongfully accused or convicted. The Act provides no option for DNA testing to those who seek to prove their innocence, and no funding to states or localities to help provide DNA sampling when requested by those who contend that were wrongfully arrested or convicted. It simply requires the collection and maintenance of blood samples from those in our society the state believes to be the most likely to commit crimes. It is thus difficult to accept the government's representation of its concerns regarding the innocent.

It is undoubtedly true that were we to maintain DNA files on all persons living in this country we would make the resolution of criminal investigations easier.^{[FN30](#)} The same would be true were we willing to sacrifice all of our interests in privacy and personal liberty. Those who won our independence chose, however, not to follow that course but instead to provide us with the safeguards contained in the Fourth Amendment. We as judges do not have the authority to sacrifice those constitutional protections.

[FN30](#). Incidentally, the argument that the reliability of a certain types of evidence justifies a relaxed Fourth Amendment standard has been made before and rejected. See [Davis](#), 394 U.S. at 723-24, 89 S.Ct. 1394 (explaining that “we find no merit in the suggestion ... that fingerprint evidence, because of its trustworthiness, is not subject to the proscriptions of the” Fourth Amendment).

D. Summary

Were we to apply the totality of the circumstances analysis, I would hold that the balance of considerations makes the programmatic suspicionless searches unconstitutionally unreasonable. The invasions of privacy the Act authorizes are

substantial; the probationers and parolees subjected to its provisions maintain reasonable expectations of privacy; and the government's interest, while significant, is no stronger than its ordinary interest in investigating and prosecuting crimes. On balance, the government's desire to create a comprehensive DNA databank must give way when weighed against the privacy interests at issue and the extent of the intrusion involved.

When democratic values are lost, society often looks back, too late, and says when did this happen-why didn't we understand before it was too late? Today's decision marks one of those turning points-a fatally unwise and unconstitutional surrender to the government of our liberty for the sake of security, and, should the plurality's theory ever become law, the establishment*[870](#) of a doctrine that would leave us without the legal tools to halt further abolition of our privacy rights. The compulsory extraction of blood samples and the maintenance of permanent DNA profiles of American citizens is, unfortunately, the beginning not the end. 1984 arrives twenty years later than predicted.

IV. Conclusion

Thomas Cameron Kincade was convicted of committing several crimes. He has paid his debt to society by serving his time for those offenses. His current term of supervised release, which ironically was imposed on him for his refusal to submit a blood sample as required by the DNA Act, will expire shortly after the publication of these opinions on August 24, 2004. At that time, the state will cease to have a supervisory interest over Kincade. Yet Kincade, by the terms of the DNA Act, 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. Every time new evidence is discovered from a crime scene, the government will search Kincade's genetic code to determine whether he has committed the crime-just as the government might search his house for evidence linking him to the crime scene-despite the fact that the government may never have cause to suspect him again. Moreover, the maintenance of his DNA will permit a myriad of other known and unknown uses of the samples, by governmental authorities, as technology evolves, in violation of his full future expectation of privacy.

In truth, the DNA Act was not enacted to meet the supervisory needs of the probation system, and no-one seriously suggests that it was. It was not established to help rehabilitate convicted offenders, and no-one seriously makes that suggestion either. Finally, it was not enacted to deter future criminal activity, and no-one seriously suggests that such is the reason it was adopted. The Act was created to help law enforcement officials solve unsolved crimes. This case is not about supervising a group of individuals with reduced expectations of privacy. It is about whether the government may invade an individual's body and compel him to surrender sensitive information for inclusion in a permanent centralized government database in order to further the state's law enforcement interests.

The plurality's determination that the government may collect and store this information given the "totality of the circumstances," dismantles the structural protections that lie at the core of the Fourth Amendment. We have always required individual suspicion for searches designed to produce ordinary evidence of criminal wrongdoing. We have never allowed blanket suspicionless searches to be justified by the need to investigate and prosecute more efficiently past and future crimes. My colleagues would abandon the restraints that the special needs doctrine places on the government's ability to conduct blanket searches. In that doctrine's place, they would leave us with nothing more than a boundless test that will inevitably side with the "monumental" law enforcement interests at stake and with the empty promise that the state will exercise restraint if the circumstances ever so demand.

