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**CAPPING THE GOVERNMENT'S NEEDLE:
THE NEED TO PROTECT PAROLEES'
FOURTH AMENDMENT PRIVACY INTERESTS
FROM SUSPICIONLESS DNA SEARCHES IN
*UNITED STATES V. KINCADE***

I. INTRODUCTION

Imagine being suspected and arrested for *any* felony offense, which may have resulted from mistaken identity or a traffic stop.¹ You may be one of the 50,000 people arrested in California every year, but never charged with a crime.² As a result of Proposition 69, which recently passed in California, law enforcement will be authorized to collect your DNA and file it in a *criminal* database.³ DNA is the unique genetic material that contains a person's most intimate information, ranging from physical characteristics to disease disposition.⁴ Upon merely being arrested, you would relinquish possessory rights to your own DNA, which can only be removed from the criminal database through a difficult and burdensome process.⁵ The

1. PRIVACY RIGHTS CLEARINGHOUSE, WHY THE PRIVACY RIGHTS CLEARINGHOUSE OPPOSES CALIFORNIA PROPOSITION 69: "DNA SAMPLES. COLLECTION. DATABASE. FUNDING. INITIATIVE STATUTE," <http://www.privacyrights.org/ar/Prop69.htm> (updated Nov. 5, 2004). The provision calling for DNA collection of "[a]dults *arrested* for or charged with *any* felony offense" begins in 2009. *Id.*

2. *Id.*

3. *Id.*

4. See John P. Cronan, *The Next Frontier of Law Enforcement: A Proposal for Complete DNA Databanks*, 28 AM. J. CRIM. L. 119, 124–25 (2000).

5. See PRIVACY RIGHTS CLEARINGHOUSE, *supra* note 1. In order to have the DNA information removed from the database, an individual must send a formal request to the trial court of the county in which he/she was arrested, send a formal request to the DNA Laboratory of the California Department of Justice, and send a formal request to the prosecuting attorney of the county in which he/she was arrested, convicted, or adjudicated, with proof of service on all parties. *Id.* A court may even deny this request and it is *not* appealable. *Id.*

California legislative enactment illustrates the expansion of government DNA profiling.

In *United States v. Kincade*,⁶ a divided Ninth Circuit court upheld the constitutionality of the DNA Analysis Backlog Elimination Act of 2000 (“DNA Act” or “Act”).⁷ The Act requires, in part, that persons on supervised release provide blood samples for DNA profiling.⁸ Although the use of DNA in the criminal justice context has been limited to identification purposes,⁹ there is a fear that future governments may use such information to “monitor, intimidate, and incarcerate political opponents and disfavored minorities.”¹⁰ Nevertheless, the court in *Kincade* succumbed to the pressures of strengthening the hand of law enforcement, collapsing the structural protections of individual privacy rights. In effect, the court widened the path to allow over-reaching measures, such as Proposition 69, to threaten our interests in our DNA.

Thomas Kincade, a parolee, challenged the constitutionality of the Act alleging that it violated his Fourth Amendment rights because it required collecting his DNA without any reasonable suspicion he committed another crime.¹¹ The United States District Court for the Central District of California denied Kincade’s claim.¹² Then, a Ninth Circuit panel found that the DNA Act did in fact violate Kincade’s Fourth Amendment rights protecting him from unreasonable searches and seizures.¹³ Taking the case en banc, the Ninth Circuit reviewed the federal statute’s constitutionality *de novo*.¹⁴ The en banc plurality affirmed the district court’s decision,

6. 379 F.3d 813 (9th Cir. 2004) (en banc).

7. *Id.* at 839.

8. *Id.* at 816–17, 839.

9. See generally Virna M. Manuel, *State DNA Data Base and Data Bank Expansion Laws: Is it Time for California to Expand its DNA Data Base Law to Include All Convicted Felons?*, 31 W. ST. U. L. REV. 339 (2004) (discussing how “[a]ll fifty states have enacted a criminal DNA Data Base and Data Bank statute to provide for the collection and retention of DNA samples” and arguing for the expanse of DNA laws to require DNA samples from all felons and certain arrestees). *Id.* at 340.

10. *Kincade*, 379 F.3d at 848 (Reinhardt, J., dissenting).

11. See *id.* at 821.

12. *Id.*

13. *United States v. Kincade*, 345 F.3d 1095, 1113 (9th Cir. 2003), *rev’d en banc*, 379 F.3d 813 (9th Cir. 2004).

14. *Kincade*, 379 F.3d at 821 n.14.

finding the DNA Act did not rise to the level of an unconstitutional violation of Kincade's Fourth Amendment rights.¹⁵ This decision realigned the Ninth Circuit with its sister circuits and other U.S. district courts, which have upheld the constitutionality of the federal DNA Act and state statutes passed pursuant to it.¹⁶

As both national and local law enforcement agencies and state legislatures seek the aggressive expansion of DNA databases, the constitutionality of these searches and seizures remains hotly contested.¹⁷ As of December 2004, the National DNA Index System contained over 2 million convicted offender DNA profiles in its database.¹⁸ Proponents of DNA profiling herald the revolutionary impact DNA technology has had on criminal investigations and its compelling ability to exonerate wrongfully convicted criminals.¹⁹ Opponents, on the other hand, challenge such profiling on privacy and ethical concerns.²⁰

This Comment will discuss how the Ninth Circuit, in validating a suspicionless search regime with an inappropriate test, eroded the structural protections offered by the Fourth Amendment. Part II provides a factual background and the procedural posture of the case. Part III introduces the DNA Act and the federally maintained DNA database, CODIS, and discusses its purpose. Part IV examines Fourth Amendment jurisprudence, beginning with the probable cause and warrant requirements and continuing to the judicially created

15. *Id.* at 840.

16. *See, e.g.,* *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1146–47 (10th Cir. 2003); *Roe v. Marcotte*, 193 F.3d 72, 82 (2d Cir. 1999); *Nicholas v. Goord*, No. 01 Civ. 7891, 2004 U.S. Dist. LEXIS 11708, at *18–*19 (S.D.N.Y. June 24, 2004).

17. *See generally* Paul E. Tracy & Vincent Morgan, *Big Brother and His Science Kit: DNA Databases for 21st Century Crime Control?*, 90 J. CRIM. L. & CRIMINOLOGY 635 (2000) (discussing various possible scenarios ranging from having no DNA databases at all to total population inclusion, while questioning the effectiveness of DNA collection where a majority of FBI Index crimes do not have a high potential benefit from DNA testing).

18. CODIS National DNA Index System, at <http://www.fbi.gov/hq/lab/codis/national.htm> (last visited Feb. 5, 2005).

19. *See* Cronan, *supra* note 4, at 130–31.

20. *See, e.g.,* Jonathan Kimmelman, *Risking Ethical Insolvency: A Survey of Trends in Criminal DNA Databanking*, 28 J.L. MED. & ETHICS 209, 214–16 (2000) (identifying “several areas where criminal offender DNA databanking statutes may inadequately protect persons’ rights to privacy, bodily integrity, and presumptive innocence.” *Id.* at 209.).

“special needs” exception. This section also explores the application of a totality of the circumstances analysis in approving searches short of probable cause. Part V presents the *Kincade* analysis under a totality of the circumstances approach. Part VI discusses not only why the plurality applied the wrong test, but also how it applied it improperly. This section asserts that the special needs doctrine was the appropriate test. Part VII further explores the implications of the court’s test and the concerns of unconstitutional DNA profiling. Finally, this Comment concludes that a suspicionless search cannot survive Fourth Amendment scrutiny using an unprincipled totality of the circumstances test. Doing so only serves to lengthen the reach of law enforcement into the confines of privacy interests.

