The Supreme Court's Primary Purpose Test: A Roadblock to the National Law Enforcement DNA Database

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TABLE OF CONTENTS

I. Introduction ........................................... 2

II. The Combined DNA Index System .................... 3
   A. How the System Works ................................ 5
   B. The Federal DNA Act ................................. 7

III. Fourth Amendment Implications ....................... 7
   A. The Search Requirement .............................. 7
   B. The Reasonableness Requirement: Suspicionless
      Searches ............................................. 9
      1. Administrative Searches .......................... 10
      2. Checkpoint/Roadblock Searches ................... 11

IV. The Supreme Court's Special Needs Primary Purpose
    Test .................................................... 14
   A. The DNA Statutes Prior to the Primary Purpose
      Test.................................................. 14
   B. City of Indianapolis v. Edmond ..................... 15
   C. Ferguson v. City of Charleston .................... 18

V. The Search for a Non-Law Enforcement Primary
    Purpose ................................................. 19
   A. Discerning the Primary Purpose of the Federal DNA
      Act .................................................... 21
      1. The Accurate Prosecution of Crime/Exoneration
         of the Innocent ................................... 22
      2. The Prevention of Recidivism Among Offenders ...... 24

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I. INTRODUCTION

The law enforcement DNA database, known as the Combined DNA Index System ("CODIS"), has been touted as the best crime-solving tool since the advent of fingerprints, helping to solve cases that have been unsolved for decades, and to identify previously convicted offenders who commit new crimes. Recently, however, two United States Supreme Court opinions have undermined lower court precedent concerning the constitutionality of state law enforcement DNA databases and shaken the constitutional underpinning of the national DNA database system. Prior to the Supreme Court's recent pronouncements, state courts had repeatedly rejected challenges to their DNA Statutes, although they did so with little agreement upon legal theory. Then, in its 2000–2001 term, the Supreme Court handed down City of Indianapolis v. Edmond and Ferguson v. City of Charleston. These two opinions undermine most, if not all, of the prior cases construing DNA Statutes. In these opinions, the Court clarified its "special needs" exception to the Fourth Amendment's warrant requirement, explaining that a government program violates the Fourth Amendment if it authorizes suspicionless searches for the "primary purpose" of evidence-gathering or general crime control.

In light of this Edmund/Ferguson primary purpose test, lower courts are facing new challenges to DNA Statutes on the grounds that the law enforcement DNA databases created by these statutes authorize a government program of suspicionless DNA searches as a means of crime control and criminal investigation—quite probably an illegal purpose under the Court's primary purpose analysis. Two federal dis-

1. The various state statutes enabling the law enforcement DNA databases will be referred to throughout this article as the "DNA Statutes" or the "State DNA Statutes." The federal counterpart, the DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C.A. §§ 14,135–14,135e (2002), will be referred to throughout as the "Federal DNA Act" or the "DNA Act." Although the various state and the federal statutory provisions differ somewhat, the federal constitutional issues discussed in this article apply equally to State DNA Statutes and to the Federal DNA Act.
4. See Ferguson, 532 U.S. at 81; Edmond, 531 U.S. at 42–43.
strict courts in California facing challenges to the Federal DNA Act are at odds: one court has upheld the constitutionality of the Act,\textsuperscript{5} while the other court has declared the Federal DNA Act to be unconstitutional, because it violates the Fourth Amendment by authorizing suspicionless DNA searches for crime-solving purposes.\textsuperscript{6}

Part II of this Article explains the operation of CODIS. Part III examines the Supreme Court's suspicionless search cases. Part IV analyzes how the \textit{Edmund/Ferguson} primary purpose analysis has refocused the lower courts now facing challenges to CODIS. Part V explores various possibilities for satisfying the primary purpose analysis, and includes a discussion of recent lower court attempts to formulate a non-law enforcement primary purpose in order to justify the DNA database system. Part VI explores the possibility that the Court will create a new categorical exception to legitimize the DNA database. This Article concludes that the primary purpose of CODIS is simply to solve crime—an impermissible primary purpose under \textit{Edmond} and \textit{Ferguson}. The various state and federal statutes that authorize the suspicionless searches that stock CODIS with DNA identifiers are, therefore, without constitutional justification.