It is always tempting to grant the government more authority to fight crime. 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—those barriers often constitute the only protections against governmental intrusions into the most intimate details of our lives. *871 DNA evidence contains such details. I therefore cannot agree that the Act is constitutional and cannot join in the plurality's enthusiastic approval of the use of suspicionless searches for law enforcement ends. Nor, of course can I join in Judge Gould's paradoxical conclusion that the use by law

enforcement officers of compulsorily extracted blood samples as a tool in the investigation of crimes is not for a law enforcement purpose.

There were valid reasons for the Founders' decision to establish a preference for probable cause in the Fourth Amendment and for the Court's decisions to demand some sort of individualized suspicion to support programmatic searches undertaken for law enforcement purposes. I continue to believe that, in the absence of a constitutional amendment, those reasons should guide our decision. See [Terry, 392 U.S. at 38-39, 88 S.Ct. 1868](#) (Douglas, J., dissenting) ("Perhaps such a step is desirable to cope with modern forms of lawlessness.... Until the Fourth Amendment ... is rewritten, the person and the effects of the individual are beyond the reach of all government agencies until there are reasonable grounds to believe (and probable cause) that a criminal venture has been launched or is about to be launched.").

Finally, no one should take comfort from the fact that today's decision is well-intentioned-or that it is purportedly limited to convicted offenders. As Justice Brandeis once wrote,

it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

[Olmstead v. United States, 277 U.S. 438, 479, 48 S.Ct. 564, 72 L.Ed. 944 \(1928\)](#) (Brandeis, J., dissenting). The erosion of conditional releasees' liberty makes us all less free.

Privacy erodes first at the margins, but once eliminated, its protections are lost for good, and the resultant damage is rarely, if ever, undone. Today, the court has opted for comprehensive DNA profiling of the least protected among us, and in so doing, has jeopardized us all. I respectfully dissent.

[KOZINSKI](#), Circuit Judge, dissenting:

New technologies test the judicial conscience. On the one hand, they hold out the promise of more effective

law enforcement, and the hope that we will be delivered from the scourge of crime. On the other hand, they often achieve these ends by intruding, in ways never before imaginable, into the realms protected by the Fourth Amendment. Which is no doubt why the Supreme Court has told us to be wary of “this power of technology to shrink the realm of guaranteed privacy.” [*Kyllo v. United States*, 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 \(2001\)](#).

The heat sensor technology at issue in *Kyllo* was a promising new tool for law enforcement, except for one small defect: It let the police get information about what was going on inside people's homes—something the Fourth Amendment generally prohibits without a warrant. DNA fingerprinting is another case in point. The good news is that it lets police identify people far more easily than would be possible using retro technology. The bad news is that those people could well be us.

Once Kincade completes his period of supervised release, he becomes an ordinary*872 citizen just like everyone else. Having paid his debt to society, he recovers his full Fourth Amendment rights, and police have no greater authority to invade his private sphere than anyone else's. The difficult question is whether the government may exploit Kincade's diminished Fourth Amendment rights while he is still a probationer to obtain his DNA signature, so it can use it in investigating thousands of crimes nationwide, past and future, for the rest of Kincade's life. Displaying an exuberant faith in the positive power of technology, the plurality opinion answers this question with a resounding yes, but I remain skeptical. Stripped of its bells and whistles, the plurality's theory seems to be this: We have a pretty good idea that people who have committed crimes in the past are more likely than others to commit crimes in the future. It is thus very, very, very useful for us to get their DNA fingerprints now so we can use them later to investigate crimes.