II. FACTUAL BACKGROUND.

After pleading guilty to his involvement in a July 20, 1993 armed bank robbery,²¹ Thomas Kincade received a ninety-seven-month sentence by the district court, followed by three years of supervised release.²² He was released from prison on August 4, 2000, and during the next year and a half, Kincade encountered problems with drug abuse.²³ On March 25, 2002, Kincade’s probation officer ordered him to submit a blood sample pursuant to the DNA Act.²⁴ Because of the nature of his crime, Kincade was lawfully subjected to the Act.²⁵ He refused to comply with the order as a matter of personal preference.²⁶ This refusal constituted an independent misdemeanor violation under the DNA Act.²⁷ At his

21. Kincade was in violation of 18 U.S.C. §§ 2113(a),(d) and 924(c)(1). *United States v. Kincade*, 379 F.3d 813, 820 (9th Cir. 2004) (en banc).

22. *Id.* In its opinion, the Ninth Circuit court recognized no constitutional difference between Kincade’s status as a supervised releasee and that of a parolee or probationer. *See id.* at 817 n.2. Thus, these terms are used interchangeably.

23. *See id.* at 820.

24. *Id.*

25. Under the DNA Act, the probation office shall collect a DNA sample from an individual, on supervised release, parole, or probation, who was convicted of a qualifying federal offense. 42 U.S.C. § 14135a(a)(2) (2000). Any felony offense involving robbery or burglary is a qualifying offense. *Id.* § 14135a(d)(1)(E).

26. *Kincade*, 379 F.3d at 820.

27. *See* § 14135a(a)(5)(A), (B) (stipulating that the criminal penalty for failure to cooperate with sample collection results in a class A misdemeanor

district court hearing, Kincade challenged the constitutionality of the Act on various grounds, including the Fourth Amendment.²⁸

The United States District Court for the Central District of California rejected Kincade's Fourth Amendment challenge of the DNA Act, finding that his refusal to submit to the probation officer's order for a blood extraction was a violation of the terms of his supervised release.²⁹ Consequently, the district court judge sentenced him to a four-month custody sentence followed by an additional two years of supervised release.³⁰ The court, however, stayed the sentence and expedited the case to the Ninth Circuit for appeal.³¹ In April 2003, while the appeal was still pending, Kincade continued to serve his supervised release and abuse drugs.³² As a result of a positive test for drug use, the district court lifted the stay, and finally forced Kincade to provide a blood sample while in custody.³³ The extraction occurred during Kincade's four-month custody sentence. He was only in custody, however, because he originally refused to submit to DNA profiling while on supervised release.³⁴ Therefore, Kincade's constitutional challenge to the Act implicated the Fourth Amendment as it applied to him as a parolee rather than as a person in custody.

Kincade's appeal went before a Ninth Circuit panel. On October 2, 2003 the court held that forced blood extractions from parolees requires individualized suspicion, and therefore the DNA Act was unconstitutional.³⁵ On January 5, 2004, a Ninth Circuit en banc hearing was granted.³⁶ On August 18, 2004, the en banc court

punishable under Title 18).

28. *Kincade*, 379 F.3d at 821 (stating that among Kincade's other constitutional challenges were claims that the DNA Act violated the Ex Post Facto Clause, separation of powers principles embodied in Article III, and the Due Process Clause).

29. *United States v. Kincade*, 345 F.3d 1095, 1098 (9th Cir. 2003), *rev'd en banc*, 379 F.3d. 813 (9th Cir. 2004).

30. *Id.*

31. *Id.* at 1098-99.

32. *See Kincade*, 379 F.3d at 821.

33. *Id.*

34. *Id.* at 820.

35. *United States v. Kincade*, 345 F.3d 1095, 1096 (9th Cir. 2003), *rev'd en banc*, 379 F.3d. 813 (9th Cir. 2004).

36. *United States v. Kincade*, No. 02-50380, 2004 U.S. App. LEXIS 89, at *1-*2 (9th Cir. Jan. 5, 2004).

held suspicionless DNA searches of parolees authorized by the DNA Act were reasonable and did not violate the Fourth Amendment.³⁷

III. THE DNA ACT AND CODIS

A. *The DNA Act*

In 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994.³⁸ This Act only authorized the collection of DNA samples from convicted offenders, crime scenes, unidentified human remains, and samples voluntarily contributed from relatives of missing persons.³⁹ This prompted Congress to consider a bill explicitly conferring upon federal law enforcement the authority to collect DNA samples not only from convicted federal offenders in custody, but also from individuals on supervised release, parole, or probation.⁴⁰ Subsequently, the provisions allowing DNA extraction from both prisoners and parolees were embodied in the DNA Analysis Backlog Elimination Act of 2000,⁴¹ which now serves as the statutory basis for forced extraction of blood samples.⁴²

In authorizing the extraction of blood, the DNA Act does not require suspicion that an individual on supervised release, parole, or probation will commit or has committed another crime.⁴³ Additionally, the DNA Act authorizes a probation officer to collect a DNA sample without requiring that such sample be used in the investigation of a particular offense.⁴⁴ Moreover, it should be noted the DNA analysis constitutes identifying “junk DNA,” which are stretches of DNA that do not encode information for the expression of traits.⁴⁵ These sites, however, are sufficient to create highly individualized DNA profiles and have the potential to reveal more

37. *Kincade*, 379 F.3d at 839–40.

38. Violent Crime Control Act, Pub. L. No. 103-322, 108 Stat. 1797 (1994) (codified as amended in scattered sections of 42 U.S.C.).

39. *See* 42 U.S.C. § 14132 (2000).

40. 146 CONG. REC. H8572, H8573 (daily ed. Oct. 2, 2000) (enacted).

41. 42 U.S.C. § 14135a (Supp. 2000).

42. *United States v. Kincade*, 345 F.3d 1095, 1097 (9th Cir. 2003), *rev'd en banc*, 379 F.3d 813 (9th Cir. 2004).

43. *See id.*

44. *See* 42 U.S.C. § 14135a(a).

45. *See United States v. Kincade*, 379 F.3d 813, 818 (9th Cir. 2004) (en banc).

genetically relevant information than purported.⁴⁶

B. CODIS: The Federally Maintained DNA Database

The Combined DNA Information System (“CODIS”) serves as the national criminal database administered by the Federal Bureau of Investigation (FBI).⁴⁷ Created in 1990, CODIS received formalized authority in 1994 to use the DNA samples collected pursuant to the *Violent Crime Control and Law Enforcement Act*.⁴⁸ Presently, the database encompasses the DNA samples authorized by the DNA Identification Act.⁴⁹ All 50 states enacted statutes creating DNA databases.⁵⁰ Data sharing between local, state, and national DNA profiles relies on a three-tiered structure.⁵¹ This structure allows the local and state agencies to operate at an individualized level according to their needs.⁵² Forty-nine of the states, along with the U.S. Army and Puerto Rico, share DNA profiles through CODIS.⁵³ Federal and local law enforcement use CODIS to match forensic crime scene samples to another crime scene sample and to match crime scene evidence to a particular offender’s DNA profile.⁵⁴

The arguments in favor of expanding the database rest on fundamental law enforcement objectives of matching crime scene evidence to a potential offender in the DNA database. Congressional records indicate the program has been vital to crime prevention and fighting efforts.⁵⁵ Offenses listed in 28 C.F.R. § 28.2 have greatly expanded the number of qualifying federal crimes beyond those originally approved by the DNA Act.⁵⁶

46. See *id.* at 849–50 (Reinhardt, J., dissenting).

47. See CODIS-Mission Statement and Background, at <http://www.fbi.gov/hq/lab/codis/program.htm> (last visited Feb. 5, 2005).