\textbf{II. THE COMBINED DNA INDEX SYSTEM}

The DNA Identification Act of 1994,\textsuperscript{7} enacted as a subsection of the Violent Crime Control and Law Enforcement Act of 1994,\textsuperscript{8} authorized the Director of the Federal Bureau of Investigation to establish an index of DNA identification records of persons convicted of crimes.\textsuperscript{9} The index would also contain the identification of DNA recovered from crime scenes, unidentified human remains, and DNA samples voluntarily contributed from relatives of missing persons.\textsuperscript{10} This automated crime-solving system became known as “CODIS,” the Combined DNA Index System.

Created in 1989 by the Federal Bureau of Investigation, CODIS is a software program that enables federal, state, and local forensic laboratories to store and compare DNA profiles electronically to solve crime where there is no suspect, or to identify multiple crimes committed by the same person.\textsuperscript{11} Forensic laboratories that support local po-

\textsuperscript{5} See infra Part V (discussing United States v. Reynard, 220 F. Supp. 2d 1142 (S.D. Cal. 2002)).

\textsuperscript{6} See infra Part V (discussing United States v. Miles, 228 F. Supp. 2d 1130 (E.D. Cal. 2002)).


\textsuperscript{9} 42 U.S.C. § 14,132(a)(1).

\textsuperscript{10} Id. § 14,132(a)(2)–(a)(4). The statute was amended in 2000 to include DNA samples voluntarily contributed from relatives of missing persons. See id.

\textsuperscript{11} Randall S. Murch & Bruce Budowle, \textit{Are Developments in Forensic Applications of DNA Technology Consistent with Privacy Protections?}, in \textit{3 Genetic Secrets:}
lice or sheriff’s offices may use the software to search their own DNA databases. Local laboratories can share DNA information by forwarding data to the state system. CODIS is typically operated at the state level by the agency responsible for implementing the state’s convicted offender statutes. The DNA Identification Act provided a statutory basis for the CODIS system, authorizing a national system operated by the Federal Bureau of Investigation, and allowing laboratories throughout the country to compare DNA profiles automatically. In response, states began to enact their own DNA database statutes, and today all fifty states have DNA statutes establishing state DNA databases.

Initially, many states required DNA samples only from offenders convicted of serious violent felonies such as murder and rape. The clear trend, however, has been toward rapid expansion of the types of crimes requiring DNA inclusion in the database. Officials in the State of Virginia, for example, attribute the success of that system to the inclusion of all felons. Two states have gone beyond the inclu-

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12. Murch & Budowle, supra note 11, at 212, 221.


14. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, FIRST “COLD” HIT RECORDED IN NATIONAL DNA INDEX SYSTEM!, at http://www.fbi.gov/pressrel/pressrel99/coldhit.htm (last visited July 1, 2004). NDIS is the highest level in the CODIS three-tier hierarchy. See FBI, CODIS PROGRAM: MISSION STATEMENT AND BACKGROUND, supra note 11. Nationwide, DNA profiles originate at the local level, then flow to the state and national levels. Id. At the state level, laboratories within states may exchange DNA profiles. Id. State and local agencies operate their databases according to their state statutory requirement. Id.

15. As of June 2003, only Mississippi and Rhode Island were not connected to NDIS. See FBI, CODIS PROGRAM: MISSION STATEMENT AND BACKGROUND, supra note 11.


A Louisiana statute authorizes the collection of DNA from persons merely arrested for certain offenses, to be taken at the time the person is fingerprinted as part of the booking process. A Texas statute authorizes collection of DNA from persons indicted or arrested for certain felonies and from those with a previous conviction or deferred adjudication for certain felonies.

The DNA Identification Act of 1994 left one noticeable gap in CODIS: it did not provide sufficient authority to begin extracting DNA from those convicted of federal crimes, crimes committed by military personnel, or crimes committed in Washington, D.C. The DNA Analysis Backlog Elimination Act of 2000 filled this gap by requiring the addition of samples taken from those convicted of certain offenses within the federal, Washington, D.C., and armed forces jurisdictions. When combined with the index of DNA samples taken from offenders convicted under state statutes, samples taken from crime scenes and victims of crime, and unidentified human remains, the result is a comprehensive national law enforcement database.