But if we accept the legal presumption-not questioned here by anyone—that once Kincade leaves supervised release he will be just like everyone else, authorizing the extraction of his DNA now to help solve crimes later is a huge end run around the Fourth Amendment. Or, to state it in reverse, if the reason for taking Kincade's DNA while he's on supervised release is that it will help solve crimes later, it seems

equally justifiable to take his blood after he comes off supervised release. Ex-probationers are just as likely to commit crimes as people now on probation, and including them in the CODIS database would surely help solve even more crimes. Balancing the minor intrusion the plurality sees from the taking of blood—a mere pin-prick—against the “monumental” benefits to society, *op. at 839*, it is unclear how the balance could be struck any differently as to ex-probationers than as to current ones.

Which brings us to the people we really need to worry about, namely you and me. If collecting DNA fingerprints can be justified on the basis of the plurality's multi-factor, gestalt high-wire act, then it's hard to see how we can keep the database from expanding to include everybody. Of course, anyone who already has to give up bodily fluids for alcohol or drug testing—airline pilots, high school athletes, customs inspectors and people suspected of driving while intoxicated—would be easy prey under the mushy multi-factor test. But, with only a little waggling, we can shoehorn the rest of us in. As the plurality notes, blood is taken from us from the day we are born pretty much till the day we die, and on many days in between. What exactly happens to that blood after it leaves our veins? Most of us don't know or care, presuming (if we consider it at all) that whatever isn't used for testing is discarded. But what if Congress were to require medical labs to submit the excess blood for DNA fingerprinting so it can be included in CODIS?

Applying the plurality's balancing analysis, I'm hard pressed to see how this would violate anyone's Fourth Amendment rights. The benefits would continue to be huge. The more DNA samples are included in the database, the better off we are: More guilty parties will be found, more innocents will be cleared and more unknown crime victims will be identified. On the other side of the ledger, the costs would be meager. By glomming onto blood already extracted for other purposes, the government would have eliminated what the plurality identifies as the most serious negative factor—the piercing of the skin. *Op. at 836-38*. Moreover, it's hard to say that most of us have any expectation as to what happens to our blood once it leaves our veins in the doctor's office; we certainly don't expect it to be returned to us. Arguably, we have no more reasonable expectation of privacy in *873 blood turned over to third parties

and abandoned than we do in our trash cans or bank records. See [California v. Greenwood](#), 486 U.S. 35, 39-41, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988) (no reasonable expectation of privacy in materials left on public street, like garbage); [United States v. Miller](#), 425 U.S. 435, 442-43, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976) (no reasonable expectation of privacy in material conveyed to third party, like bank records, even if conveyed in confidence and for a limited purpose). And without a reasonable expectation of privacy, there isn't even a "search" for Fourth Amendment purposes. [Kyllo](#), 533 U.S. at 31-33, 121 S.Ct. 2038. Which is why it is important to recognize that the Fourth Amendment intrusion here is not primarily the taking of the blood, but seizure of the DNA fingerprint and its inclusion in a searchable database.

The plurality's approach will cut even closer to home as our techniques for extracting DNA improve and identifying information can more easily be obtained from urine and saliva, or from hair follicles inadvertently pulled out during a visit to the barber or hairdresser. As the plurality points out, op. at 838 n.37, we can't go anywhere or do much of anything without leaving a bread-crumbs trail of identifying DNA matter. If we have no legitimate expectation of privacy in such bodily material, what possible impediment can there be to having the government collect what we leave behind, extract its DNA signature and enhance CODIS to include everyone? Perhaps my colleagues in the plurality feel comfortable living in a world where the government can keep track of everyone's whereabouts, or perhaps they believe it's inevitable given the dangers of modern life. But I mourn the loss of anonymity such a regime will bring.