48. See *Kincade*, 345 F.3d at 1097.

49. See CODIS-Mission Statement and Background, *supra* note 47, at <http://www.fbi.gov/hq/lab/codis/program.htm>.

50. *Kincade*, 345 F.3d at 1097.

51. CODIS-Mission Statement and Background, *supra* note 47, at <http://www.fbi.gov/hq/lab/codis/program.htm>.

52. *Id.*

53. *United States v. Kincade*, 379 F.3d 813, 819 n.9 (9th Cir. 2004) (en banc).

54. *Id.* at 819.

55. See 146 CONG. REC. H12032 (daily ed. Dec. 7, 2000) (statement of Rep. Gilman).

56. See *Kincade*, 379 F.3d at 846 (Reinhardt, J., dissenting) (pointing out the majority’s failure to accurately portray the broad reach of the DNA Act).

This trend of expansion continues. Passed on November 2, 2004, Proposition 69, endorsed by California Governor Schwarzenegger, requires the collection of DNA samples from persons convicted of *any* felony offense and any person *arrested* for, charged with, or who attempt to commit felony sex and homicide offenses.⁵⁷ Moreover, the Department of Justice and President George W. Bush's DNA initiative proposes to commit more than one billion dollars over five years to implement a more efficient and expansive use of DNA technology in the criminal justice system.⁵⁸ Not only does this initiative intend to aid in testing backlogged DNA samples, it would allow states like California to continue aggressive inclusion of DNA profiles from arrestees and juvenile offenders.⁵⁹

IV. FOURTH AMENDMENT JURISPRUDENCE

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures and establishes a probable cause and warrant requirement for such activities.⁶⁰ In order for a search to be conducted, an individual must have a subjective reasonable expectation of privacy that "society is prepared to accept as reasonable."⁶¹ The Fourth Amendment protects individuals against unreasonable government intrusion into this

In a seemingly endless paragraph, the dissent provided a "sample" and "non-exhaustive" laundry list of federal crimes under 28 C.F.R. § 28.2 that expands the number of qualifying offenses under the DNA Act. *Id.* at 846-48 (Reinhardt, J., dissenting). The dissent found such crimes are susceptible to "countless possible permutations of qualifying crimes." *Id.* at 846 (Reinhardt, J., dissenting).

57. See Governor Arnold Schwarzenegger Endorses Prop. 69, *The DNA Fingerprint Initiative*, PR NEWswire, July 7, 2004 (emphasis added) (on file with the Loyola of Los Angeles Law Review), <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=109&story=/www/story/07-07-2004/0002206346&EDATE=>.

58. See Liza Porteus, *Supporters, Critics Debate DNA Database Expansion*, FOX NEWS, May 9, 2003, available at <http://www.foxnews.com/story/0,2933,86390,00.html>.

59. *Id.*

60. See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ."); see also *Kincade*, 379 F.3d at 851 (Reinhardt, J., dissenting).

61. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

privacy expectation.⁶²

“[W]hen the State’s reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue. . . .” [I]n applying the “probable cause” standard “by which a particular decision to search is tested against the constitutional mandate of reasonableness,” it is necessary “to focus upon the governmental interest which allegedly justifies official intrusion.”⁶³

In certain circumstances, however, the United States Supreme Court departed from the probable cause standard and allowed law enforcement to conduct searches based solely on reasonable suspicion. For example, the Court has applied a less demanding reasonable suspicion standard in cases where circumstances necessitated quick police action, making the warrant procedure impractical.⁶⁴ Courts adduce the reasonableness of a warrantless search by evaluating the totality of the circumstances and by specifically identifying facts supporting the intrusion.⁶⁵ A broad categorical exception to the probable cause requirement is “exempted areas,”⁶⁶ which include airport and border searches, where the Court requires a minimum level of reasonableness to justify a lawful search and seizure.⁶⁷ Similarly, the Court views the confines of prison walls to be an exempted area,⁶⁸ emphasizing the loss of privacy interests of individuals in custody.

62. *See id.*

63. *Zurcher v. Stanford Daily*, 436 U.S. 547, 554–555 (1978) (citations omitted).

64. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 20, 30 (1968) (allowing a “stop and frisk” warrantless search where the officer reasonably suspected the person was armed).

65. *See id.* at 21.

66. *United States v. Kincade*, 379 F.3d 813, 822 (9th Cir. 2004) (en banc).

67. *Id.*; *see also United States v. Ramsey*, 431 U.S. 606, 616 (1977) (maintaining that the sovereign has a right to protect its borders, and the reasonableness of searches among border crossings is by virtue of that fact); *United States v. Edwards*, 498 F.2d 496, 500–01 (2d Cir. 1974) (justifying warrantless airport searches on the basis that where there is a risk of endangering hundreds, which may result from explosives at a government building or the hijacking of an aircraft, the danger alone satisfies the test of reasonableness).

68. *See Hudson v. Palmer*, 468 U.S. 517, 525–29 (1984) (concluding that prisoners do not have expectations of privacy within their prison cells).

A. *The Special Needs Doctrine:
An Exception to the Probable Cause Requirement*

The Supreme Court decided a line of cases delineating another exception to the warrant and probable cause requirement, conferring government authority to conduct searches when a special need makes the warrant requirement impracticable.⁶⁹ The special needs doctrine balances government interests against individual privacy.⁷⁰ Where the Court deemed such intrusions minimal compared to the government interest at stake, the Court carved out exceptions for searches lacking probable cause, and in some cases, without individualized, reasonable suspicion.⁷¹ The Court has applied the special needs exception to uphold workplace searches⁷² and random drug testing of student athletes⁷³ and U.S. Customs officials.⁷⁴

In *Griffin v. Wisconsin*,⁷⁵ the U.S. Supreme Court found that the state's probation system falls within the special needs exception.⁷⁶ This permitted the state a degree of impingement upon privacy where "reasonable grounds" existed.⁷⁷ The Court held that in furthering the goals of probation—a period of parolee rehabilitation that also serves to insure community safety—a standard of reasonable grounds would replace the probable cause requirement where obtaining a warrant would be impracticable.⁷⁸

B. *Establishing a New Rule that
Curtails the Special Needs Exception*

The Supreme Court greatly curtailed the reach of the special needs doctrine in *City of Indianapolis v. Edmond*⁷⁹ and *Ferguson v.*

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

70. See Joseph S. Dowdy, *Well Isn't That Special? The Supreme Court's Immediate Purpose of Restricting the Doctrine of Special Needs in Ferguson v. City of Charleston*, 80 N.C. L. REV. 1050, 1054–58 (2002) (suggesting that the doctrine has been limited over time).

71. See *id.* at 1054–56.

72. *O'Connor v. Ortega*, 480 U.S. 709 (1987).

73. *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

74. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

75. 483 U.S. 868 (1987).