A. How the System Works

CODIS consists of a Forensic Index and an Offender Index. The Forensic Index contains DNA profiles from biological evidence recovered for sexual or violent offenses, inferring that identifications may not have been made if the database had been confined to violent or sex offenders. In a Florida study, 52% of offenders linked to a crime through DNA had burglary convictions in their criminal histories, thus increasing the size of Florida's DNA database from 65,000 offenders to over 110,000 in the first year it was implemented."

18. LA. REV. STAT. ANN. § 15:609 (West Supp. 2004). The Louisiana statute authorizes the collection of DNA from persons arrested for certain violent offenses, including murder, assault, stalking and kidnapping. Id. § 15:603.


20. Although the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 811(a)(2), 110 Stat. 1214, 1312, "authorized the Director of the FBI to expand CODIS to include Federal crimes, and crimes committed in the District of Columbia," H.R. REP. No. 106-900, supra note 17, pt. 1, at 9 (internal quotations omitted), the Department of Justice did not believe this provision provided the FBI with sufficient legal authority to begin collecting samples from federal offenders.


23. Id. § 14,135b.


ered from crime scenes. The Offender Index contains DNA profiles of those offenders convicted of qualifying offenses under state or federal DNA Statutes. The purpose of CODIS is to link crimes together and to generate investigative leads for law enforcement officials. For example, the suspect DNA from a sexual assault may be profiled and searched against the Offender Index. A potential match identifies the perpetrator, and allows qualified DNA laboratory analysts to contact each other to validate or refute the match. A match allows police in multiple jurisdictions to coordinate their respective investigations and to share independently-developed leads. In addition, CODIS matches DNA profiles within the Forensic Index to link two or more crimes together, identifying potential serial offenders, and allowing law enforcement agencies to pool their information about the cases.

Understanding Gene Testing]. At the center of every cell lies its nucleus. Within the nucleus are forty-six chromosomes consisting of two sets of twenty-three chromosomes each, one set inherited from the mother’s egg, the other from the father’s sperm. Id. These forty-six chromosomes consist mostly of proteins and acids, specifically deoxyribonucleic acid (DNA). Id. DNA is structured in the shape of the familiar double helix, much like a twisted ladder, but with three billion rungs. See Harlan Levy, And the Blood Cried Out 23 (1996). The rungs of the ladder are called “chemical bases” and each base is made up of a chemical combination. Only four different chemical bases exist in DNA: adenine (A), thymine (T), cytosine (C), and guanine (G). Understanding Gene Testing, supra, at 1. In addition, A is always paired with T, and G is always connected to C. Id. It is the order in which these base pairs occur that determines the information available. Id.

Less than one percent of DNA varies from person to person, and it is this comparatively small variation in the order of the DNA chemical bases that makes each person’s DNA unique (except for identical twins). Howard Coleman & Eric Swenson, DNA in the Courthouse, A Trial Watcher’s Guide 32 (1994). This uniqueness is at the heart of the forensic use of DNA. Id. DNA is present in all cells, including blood, semen, tissue, bone marrow, hair root, saliva, urine, even tooth pulp. Id. The DNA in each individual cell is the same throughout the body, and remains the same throughout a person’s lifetime. Understanding Gene Testing, supra, at 3. Regions of DNA that are not involved in the regulation of cell activities are called non-coding DNA. Office of Technology Assessment, Congress of the United States, Genetic Witness: Forensic Uses of DNA Tests 41 (1990). The Federal Bureau of Investigation uses thirteen standard loci (locations) in this non-coding region for its law enforcement database. See John M. Butler, Forensic DNA Typing: Biology and Technology Behind STR Markers 245 (2001).