This isn't an issue we can leave for another day. Later, when further expansions of CODIS are proposed, information from the database will have been credited with solving hundreds or thousands of crimes, and we will have become inured to the idea that the government is entitled to hold large databases of DNA fingerprints. This highlights an important aspect of Fourth Amendment opinions: Not only do they reflect today's values by giving effect to people's reasonable expectations of privacy, they also shape future values by changing our experience and altering what we come to expect from our government. A highly expansive opinion like the plurality's, one that

draws no hard lines and revels in the boon that new technology will provide to law enforcement, is an engraved invitation to future expansion. And when that inevitable expansion comes, we will look to the regime we approved today as the new baseline and say, this too must be OK because it's just one small step beyond the last thing we approved. See Eugene Volokh, [The Mechanisms of the Slippery Slope](#), 116 *Harv.L.Rev.* 1026, 1077-1114 (2003). My colleagues in the plurality assure us that, when that day comes, they will stand vigilant and guard the line, but by then the line-never very clear to begin with-will have shifted. The fishbowl will look like home.

Anyone who doubts that CODIS will expand, prodded by the voracious appetite of law enforcement, has only to consider the growth of fingerprint databases. In 1924, when J. Edgar Hoover became head of what was to become the FBI, the Justice Department's fingerprint files contained only prints of those who had at some point passed through the criminal justice system. Hoover, who favored universal fingerprinting, moved to expand the database and aggressively lobbied local law enforcement officials to submit prints to the FBI. He took a further step in 1929 *874 and began fingerprinting all civil servants. The Alien Registration Act, passed in 1940, eventually delivered over a million prints to the FBI. See Simon A. Cole, *Suspect Identities: A History of Fingerprinting and Criminal Identification* 246-47 (2001). Today, the FBI's Integrated Automated Fingerprint Identification System contains the fingerprints of over 47 million people, including prints "acquired related to a background check for employment, licensing, and other non-criminal justice purposes" and "submitted voluntarily by state, local, and federal law enforcement agencies." U.S. Dep't of Justice, Fed. Bureau of Investigation, *IAFIS*, at <http://www.fbi.gov/hq/cjisd/iafis.htm> (last visited Aug. 4, 2004). Several states require fingerprints of all drivers' license applicants. See, e.g., [Cal. Veh.Code § 12517.3\(a\)\(1\)](#); [Colo.Rev.Stat. § 42-2-107\(2\)\(a\)](#); [Tex. Transp. Code § 521.142\(b\)\(1\)](#). California all by itself has the prints of over 22 million drivers' license holders on file, see Dep't of Motor Vehicles, *Driver Licenses Outstanding by County* (2003), at <http://www.dmv.ca.gov/about/profile/dl-outs-by-county.htm>, as well as the prints of lawyers, [Cal. Bus. & Prof.Code § 6054](#), and certain welfare recipients, [Cal. Welf. & Inst.Code § 10830\(b\)\(1\)](#). See also Nat'l Conf. of State Legislatures, *Biometrics*

Implementation Legislation by State (2002), at <http://www.ncsl.org/programs/esnr/licenseD.htm>. Not all these fingerprint databases are currently in searchable form, but given our improving ability to store biometric identifiers electronically, it's only a matter of time.

Because the great expansion in fingerprinting came before the modern era of Fourth Amendment jurisprudence ushered in by *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), it proceeded unchecked by any judicial balancing against the personal right to privacy. As a consequence, we have become accustomed to having our fingerprints on file in some government database. The suggestion that law enforcement agencies, including the FBI, must destroy the fingerprints of those who were wrongfully arrested and booked, and were later released, would today be greeted by reactions ranging from apathy to a disdainful snigger. Why? Because we have come to accept that people—even totally innocent people—have no legitimate expectation of privacy in their fingerprints, and that's that.

Judge Gould commendably recognizes the troubling implications of using Kincade's status today to extract his DNA for use after he ceases to be on supervised release, but leaves for another day whether Kincade might be entitled to have his DNA removed from CODIS once his status changes. Had the government sought to justify the extraction of the DNA as a measure for ensuring Kincade's compliance with the terms of his supervised release, I would be tempted to agree with Judge Gould. But the government did not do such thing. Kincade's probation officer did not seek to have Kincade's DNA extracted to better supervise him—blood extraction for DNA typing purposes was not an explicit probation condition, nor was there any showing that the probation officer had determined that extracting Kincade's blood and typing his DNA was necessary or desirable to improve his chances of successfully completing probation. The record clearly shows that the probation officer ordered Kincade to submit a blood sample only to comply with the DNA Act. The government thus seeks to justify the blood extraction precisely so his DNA will be available in the CODIS database for the rest of his life.