76. *Id.* at 873–74.

77. See *id.* at 875.

78. See *id.* at 872–73.

79. 531 U.S. 32 (2000).

City of Charleston.⁸⁰ In *Edmond*, the Court was unwilling to justify a regime of suspicionless stops under the ambit of “general interest in crime control” where roadblocks set up by law enforcement primarily served to interdict narcotics.⁸¹ In *Ferguson*, the Court held that a state hospital’s screening program implemented to detect the presence of cocaine in pregnant women primarily for the purpose of supplying the results to law enforcement unconstitutionally intruded on the patients’ reasonable expectations of privacy.⁸² Concerned with the primary purpose of the program and the extensive involvement of police in the administration of the policy, the Court held the searches did not fall within the special needs exception.⁸³

Finding that the special needs category is a closely guarded one, the Court in both *Edmond* and *Ferguson* added a new requirement to the special needs analysis: the immediate objective inquiry.⁸⁴ Thus, where the Court determines that the immediate objective of a suspicionless search is a general law enforcement end, it will not recognize a special need justifying the search.⁸⁵

C. Totality of the Circumstances

Courts have also employed a traditional totality of the circumstances approach to determine the lawfulness of searches where only a level of reasonable suspicion is present.⁸⁶ Under this approach, the Court does not address the question of whether there is a “special need.”⁸⁷ Rather, the court first determines the extent of the privacy expectations of the individual and evaluates the reasonableness of the search under the circumstances.⁸⁸ The Court then

80. 532 U.S. 67 (2001).

81. 531 U.S. at 40–42, 44 (citing *Delaware v. Prouse*, 440 U.S. 648, 659 n.18 (1979)).

82. 532 U.S. at 82–84 (2001).

83. *Id.* at 84.

84. *See id.* at 83–84.

85. In *Edmond*, the immediate objective of the checkpoint program was to intercept narcotics. 531 U.S. at 40. Likewise, the Court in *Ferguson* ruled the immediate purpose of the screening program to be the use of “threat of arrest and prosecution in order to force women into treatment.” 532 U.S. at 84.

86. *See United States v. Knights*, 534 U.S. 112, 118–22 (2001) (applying the totality of the circumstances test to conclude that warrantless searches of probationers are lawful within the meaning of the Fourth Amendment).

87. *Id.* at 122.

88. *See United States v. Kincade*, 379 F.3d 813, 821 (9th Cir. 2004) (en

balances these considerations against the government's interest.⁸⁹ As a result of the curtailment of the special needs doctrine in *Edmond* and *Ferguson*, the use of the totality of the circumstances approach has become more prevalent in Fourth Amendment analysis.⁹⁰

*United States v. Knights*⁹¹ demonstrates how the Court applies the totality of the circumstances test. There, the Court upheld a warrantless search in the investigation of a probationer suspected of engaging in criminal activity.⁹² The Court relied heavily on Knights' diminished expectations of privacy as a parolee and his acceptance of the search provision as a condition of release to support the finding that the government's interest in law enforcement greatly outweighed Knights' privacy interest.⁹³ The Court also found Knights' probation condition "significantly diminished [his] reasonable expectation of privacy."⁹⁴ The Court unanimously concluded the government's imposition of a criminal sanction in the form of probation renders a probationer subject to reasonable search conditions by virtue of his diminished liberty rights.⁹⁵

The Court's application of the totality of the circumstances test in *Knights* illustrates the limiting effect of *Edmond* and *Ferguson*: searches under a special needs rubric demand "some underlying motivation apart from the government's general interest in law enforcement."⁹⁶ Although the Court in *Griffin* found a special need in the effective administration of the parole system, it left open the

banc) (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 108–09 (1977)).

89. See *Knights*, 534 U.S. at 118–21.

90. Courts have applied this traditional balancing approach in determining the reasonableness of a search where a warrant was not obtained. See, e.g., *United States v. Hunter*, 291 F.3d 1302, 1307 (11th Cir. 2002) (finding that under the totality of the circumstances the police officer's stop and frisk search of defendant, supported by reasonable suspicion, was justified); see also *United States v. Patterson*, 340 F.3d 368, 371–72 (6th Cir. 2003) (holding that under a totality of the circumstances analysis, the officer's search was not justified where he did not have reasonable suspicion); Dowdy, *supra* note 70, at 1050, 1064–68 (suggesting that the special needs doctrine is in growing disfavor by the Court and was greatly weakened by the *Ferguson* majority).

91. 534 U.S. 112 (2001).

92. *Id.* at 118–22.

93. See *id.* at 119–120.

94. *Id.* at 120.

95. See *id.* at 119.

96. See *United States v. Kincade*, 379 F.3d 813, 828 (9th Cir. 2004) (en banc).

possibility that “any search of a probationer’s home by a probation officer is lawful when there are ‘reasonable grounds’”⁹⁷ The *Knights* Court used this opportunity to find a constitutionally valid search outside the special needs framework by applying the totality of the circumstances test.⁹⁸ Consequently, although the actual search in *Knights* bore close resemblance to that in *Griffin*, a narrowed doctrine precluded the Court from convincingly finding a special need disconnected from law enforcement purposes.⁹⁹

V. THE NINTH CIRCUIT’S EN BANC DECISION IN *UNITED STATES V. KINCADE*

A. The Ninth Circuit Plurality Balances the Interests in a Totality of the Circumstances Analysis

The Ninth Circuit plurality used the totality of the circumstances analysis as the runway by which to depart from the reasonable suspicion requirement.¹⁰⁰ The Ninth Circuit cited the *Knights* Court, which declined to “decide whether the probation condition so diminished, or completely eliminated, *Knights*’ reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment.”¹⁰¹ Seeing this narrow window of opportunity, the *Kincade* en banc plurality rationalized the reasonableness of a suspicionless search regime entangled with law enforcement objectives.¹⁰² First, the court evaluated *Kincade*’s expectation of privacy as a parolee.¹⁰³ Second, it determined the level of invasiveness the DNA search entailed.¹⁰⁴ Finally, the court balanced these two concerns against the government interest and concluded that because of the lessened privacy expectation and non-invasiveness of the search, the government interest in mandating DNA profiling of parolees was

97. *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987).

98. *See* 534 U.S. at 118.

99. *See id.* at 119–20.

100. *See Kincade*, 379 F.3d at 831–32.

101. *Id.* at 830 (quoting *Knights*, 534 U.S. at 120 n.6).

102. *Id.* at 832–33.

103. *Id.* at 833–36.

104. *Id.* at 836–38.

constitutional.¹⁰⁵

1. Parolees' purported lessened privacy interest
and the unintrusive nature of the search

Relying on *Knights* and other cases, the court stated that severe constrictions on conditional releasees' privacy expectations differentiate them from the law-abiding citizenry.¹⁰⁶

We believe 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"—at least where such searches meet the Fourth Amendment touchstone of reasonableness as gauged by the totality of the circumstances.¹⁰⁷

Thus, the court found that parolees have a drastically reduced expectation of privacy.¹⁰⁸ The court further pointed out that judicial relief was available where a given search cannot satisfy the totality of the circumstances test.¹⁰⁹ In relying on Judge Trott's aforementioned characterization of conditional releasees in *Crawford*, the court established the threshold of reasonableness—a search is subject to remedy and redress if it "shock[s] the conscience of our community's sense of decency and fairness, or [is] so brutal and offensive that it does not comport with traditional ideas of fair play and decency"¹¹⁰

Next, the court addressed the significance of DNA extraction as a privacy issue.¹¹¹ The plurality cited case law to portray blood extraction¹¹² as an unintrusive imposition on bodily integrity.¹¹³

105. *Id.* at 838–39.