27. See, e.g., Testimony of Dwight E. Adams, supra note 16; see also FBI, National DNA Index System, supra note 26.
B. The Federal DNA Act

The Federal DNA Act authorizes funds for the collection of DNA from federal, armed forces, and District of Columbia offenders who have been convicted of certain offenses. These offenses include violent crimes such as homicide, sexual offenses, kidnapping, robbery, conspiracies to commit those offenses, and certain crimes related to terrorism. DNA (typically blood) is extracted by Bureau of Prison officials from individuals in custody, and by the Probation Office from individuals on probation, parole, or supervised release. Any individual who fails to cooperate may be forcibly restrained in order to extract the DNA sample, and may be charged with a misdemeanor for failure to cooperate in providing the sample. For individuals on probation, parole, or supervised release, a DNA sample must be provided as a condition of release.

III. FOURTH AMENDMENT IMPLICATIONS

A. The Search Requirement

The Fourth Amendment is implicated only if taking DNA constitutes a search for Fourth Amendment purposes. All courts interpreting the constitutionality of State DNA Statutes recognize the well-settled principle that involuntary taking of blood from a person constitutes a search under the Fourth Amendment. Over thirty years ago, the United States Supreme Court held that the government’s compelled intrusion into a person’s body for the purpose of drawing blood to determine alcohol content is a search under the Fourth Amendment, as are other processes that reveal private physiological and medical facts, even in the absence of the physical intrusion caused by

28. The Federal DNA Act is similar in many respects to the State DNA Statutes, which exist in all fifty states. See Rothstein & Carnahan, supra note 13. Although only the Federal DNA Act is reviewed here, the constitutional arguments, analysis, and conclusions presented in this article apply equally to State DNA Statutes and state DNA law enforcement database programs throughout the nation.
32. Id. § 14,135a(d). The Federal DNA Act was amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107–56, § 503, 115 Stat. 272 (USA PATRIOT Act), which added kidnapping and certain other qualifying offenses related to terrorism concerns.
33. 42 U.S.C.A. § 14,135a(1).
34. Id. § 14,135a(2).
35. Id. § 14,135a(4)(A).
36. Id. § 14,135a(5)(A).
37. Id. § 14,135c.
a needle. For example, taking urine samples for a drug test, although it does not require bodily intrusion, is a search under the Fourth Amendment, because it involves government intrusion into a personal, private activity, well-recognized by society as a function meant to be performed privately. Under this analysis, the use of buccal swabs to collect skin cells from the lining of the cheek—a procedure allowed under various state DNA testing statutes—is a search as well. The drawing of blood has been characterized as "minimally intrusive;" nevertheless, the Supreme Court has said that physical intrusion, penetrating beneath the skin to draw blood, infringes upon an expectation of privacy that implicates the Fourth Amendment.

DNA Statutes typically authorize DNA samples to be involuntarily taken from persons convicted of qualifying offenses. The involuntary process entails both a seizure of the person, and a search by intrusion under that person's skin. Both acts implicate the Fourth Amendment, and ordinarily require some level of individualized suspicion of wrongdoing. Yet, when the government extracts DNA for CODIS, it does so absent any level of individual suspicion, and for purposes unconnected to any specific crime. If the acts authorized by the DNA Statutes are constitutionally permissible, then they must fall within one of the Court's few exceptions to the individualized suspicion requirement.

40. Id. (analyzing Nat'l Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987), aff'd in part, 489 U.S. 656 (1989)).
41. See Shelton v. Gudmanson, 934 F. Supp. 1048, 1050 (W.D. Wis. 1996) (assuming that non-consensual cheek-swabbing to obtain DNA material is a search under the Fourth Amendment).
43. Skinner, 489 U.S. at 616 ("[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.").
44. Technology may advance to the point where virtually no intrusion is involved in collecting DNA. For example, if DNA could be extracted from fingerprints, or scrapings from the skin surface, such developments could change the Fourth Amendment analysis. Currently, however, many forensic laboratories have a preference for blood samples over even the less intrusive buccal (cheek) swabs, because the swabs often produce less reliable results, due to lack of sufficient cheek material in samples taken by insufficiently trained personnel. See Nat'l Inst. of Justice, U.S. Dep't of Justice, DNA Analysis Backlogs: Transcripts of the Attorney General's Initiative on DNA Laboratory Backlogs (AGID–LAB) Working Group (March 4, 2002) (statement of Tim Schellberg), at http://www.ojp.usdoj.gov/nij/dnainitiative/a04.html (last visited July 1, 2004). In any event, the involuntary aspect of taking the DNA would still constitute a seizure under the Fourth Amendment, which protects both unreasonable searches and seizures. Seizures are of no less constitutional moment than are searches.
B. The Reasonableness Requirement: Suspicionless Searches