The plurality enthusiastically accepts this justification and thus has already answered*875 the question

Judge Gould would keep in reserve. As a practical matter, moreover, the chance that Kincade could have his DNA removed from the CODIS database once he completes his supervised release is about the same as the chance that someone arrested and fingerprinted, but eventually found innocent, could force the FBI to delete his fingerprints from its database, namely nil. While I sympathize with Judge Gould's reluctance to speak on an issue that might be better resolved later, on this record we have no choice: The extraction of Kincade's blood for DNA typing must be justified on the ambitious grounds advanced by the government and accepted by the plurality, or not at all. For the reasons eloquently expressed by Judge Reinhardt in his dissent, and those stated above, I cannot agree that the suspicionless extraction of blood to include Kincade's DNA in the CODIS database can be upheld under the Fourth Amendment. The time to put the cork back in the brass bottle is now—before the genie escapes.

HAWKINS, Circuit Judge, dissenting:

We are asked whether the forced extraction of blood from certain convicted felons, as a condition of supervised release and for the purpose of retention without time limit in a national DNA database, violates the Fourth Amendment. My colleagues have written exhaustively and well on the subject. My purpose is not necessarily to replot their ground, but to set forth my own thoughts on this difficult question.

Asking convicted felons to provide proof of identity, whether by fingerprint or DNA sample, should be viewed, as Judges Gould and Reinhardt both persuasively argue, through the lens of the “special needs” doctrine. In the abstract, I have no quarrel with the notion that this could be a reasonable exercise of government power under contemporary Fourth Amendment standards. The forcible extraction of blood, however, not mandated by Congressional command, but by dictates of law enforcement efficiency, is different. Beginning with *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the Supreme Court has recognized that while a lawfully arrested person may have lessened expectations of privacy and be subject to other searches incident to arrest, 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. *Id.* at 769-70, 86

[S.Ct. 1826](#); see also [Skinner v. Ry. Labor Executives' Ass'n.](#), 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (“[I]t is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable.”). While convicted felons certainly have lessened expectations of privacy, the legitimate governmental needs identified by the majority and by Judge Gould simply do not, in my view, justify this particular type of intrusive, suspicionless search.

Judge Gould properly questions whether it is reasonable to retain the sample beyond the period of supervised release-in perpetuity, according to this record. I agree with Judge Reinhardt, however, that this case does present that issue. Although Kincade is currently on supervised release, we cannot ignore that the data obtained from him while in that status will be stored and used long beyond that period of time. This use will not serve the special needs identified by Judge Gould, but the “general interest in law enforcement” that the Court has held cannot justify suspicionless searches. See, e.g., *[876 Ferguson v. City of Charleston](#), 532 U.S. 67, 79, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001).^{FN1}

^{FN1}. While *Ferguson* and most of the Court's special needs cases have involved the population at large, rather than those on supervised release, I do not believe that distinction carries the day; as Judge Reinhardt notes, the privacy expectations of convicted felons are reduced, not eliminated.

Enforcing the Constitution is neither a popularity contest nor a polling exercise. The Bill of Rights restrains government power and, along with it, law enforcement efficiency. In a world unrestrained by our Fourth Amendment, every citizen, convicted or not, might be forced to supply a DNA sample. More crimes would undoubtedly be solved, just as would be the case if there were no warrant requirement. But that is not the world that Mr. Madison and the First Congress created for us. I sincerely hope that the drastic consequences Judge Reinhardt projects will not come to pass. I do, however, agree that the DNA Act as currently implemented-forcible extraction of blood and retention without limitation-violates the Fourth Amendment. Therefore, I respectfully dissent.

C.A.9 (Cal.),2004.

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