106. *Id.* at 834–35 (citing *United States v. Crawford*, 372 F.3d 1048, 1071 (9th Cir. 2004) (en banc) (Trott, J., concurring)).

107. *Id.* at 835.

108. *See id.*

109. *Id.*

110. *Id.* at 835 n.29 (citing *Crawford*, 372 F.3d at 1072).

111. *Id.* at 836.

112. Although the focus is on blood extraction, the term "DNA sample" also includes "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) (2000).

“[T]he intrusion occasioned by a blood test is not significant, since such tests are a commonplace in these days of periodic physical examinations”¹¹⁴ The plurality went further in portraying the non-offensiveness of the DNA extraction process by comparing it to court-sanctioned “body cavity searches of inmates during which male inmates ‘must lift [their] genitals and bend over to spread [their] buttocks for visual inspection’”¹¹⁵ Additionally, the court supported the idea that a pinprick performed by a trained medical professional is characterized as a routine act hardly extending a couple inches below a person’s skin and is therefore non-invasive.¹¹⁶ Thus, the court found that blood extractions were neither offensive nor intrusive as a general matter.¹¹⁷

2. Monumental government interests

After analyzing the factors affecting Kincade’s privacy rights, the court continued its balancing analysis by establishing the “monumental” nature of the government’s interest.¹¹⁸ The court embraced the idea that the government’s “overwhelming interest” was the reduction of recidivism and increased criminal deterrence.¹¹⁹ Drawing upon governmental and societal interests expressed in *Knights* and other cases—“rehabilitating convicted offenders and sheltering society from future victimization”¹²⁰—the court emphasized that the collection of DNA profiles serves as a way of monitoring parolees to ensure compliance with the terms of their release.¹²¹ Accordingly, the court held the DNA Act constitutional.¹²²

113. *See Kincade*, 379 F.3d at 836 (quoting *Winston v. Lee*, 470 U.S. 753, 762 (1985) (stating that “society’s judgment that blood tests do not constitute an unduly extensive imposition on an individual’s personal privacy and bodily integrity”)).

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

115. *Id.* at 837 (citing and quoting *Bell v. Wolfish*, 441 U.S. 520, 558–60 n.39 (1979)).

116. *See id.* at 836–37.

117. *Id.*

118. *Id.* at 838–39.

119. *Id.*

120. *Id.* at 839.

121. *Id.*

122. *Id.*

VI. ANALYSIS OF THE NINTH CIRCUIT'S DECISION

A. Reweighing the Balance

The court's application of the totality of the circumstances test was not only wrong, it weighed the interests incorrectly. Kincade's expectation of privacy as a parolee was not extinguished as the plurality's reasoning would suggest. Moreover, blood sampling for purposes of DNA profiling is more invasive than the plurality is willing to admit. Finally, the government's interest did not go beyond normal law enforcement ends, and therefore, cannot be so "monumental" as to justify a suspicionless search regime.

Kincade maintained a reasonable expectation of privacy despite being a parolee. It is uncontested that parolees experience some reduced expectation of privacy.¹²³ It is unbelievable, however, that the plurality asserted that parolees retain basic protections only in cases where the conducted search "shocks" the community conscience or is "brutal and offensive."¹²⁴ The court imported this standard of protection from Fourteenth Amendment Due Process analysis¹²⁵ and is wholly unnecessary if the standard in Fourth Amendment analysis is reasonableness. By relegating reasonableness to a shockingly offensive standard, the plurality has practically extinguished Kincade's expectation of privacy. Under this analysis, it would appear that Kincade would only be protected in situations where the search required a forceful invasion of a body cavity absent any indication of criminal activity.¹²⁶

The court's characterization of the intrusion of a blood test as minimal diverts attention from the true invasions facilitated by the needle prick, namely the wealth of information potentially present in the DNA. "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

123. *Id.* at 868 (Reinhardt, J., dissenting).

124. *Id.* at 839 n.29.

125. *See* United States v. Crawford, 372 F.3d 1048, 1072 (9th Cir. 2004) (en banc) (Trott, J., concurring).

126. *See* Huguez v. United States, 406 F.2d 366, 378-79 (9th Cir. 1968) (concluding that where law enforcement did not have a warrant or at least a "plain suggestion" that Huguez had a rectal cavity cache containing drugs, the painful rectal cavity invasion was brutally intrusive and a violation of Huguez's Fourth Amendment rights).

being searched time and time again throughout the course of an individual's life."¹²⁷ Similar to the plurality, other courts have attempted to reduce the scope of the intrusion by claiming the DNA profile is for identification purposes akin to fingerprinting.¹²⁸ In reality, DNA has the potential to reveal information beyond mere identity, relating to health, race, and gender.¹²⁹ For example, private employers and insurance companies could use the DNA databases to obtain information on an applicant's susceptibility to genetic disease and discriminate on that basis.¹³⁰ Indeed, the U.S. Department of Labor has recognized improper and discriminatory use of genetic information as a serious workplace issue.¹³¹ Some states authorize DNA use for medical research, but the statutes do not require informed consent from the donors prior to conducting the research.¹³² Thus, forcefully mandating the surrender of such personal information where no reasonable suspicion is present is a far greater intrusion into privacy rights than the plurality in *Kincade* is willing to acknowledge.

The government's arguments supporting the intrusions are not persuasively compelling. The stated government interests are crime prevention and encouraging rehabilitation.¹³³ These interests, although important, are just everyday needs of general law enforcement.¹³⁴ Moreover, the contention that DNA profiling serves a role in the exoneration of wrongfully convicted persons is merely a

127. *Kincade*, 379 F.3d at 867 (en banc) (Reinhardt, J., dissenting).

128. *Id.* at 837 (stating that DNA profiles from patient blood only establishes the defendant's identity); *accord* *Nicholas v. Goord*, No. 01 Civ. 7891, 2004 U.S. Dist. LEXIS 11708, at *16 (S.D.N.Y. June 23, 2004); *Padgett v. Ferrero*, 294 F. Supp. 2d 1338, 1342 (N.D. Ga. 2003) (stating the bodily intrusion of taking a blood sample is not significantly greater than fingerprinting or taking a photograph).

129. *See Kincade*, 379 F.3d at 842 n.3 (Gould, J., concurring).

130. Andrea de Gorgey, *The Advent of DNA Databanks: Implications for Information Privacy*, 16 AM. J.L. & MED. 381, 390 (1990).

131. Brief of Amicus Curiae Protection & Advocacy, Inc. at 32, *Kincade*, 379 F.3d 813 (en banc) (No. 02-50380), available at http://www.epic.org/privacy/kincade/pa_amicus.pdf [hereinafter Protection & Advocacy Brief].

132. *See* Mark A. Rothstein & Sandra Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 BROOK. L. REV. 127, 156 (2001).

133. *See Kincade*, 379 F.3d at 838-39.

134. *See id.* at 853 n.8, 855-56 (Reinhardt, J., dissenting).

collateral benefit from the potential uses of the database.¹³⁵ The DNA Act was not designed for this purpose.¹³⁶ There are no options for DNA testing in cases where people seek to prove their innocence, nor is there funding specifically allocated to allow DNA sampling for exoneration efforts.¹³⁷ Thus, the government interest is an ordinary one outweighed by the privacy interests at stake and the extent of the intrusion.