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 . . . ." The Fourth Amendment guarantees that the privacy, dignity, and security of persons will not be disturbed arbitrarily by the government. Fourth Amendment proscriptions are satisfied, therefore, only when a search is reasonable. Under traditional Fourth Amendment analysis, a search is presumed reasonable when it is conducted with a warrant issued by a neutral magistrate, upon probable cause to believe that a crime has been committed, and the person to be searched committed the crime. Under certain circumstances, however, the reasonableness requirement may be satisfied even when the search is conducted without a warrant, or under a less stringent test, such as that of "reasonable suspicion." This reduced level of suspicion is typically defined as facts which would lead a law enforcement officer to reasonably conclude that crime is afoot. Although the Fourth Amendment ordinarily requires some level of individualized suspicion of wrongdoing, the Supreme Court has said that individualized suspicion is not an "irreducible component" of reasonableness.

In the few cases in which the Court has approved suspicionless searches or seizures, the reasonableness requirement is satisfied if the government's interest in conducting the search outweighs the intrusion upon personal privacy. This "Balancing Test" has been applied in three ill-defined, and at times overlapping, categories of searches: (1)

45. U.S. Const. amend. IV.
47. U.S. Const. amend. IV.
48. See Dunaway v. New York, 442 U.S. 200, 214 (1979). Even when a search is conducted under one of the recognized exceptions to the warrant requirement, such as hot pursuit, destruction of evidence, or other emergency circumstance, courts have still required a showing of probable cause. See, e.g., Chambers v. Marony, 399 U.S. 42 (1970).
49. See Terry v. Ohio, 392 U.S. 1, 27–28 (1968) (holding that a "pat down" search of a suspect's outer clothing was reasonable, even absent probable cause, when the officer reasonably believed the suspect may be armed).
50. United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976) (noting that nothing in the Fourth Amendment expressly precludes a search and seizure based on less than probable cause or other level of individualized suspicion); see also Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989) ("[N]either a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance."); Prouse, 440 U.S. at 655 (recognizing that the balance of interests may sometimes preclude insistence upon specific individualized suspicion); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 624 (1966) ("[I]ntermediate suspicion is not a constitutional floor, below which a search must be presumed unreasonable.").
Administrative searches; (2) Checkpoint searches (border and highway safety programs, and (3) "Special Needs" searches. Although most courts agree that the DNA cases ought to be analyzed under the "special needs" doctrine, the Supreme Court's reasoning in each of these three categories applies substantially to the other categories as well. Thus, this section examines each category in turn.

1. Administrative Searches

The administrative searches typically involve a government agency or entity that either cannot function properly, or otherwise achieve its administrative goals, unless it is allowed to conduct suspicionless searches. The doctrine is typically traced to Camara v. Municipal Court of San Francisco, in which the Court considered whether the Fourth Amendment's Reasonableness Clause would permit municipal health and safety inspectors to inspect housing, absent specific knowledge that a particular building had code violations. The primary governmental interest at stake, the Court explained, was "to prevent even the unintentional development of conditions which are hazardous to public health and safety." The Fourth Amendment reasonableness requirement in the public health and safety context, therefore, is satisfied when the government interest outweighs the intrusion upon personal privacy entailed by the search, and where protections exist to protect individual privacy interests. Particularly persuasive to the Court was that, (1) no other reasonable way existed to achieve the administrative goal of protecting the public from dangerous housing conditions, other than to conduct suspicionless area inspections, and (2) the searches were not aimed at the discovery of criminal evidence. The Court used similar reasoning to allow