B. The Totality of the Circumstances Test Offers an Unprincipled Approach in Upholding Fourth Amendment Protections

The plurality's totality of the circumstances test, as it applies to suspicionless searches, deviates from the principled approach provided by the special needs exception. This balancing test may be appropriate in highly fact dependent situations where reasonable suspicion exists, such as in *Knights*.¹³⁸ It should not be applied, however, when evaluating an expansive, suspicionless search program. Despite the plurality's contention in *Kincade* that its analysis is consistent with, and flows from the question left unanswered in *Knights*,¹³⁹ it wanders from the more definitive lines establishing the bounds of Fourth Amendment privacy protections. Rather than guarding this line, the court chose to redraw it.

The *Kincade* plurality's use of the totality of the circumstances test only balanced two factors: the extent of the intrusion involved and the government's interest.¹⁴⁰ The court was convinced *Kincade*'s status as a parolee deprived him of almost all expectations of privacy.¹⁴¹ Based on this privacy analysis, the court eviscerated *Kincade*'s legitimate interests as a counterbalance to government interest.¹⁴² The disturbing precedent set by the plurality is one that

135. *Id.* at 869 (Reinhardt, J., dissenting).

136. *Id.*

137. *Id.*

138. 534 U.S. 112 (2001). *But see* Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 527-528 (1991) (stating that the Court's case-by-case approach to Fourth Amendment law fails to establish a reliable, consistently applicable rule).

139. *See supra* text accompanying note 101.

140. *See Kincade*, 379 F.3d at 833-39.

141. *Id.* at 833-36.

142. *See* Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV.

does not follow from any Supreme Court holding: a reduced expectation of privacy is sufficient to render the individualized suspicion requirement inapplicable when a suspicionless search enacted by the government fulfills a law enforcement end.¹⁴³

C. The Special Needs Doctrine Was the Appropriate Test to Apply

Unlike the totality of the circumstances test where the level of suspicion merely serves as a backdrop in the analysis, the special needs test to the DNA Act assumes a level of privacy expectation retained by parolees that protects them from suspicionless searches. “Never once in over two hundred years of history has the [United States] Supreme Court approved of a *suspicionless search* designed to produce ordinary evidence of criminal wrongdoing for use by the police.”¹⁴⁴ The plurality applied an inappropriate test without convincing justification when it liberally extended the analysis applied in *Knights*, where reasonable suspicion existed. The *Kincade* plurality neglected to consider the fact that the search regime of the DNA Act lacks a requirement of reasonable suspicion. To the contrary, the parolee’s interest in privacy and protection from egregious bodily intrusion is built into the special needs test.¹⁴⁵ Therefore, the special needs test was the proper test to apply.

The dissent appropriately began its inquiry by acknowledging that “[s]ome level of individualized suspicion, therefore, remains the *sine qua non* of cases involving searches undertaken for law enforcement purposes”¹⁴⁶ When evaluating the reasonableness of a suspicionless search, where the immediate objective is to generate evidence for law enforcement purposes, the search is unconstitutional.¹⁴⁷

Applying a systematic approach to its special needs analysis, the dissent appropriately noted that applying the special needs test triggers the departure from the warrant-and-probable cause requirement.¹⁴⁸ This includes: (1) identifying the search and

483, 588 (1995).

143. See *Kincade*, 379 F.3d at 864 (Reinhardt, J., dissenting).

144. *Id.* at 854 (Reinhardt, J., dissenting) (footnote omitted) (emphasis added).

145. See *id.* at 863 (Reinhardt, J., dissenting).

146. *Id.* at 853 n.10 (Reinhardt, J., dissenting).

147. *Id.* at 855 (Reinhardt, J., dissenting).

148. *Id.* at 863 n.23 (Reinhardt, J., dissenting).

characterizing it as programmatic or non-programmatic; (2) determining the government interest and purpose of the search; and (3) inquiring whether the search's primary or immediate purpose is one of law enforcement.¹⁴⁹ These are the factors the government must address in order to show that a constitutionally valid departure from the standard warrant-and-probable cause requirement is appropriate.¹⁵⁰ Thus, by insisting on the special needs framework, the dissent assumed the appropriate stance of guarding "the structural edifices of the Fourth Amendment—[the] barriers [which] often constitute the only protections against governmental intrusions into the most intimate details of our lives."¹⁵¹

Several courts have taken the position that the DNA Act's primary purposes are divorced from criminal prosecution ends. These courts have found that the immediate purposes of the DNA Act include simply completing the CODIS database with DNA samples, with one of the ultimate purposes being to increase the accuracy of the criminal justice system.¹⁵² Moreover, Judge Gould, in his *Kincade* concurrence, opined that recidivism and deterrence serve as the underpinnings of the Act.¹⁵³ Despite this clever maneuvering to pull these ancillary benefits to the forefront, the law enforcement objective is clear: "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."¹⁵⁴ To say the immediate purpose of the Act is to complete the CODIS database

149. *Id.* at 855 (Reinhardt, J., dissenting).

150. *See id.* at 854–59, 863 n.23 (Reinhardt, J., dissenting). But see *id.* at 829 n.23 wherein the plurality contends:

The problem with [the dissent's] view is that courts look for a special need apart from law enforcement needs only *after* the government has executed some challenged search without first obtaining a warrant supported by probable cause. The Court's resort to special needs analysis in such cases is the product of that failure, and it has applied such analysis even in warrantless search cases where there was reasonable suspicion, like *Griffin* [v. Wisconsin]

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

152. *See United States v. Sczubelek*, 255 F. Supp. 2d 315, 318 (D. Del. 2003); *accord United States v. Reynard*, 220 F. Supp. 2d 1142, 1148 n.4, 1148–49, 1157, 1167–68 (S.D. Cal. 2002).

153. 379 F.3d at 840 (Gould, J., concurring).

154. H.R. REP. NO. 106-900, pt. 1, at 27 (2000) (agency view of the Department of Justice).

utters an incomplete sentence. The immediate purpose of the Act is to “permit the construction of a national database *aimed* at solving past and future crimes,”¹⁵⁵ which is a law enforcement objective.

Applying the special needs test to the DNA Act is straightforward. The Act is a programmatic, suspicionless search regime. The government’s interest in accurately solving and prosecuting crimes quickly, with the residual benefit of exonerating the wrongfully convicted, is undoubtedly a law enforcement objective. Applying the immediate purpose inquiry provides that the excessive entanglement of the primary law enforcement objectives removes DNA searches from the Supreme Court’s special needs exception.

D. Notice and Consent to Search as Part of Kincade’s Parole Condition

In *Knights*, the Court found that a search pursuant to Knights’ parole condition, which explicitly stated that he submit to a warrantless search at anytime, was constitutionally valid.¹⁵⁶ Although Kincade did not agree to a similarly explicit term, the government could have argued that, as in *Knights*, Kincade’s parole condition placed him on notice of possible searches by his parole officer. Moreover, as a parolee, Kincade impliedly consented to the DNA search. Under the implied consent doctrine, consent to Fourth Amendment intrusion can be inferred when there is notice of an impending intrusion and voluntary conduct in light of the notice.¹⁵⁷ Although blood extraction for DNA profiling was not an explicit parole condition,¹⁵⁸ the state required Kincade to follow the instru-

155. *Kincade*, 379 F.3d at 857 n.17 (Reinhardt, J., dissenting) (emphasis added).

156. *United States v. Knights*, 534 U.S. 112, 114 (2001) (stating that the probation order included the following condition: that Knights would “[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer.”).

157. Eustace T. Francis, *Combating the Drunk Driver Menace: Conditioning the Use of Public Highways on Consent to Sobriety Checkpoint Seizures—The Constitutionality of a Model Consent Seizure Statute*, 59 ALB. L. REV. 599, 646 (1995) (citing *McGann v. Northeast Ill. Reg’l Commuter R.R. Corp.*, 8 F.3d 1174, 1180 (7th Cir. 1993)).

158. *Kincade*, 379 F.3d at 874 (Kozinski, J., dissenting). The DNA Act was not passed until December 19, 2000 and was not incorporated into 18 U.S.C.

ctions of his parole officer. Because Kincade's parole officer requested he submit to DNA profiling after experiencing problems with drug abuse, the government could have argued this request was within the scope of the terms of his release, and therefore, Kincade received fair warning of a search relating to his parole supervision.

In order to find a valid consent to a search, thereby waiving Fourth Amendment protection, the consent must be given voluntarily and not be the product of official coercion.¹⁵⁹ Courts glean the question of voluntariness from the totality of the circumstances, using the *Schneckloth* factors as a guide.¹⁶⁰ The court considers several factors in determining voluntary consent, none of which is dispositive: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent of the defendant's cooperation; (4) the defendant's education and intelligence; (5) the defendant's belief that no incriminating evidence will be found; and (6) the defendant's awareness of the right to refuse to consent.¹⁶¹ Proof of knowledge of the right to refuse consent, however, is not mandatory to show voluntariness.¹⁶²

Here, Kincade accepted his release from custody and voluntarily made a choice to accept the burdens associated with his freedom. As a result, he knew he would be subjected to regular monitoring by his parole officer. Alternatively, he had a right to reject the imposed conditions by refusing parole. There is no evidence the state used coercive procedures. The standard conditions applied to federal parolees is set forth in 18 U.S.C. § 4209.¹⁶³ There is no indication that Kincade objected to monitoring by the parole officer, nor is there a suggestion he did not understand the imposed conditions. Whether Kincade knew he had a right to refuse his parole condition and remain in prison does not affect whether his consent was voluntary. Kincade had no belief the state would find any incriminating

§ 4209's "Conditions of Parole" until that date. See DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, 114 Stat. 2729 (2000). Therefore, Kincade could not have been aware of the DNA requirement at the time of his release on August 4, 2000. See *United States v. Kincade*, 345 F.3d 1095, 1098 (9th Cir. 2003), *rev'd en banc*, 379 F.3d 813 (9th Cir. 2004).

159. *Id.* at 228.

160. *Id.* at 223.

161. *United States v. Olivier-Becerril*, 861 F.2d 424, 426 (5th Cir. 1988).

162. *Id.* at 234.

163. 18 U.S.C. § 4209 (2000) (repealed 1987).

evidence if his parole officer conducted a search, suggesting consent to any impending search. Moreover, the DNA Act provided Kincade with constructive notice of the mandatory DNA profiling of parolees. Therefore, the government would argue Kincade voluntarily consented to the provisions of the DNA Act in deciding to get out of the predicament in which he willingly placed himself *ab initio*.¹⁶⁴

This analysis, however, remains constitutionally problematic. Notice of general accountability to a parole officer is not sufficient in itself to infer Kincade's consent to an invasive DNA search. The inference of consent and waiver of Fourth Amendment rights is too tenuous considering the lack of specific notice to Kincade of blood extraction for DNA profiling. The terms of his release do not properly inform Kincade of the basis and scope of the intrusion.¹⁶⁵ There is also a strong argument against the voluntariness of the consent where the state forced Kincade to decide between two undesirable alternatives: remain in prison or be subjected to an intrusive DNA search. In this situation, the government is coercing Kincade's choice with its superior bargaining position while creating the illusion that Kincade is actually making a bargain.¹⁶⁶ A choice between freedom with the burden of a suspicionless search condition versus incarceration does not appear to be a genuinely "unconstrained choice."¹⁶⁷ The government further demonstrated its coerciveness with its position of power as the offeror of the conditions while forcing Kincade to make the decision as a prisoner of the federal penal system. Because the state forcefully extracted Kincade's DNA absent any particular investigation, this weakens the inference that Kincade would impliedly consent to granting the state such broad, overreaching authority. As such, if the search was premised on the implied consent doctrine, it still would not pass constitutional muster, and thus the search would violate Kincade's Fourth Amendment rights.

164. See Francis, *supra* note 157, at 656 (stating that it is paradoxical for individuals to claim that they were coerced into making a decision when the choice is compelled by a predicament they placed themselves into in the first place).

165. See *id.* at 647.

166. See *id.* at 655.

167. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973).

VII. IMPLICATIONS

A. The Provisions of the DNA Act and State Statutes Authorizing DNA Collection from Parolees Should be Removed

The issue presented in *Kincade* and the court's subsequent analysis require that any statute mandating suspicionless collection of DNA samples from any person not in government custody be stricken. The DNA Act improperly asserts that parolees and incarcerated offenders retain the same level of Fourth Amendment protection. However, this is not the case. Whereas parolees retain a right against suspicionless searches, the Supreme Court has recognized that offenders in custody relinquish many significant privacy rights.¹⁶⁸ In the case of prisoners, "[t]he curtailment of certain rights is necessary . . . to accommodate a myriad of 'institutional needs and objectives' of prison facilities, chief among which is internal security . . . [as well as] deterrence and retribution"¹⁶⁹ When these government justifications appear in the DNA profiling context, they appear to sufficiently justify the intrusion.¹⁷⁰ These justifications, however, are not appropriately extended to parolees.

In the context of parolees, the concern is that because parolees are no longer in custody, they are closer to reintegrating into society. Although this may be true, "[t]hose who have suffered a lawful

168. See *Hudson v. Palmer*, 468 U.S. 517, 524 (1984).

169. *Id.* (citations omitted). It is not exactly presented how DNA profiling serves the purposes of justice and retribution when the offender is incarcerated. However, more judicial deference may be warranted if any *conceivable* legitimate interest is present.

170. See *Padgett v. Ferrero*, 294 F. Supp. 2d 1338, 1342–43 (N.D. Ga. 2003) (recognizing that the U.S. Supreme Court has not applied the special needs analysis in defining Fourth Amendment rights of prisoners). Following the reasoning in *Hudson* regarding the significant decrease of prisoner privacy interests, the *Padgett* court easily concluded the prisoners are constitutionally required to submit to DNA sampling. *Id.* at 1344. Moreover, the court reasoned the felony convictions and placement in prison provided the necessary justification for the search. *Id.* at 1343. *But see* *Rise v. Oregon*, 59 F.3d 1556, 1568 (9th Cir. 1995) (Nelson, J., dissenting) (maintaining that the prison inmate exception could not be relied upon because the purpose of the legislation had nothing to do with prison administration or internal security). Judge Nelson went on to explain that because the statute allowed collection of DNA at any point, and it was common practice to collect the sample right before being released, the government interests were nothing more than traditional law enforcement. *Id.*

conviction lose an interest in their identity to a degree well-recognized as sufficient to entitle the government *permanently* to maintain a verifiable record of their identity.”¹⁷¹ The government’s claim that DNA is and would only be used for identification purposes appears disingenuous. Not only has the scientific community challenged the meaning of the “junk” DNA stored in CODIS, one of the major privacy issues is the retention of the samples themselves.¹⁷² Thus, because of the serious privacy implications DNA profiling will have on parolees, which extend beyond their probationary period, the provision of the Act mandating the collection of their DNA is unconstitutional and should be removed.