51. The suspicionless (or reduced suspicion) cases have been organized in various ways by different commentators. The organization here is based on the Supreme Court's apparent, but not distinct, grouping of cases in Edmond. See 531 U.S. 32, 37–39 (2000).
52. 387 U.S. 523 (1967).
53. Id. at 535. The health and safety codes requiring the building inspections were designed to address the public interest in preventing fires and other unsightly conditions that lower property values. Id. In Camara, the Court essentially recast the definition of probable cause in the health and safety context. Id. at 538 ("Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken.").
54. Id. at 536 (explaining that the normal requirement of probable cause could, in this context, be satisfied if the code regulations were reasonable, such as where enforcement was based on the type or age of the building, the condition of the entire area, or the time since last inspection).
55. Id. at 537 (identifying three factors the Court found persuasive in upholding these searches as reasonable under the Fourth Amendment: (1) the "long history of judicial and public acceptance" of building inspections; (2) that no other reason-
firefighters (who are charged with finding the cause of fires as well as extinguishing them), to remain in a building for a reasonable time after extinguishing a blaze to determine its cause. The Court also upheld a New York statute setting forth rules of business conduct for closely-regulated businesses (here, an automobile dismantling business), and allowing the government to enforce those rules by conducting warrantless inspections.

2. Checkpoint/Roadblock Searches

The suspicionless searches conducted under this second category differ in that they are performed by law enforcement. Because these searches seem barely distinguishable from ordinary criminal investigation, the Court has only rarely condoned suspicionless searches in this context—and then only to protect our nation's borders or to promote the safety of its citizens upon the highways. In United States v. Martinez-Fuerte, the Court allowed the Border Patrol, operating from a fixed checkpoint, to conduct suspicionless stops of motorists coming northbound from the Mexican border. The purpose of the stops was to stem the tide of illegal aliens flowing into the United States from Mexico. The Court recognized that requiring a warrant prior to stopping a vehicle would frustrate the very purpose of the checkpoint, because the flow of traffic would be too heavy to allow the officers to look inside individual vehicles in an effort to spot the wrongdoers. The Court applied much the same reasoning in Michigan Department of State Police v. Sitz, where it upheld brief stops of motorists at fixed checkpoints to allow officers to question drivers briefly, and check for signs of intoxication. The Court found the government's strong interest in protecting the public from the immediate

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56. Michigan v. Tyler, 436 U.S. 499, 511 (1978) (explaining that although firefighters could remain in the building a reasonable time to determine the cause, separate entries made at later times to pursue their investigation were subject to warrant procedures governing administrative searches).
59. Id. at 557.
60. Id. ("A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens.").
hazard of drunk drivers upon the roadway outweighed the brief seizure of the motorists. 62

3. "Special Needs" Searches

The "special needs" doctrine describes a similar exception to the general rule that a search must be conducted pursuant to some level of individualized suspicion of wrongdoing. These searches are 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 . . . ." 63 Like the administrative and checkpoint searches, these searches are distinguishable from the typical law enforcement function of gathering evidence for criminal prosecution. 64 As in the administrative and checkpoint search cases, reasonableness is determined by application of the balancing test, and protections must exist to prevent the dissemination of results to third parties. 65

The term "special needs" was first used to signal an exception to the Fourth Amendment's warrant requirement in the context of the warrantless search of a student's purse by public school officials. In New Jersey v. T.L.O., 66 the Court considered the reasonableness of the

62. Id. at 455. Similarly, in Delaware v. Prouse, the Court, in dictum, suggested that, given proper standards and restraints, "[questioning of all oncoming traffic at roadblock-type stops," 440 U.S. 648, 663 (1979), would be a lawful means of serving the state's interest in protecting persons on the highways by ensuring only licensed drivers are operating vehicles, and that these vehicles are fit for safe operation.

63. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). Justice Blackmun, in his concern that the balancing test would too easily become a substitute for the Fourth Amendment's warrant requirement, defined the special needs exception in this way. Although first appearing in his concurring opinion, this definition was thereafter consistently invoked in the Court's special needs cases. See, e.g., Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pattawatomie County v. Earls, 536 U.S. 822, 829 (2002); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989).