B. The Concerns Resulting From Unconstitutional DNA Profiling

Interestingly, Judge Gould, in his concurrence, realized that the DNA Act threatens a loss of privacy, the full scope of which cannot yet be discerned.¹⁷³ He emphasized that this consequence would not be properly resolved in the case before the court because at the time the government demanded Kincade’s blood. Kincade was still part of the penal system.¹⁷⁴ As such, the DNA was lawfully collected and served the penalogical purposes of deterrence and rehabilitation.¹⁷⁵ The implications, however, of having sensitive information permanently stored should be examined.

There are concerns for potential misuse and abuse of the DNA profiles. Although § 14135e of the Act provides a provision for criminal penalties for unauthorized disclosure or use of samples,¹⁷⁶

171. *United States v. Kincade*, 379 F.3d 813, 837 n.32 (9th Cir. 2004) (en banc) (emphasis added).

172. Protection & Advocacy Brief, *supra* note 131, at 17–18.

173. *Kincade*, 379 F.3d at 842 (Gould, J., concurring).

174. *See id.*

175. *See id.* at 841.

176. 42 U.S.C. § 14135e(c) (2000) states that a criminal penalty for impermissible use of DNA is subject to a fine of not more than \$250,000. The Violent Crime Control and Law Enforcement Act, 42 U.S.C. § 14132(b)(3), limits the use of DNA information:

(A) to criminal justice agencies for law enforcement identification purposes; (B) in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules; (C) for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged; or (D)

these vague privacy standards do not offer substantive, reassuring protective guidelines. Rather than calling for measures that protect DNA information at the front-end by instituting guidelines to *prevent* misuse, the statutory provisions only call for punishments *after* DNA may have been misappropriated. Preventative measures could include provisions limiting the use of DNA to specific agencies or requiring the destruction of the samples after they have been analyzed. The Act does not provide a means for DNA removal from the database.¹⁷⁷ As a result of the lack of definitive post-collection guidelines, there is a growing concern that advances in technology will expand the use of the DNA for non-forensic purposes.¹⁷⁸ The expansion beyond the intended purpose is known as a “function creep” and is seen in the evolving use of Social Security numbers.¹⁷⁹ The use of the numbers, originally limited to Social Security programs, has segued from governmental to non-governmental purposes.¹⁸⁰

In addition to the potential abuses of DNA in the United States, the Public Defender Service for the District of Columbia, wrote in its amicus brief in support of *Kincade* that, almost inevitably, database insecurity and unauthorized data sharing is subject to exposure and abuse in a more global context.¹⁸¹ International law enforcement agencies such as Interpol have access to CODIS.¹⁸² Cooperation between international agencies is becoming increasingly important to identify terrorist subjects and other criminal suspects through DNA

if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes.

Cross referencing these provisions, it appears they do not adequately establish requirements that protect DNA information.

177. See *Kincade*, 379 F.3d at 875 (Kozinski, J., dissenting).

178. See Protection & Advocacy Brief, *supra* note 131, at 20–21.

179. *Id.* at 20.

180. *Id.* at 20–21 (noting that one of the negative results from this evolution is “identity theft” by unauthorized individuals).

181. Brief of Amicus Curiae Public Defender Service for the District of Columbia at 11, *Kincade*, 379 F.3d 813 (en banc) (No. 02-50380), available at http://www.epic.org/privacy/kincade/pd_amicus.pdf (illustrating this misuse where the state of Georgia shared information of law-abiding citizens with a privately-owned multistate law enforcement databank known as “Matrix”).

182. Brief of Amicus Curiae Electronic Privacy Information Center at 15, *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004) (en banc) (No. 02-50380), http://www.epic.org/privacy/genetic/kincade_amicus.pdf.

data.¹⁸³ As the U.S. becomes more willing to share DNA information internationally, there is less opportunity for the U.S. to control the way foreign agencies use the data. There are ethical concerns regarding nonconsensual medical research for studying the propensity to engage in criminal activity and the mining of DNA for the compilation of personal information unrelated to mere identification purposes.¹⁸⁴

With the continued expansion of DNA databases and the increasing realization that extracted samples contain more information than previously thought, the precedent the plurality set in applying the totality of the circumstances test has left little in the way of reinforcing the structural protections of the Fourth Amendment. Members of the International Association of Chiefs of Police (IACP) support a measure for testing criminal suspects as soon as they are arrested.¹⁸⁵ The constitutionality of these measures is not yet resolved and limits should be drawn. Limitations in the form of a stringent and consistently applicable test would prevent the encroachment upon basic Fourth Amendment liberties by what has been described as “the voracious appetite of law enforcement.”¹⁸⁶

VIII. CONCLUSION

The Ninth Circuit en banc court decided that the Fourth Amendment permits DNA profiling of conditionally released federal offenders in the absence of individualized suspicion that they have committed any additional crimes.¹⁸⁷ The court used *United States v. Knights* to find reasonableness in a suspicionless DNA search regime.¹⁸⁸ Although the touchstone of Fourth Amendment jurisprudence has been reasonableness, it has always required a minimum level of suspicion, which the DNA Act does not demand. Unwilling to recognize the expansive scope of the DNA Act and its implications, the court’s overly narrow perspective on the intrusiveness of

183. *See id.*

184. *See id.* at 10–11.

185. Aaron P. Stevens, *Arresting Crime: Expanding the Scope of DNA Databases in America*, 79 TEX. L. REV. 921, 949 (2001) (referring to the IACP Resolution that calls upon law enforcement to support legislation authorizing DNA profiling of arrestees).

186. *Kincade*, 379 F.3d at 873 (Kozinski, J., dissenting).

187. *See Kincade*, 379 F.3d at 816, 839–40.

188. *See id.* at 827–28, 839.

the search allows the government to extract and retain personally sensitive information that does not survive proper constitutional scrutiny, even in the context of individuals who admittedly maintain a lesser degree of privacy expectations. The court should have applied the special needs test to guard and preserve Fourth Amendment protection. Had it done so, the court would have properly concluded that the search and the DNA Act as it applies to parolees violated the Fourth Amendment.

Eighteenth century common law afforded a higher level of protection to the home for search and seizure purposes.¹⁸⁹ “[T]he home was the last bastion of unreasonability in Fourth Amendment jurisprudence.”¹⁹⁰ More accurately, the remaining bastion of unreasonability should be exactly what the Constitution protects, “[t]he right of the people to be secure in their *persons*.”¹⁹¹ One’s own possessory interest in his or her body and the vast information one’s DNA may contain should receive appropriate judicial protection under the guarantees of the Fourth Amendment.

*Gilbert J. Villaflor**

189. See Jonathan T. Skrmetti, *The Keys to the Castle: A New Standard for Warrantless Home Searches in United States v. Knights*, 25 HARV. J.L. & PUB. POL’Y 1201, 1209–10, 1213 (2002).

190. *Id.* at 1213.

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

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