64. See Ferguson v. City of Charleston, 532 U.S. 67, 80 n.15 (2001); see also T.L.O., 469 U.S. at 341 n.7 (distinguishing searches "carried out by school authorities acting alone and on their own authority" from those conducted "in conjunction with or at the behest of law enforcement agencies").

65. See Ferguson, 532 U.S. at 78.

66. 469 U.S. at 337, 340. Although the Supreme Court first used the "special needs" term in T.L.O., this case did not represent the category of suspicionless searches that later came to be associated with the special needs exception. In T.L.O., the school officials searched the purse of the Respondent because she had been caught smoking in the lavatory, in violation of school regulations. Id. at 345–46. The subsequent search of the student's purse for cigarettes revealed marijuana. Id. at 346. The issue was whether or not school officials should have obtained a warrant prior to the search. Id. at 329. Because some level of individualized suspicion was present here, the Court expressly declined to consider whether suspicionless school searches would be permissible. Id. at 342 n.8.
search, balancing the student's legitimate expectations of privacy against the government's need for effective methods to maintain order within the school system, and to promote an environment conducive to learning. The Court upheld the warrantless search, because, as it had observed in its earlier administrative cases, requiring a warrant would likely frustrate the government's purpose behind the search—here, to maintain the swift and informal disciplinary procedures needed in the public schools to preserve order and promote the educational experience.67

Perhaps the most often cited "special needs" case is Skinner v. Railway Labor Executives' Association.68 In Skinner, the Court recognized the government's special need to investigate railway accidents, and to protect the public from railroad employees who may be under the influence of drugs or alcohol during their work hours.69 The Court upheld federal regulations requiring that railroad officials collect blood, breath, and urine from employees involved in railway accidents for drug and alcohol testing, absent individual suspicion of wrongdoing.70 The Court explained that the purpose of the regulation requiring the testing was not to assist in the criminal prosecution of employees, but rather, to further the government's special need to investigate railroad accidents, and to prevent injuries that could result if employees were impaired by drugs or alcohol.71 Requiring a warrant under these circumstances, the Court reasoned, would jeopardize the government's public safety interest.72 The "special needs" exception was further articulated in a companion case to Skinner in National Treasury Employees Union v. Von Raab,73 which involved the suspicionless collection of urine specimens from United States Customs Service employees to insure their fitness to interdict illegal drugs and to use firearms. The special need of the government in this context was to deter drug use among officers seeking promotion to cer-

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67. Id. at 340 ("[T]he burden of obtaining a warrant is likely to frustrate the government's purpose behind the search.") (quoting Camara v. Mun. Court of San Francisco, 387 U.S. 523, 532-33 (1967)).


69. Id.

70. Id. at 613.

71. Id. at 620-21.

72. Id. at 624.

tain sensitive positions and, again, not to prosecute employees for a particular crime.\(^74\)

Finally, in *Vernonia School District 47J v. Acton*,\(^75\) the Court considered the suspicionless random drug testing of students choosing to participate in school athletics programs in a public school plagued with disciplinary problems stemming from the students’ flagrant drug use. Because drug use could expose student athletes to an increased risk of injury, the school’s express purpose in instituting the program was to prevent the students from using drugs, to provide them with drug assistance programs, and to protect their health and safety during athletic endeavors.\(^76\) Test results were neither turned over to law enforcement authorities, nor used for purposes of internal school discipline.\(^77\) Thus, the balance of interests weighed in favor of the school policy.\(^78\)

### IV. THE SUPREME COURT'S SPECIAL NEEDS PRIMARY PURPOSE TEST

#### A. The DNA Statutes Prior to the Primary Purpose Test

Against this backdrop of exceptions to the requirement of individualized suspicion, the lower courts faced challenges to the State DNA Statutes. For the most part, these courts had little difficulty deciding that taking a DNA sample involuntarily from any individual, even a convicted offender, constituted a search under the Fourth Amendment. But many courts brushed aside the requirement of a special need beyond the normal need for law enforcement, and instead, proceeded directly to the balancing test, finding, essentially in every case, that the government interest in protecting the public from criminals outweighed the minimal intrusion of extracting a DNA sample from a convicted offender.\(^79\)

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74. Id. at 679.
76. Id. at 650. Protections were in place to protect student privacy while providing the urine samples, and only certain school officials had access to the test results. Id. at 650–51.
77. Id. at 658.
78. Id. at 664–65. Moreover, the Court noted that the most significant element in this case was that the policy furthered the government’s responsibility to act as guardian and tutor, to protect the children in the public school setting. Id. at 665.
79. At least the reasoning, if not the holdings, of cases applying a straight balancing test, is seriously in question subsequent to the Court’s decisions in *Edmond* and *Ferguson*. These cases include: *Shaffer v. Saffle*, 148 F.3d 1180 (10th Cir. 1998); *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996); *Schlicher v. Peters*, 103 F.3d 940 (10th Cir. 1996); *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992); *Kruger v. Erickson*, 875 F. Supp. 583 (D. Minn. 1995), aff’d on other grounds, 77 F.3d 1071 (8th Cir. 1996); *Sanders v. Coman*, 864 F. Supp. 496 (E.D.N.C. 1994); *Ryncarz v. Eikenberry*, 824 F. Supp. 1493 (E.D. Wash. 1993); *Matter of Appeal in Maricopa County Juvenile Action Numbers JV-
Confounding the confusion were attempts by a few courts to find a special need beyond law enforcement. One court upheld the DNA Statute, yet candidly admitted that the traditional special needs reasoning could not be applied squarely to its DNA testing cases. Another court, construing the Pennsylvania DNA statute, held the statute constitutional, finding the special need was to maintain an identification system to facilitate the purpose of the statute, but admitting that the purpose of the statute was to be "a tool in criminal investigations and for the deterrence of recidivist crime." A Wisconsin court stated unequivocally that the DNA testing of prison inmates was "ultimately for a law enforcement goal," yet it fit within the special needs exception, because it was not undertaken for the investigation of a specific crime—just crime in general. Equally puzzling, the Ninth Circuit, construing the Oregon DNA statute, upheld it based on the reduced expectation of privacy of convicted offenders, "even if [the statute's] only objective is law enforcement."

B. City of Indianapolis v. Edmond

The Court's more recent enlightenment on the special needs doctrine in Edmond and Ferguson, however, casts doubt on much, if not all, of the reasoning of the prior DNA cases, placing some squarely in conflict. City of Indianapolis v. Edmond provided new insight into how the lower courts should determine when a government interest was far enough beyond normal law enforcement to qualify for the special needs exception to the Fourth Amendment's warrant requirement. The Court drew the line at seizures, even brief detentions, that are authorized by government programs designed primarily to serve the general public interest in crime control, even when the detention involves no physical intrusion, and even when the program has secondary purposes that may be constitutionally permitted.

In Edmond, motorists brought a class action against the city, mayor, and members of the police department alleging the city's drug
interdiction roadblock checkpoint violated their Fourth Amendment rights, because police lacked individualized suspicion of wrongdoing to stop the vehicles at the checkpoint.\textsuperscript{86} At checkpoints located in areas known for narcotics trafficking, and pursuant to department directives, police stopped a predetermined number of vehicles, asked the drivers to produce license and registration, looked for signs of impairment, and peered into the vehicles from the outside.\textsuperscript{87} At the same time, a drug-sniffing dog walked around the outside of each stopped vehicle. The government parties conceded the primary purpose of the checkpoint program was to interdict illegal narcotics in a city area known for its narcotics trafficking.\textsuperscript{88}

The Court distinguished this case from its prior suspicionless search cases in the special needs, administrative, highway safety, and border policing contexts, because in its previous cases, the primary purpose of the programs was not to uncover evidence of ordinary criminal wrongdoing.\textsuperscript{89} Thus, the city program violated the Fourth Amendment, because its primary purpose was “indistinguishable from the general interest in crime control”\textsuperscript{90} and it was designed primarily to “uncover evidence of ordinary criminal wrongdoing.”\textsuperscript{91} Neither was the court persuaded that the “severe and intractable nature” of the drug problem justified the checkpoint program. Noting that the same could be said of various other criminal activities, the Court stated it was “particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.”\textsuperscript{92}

In an effort to save its case, the government argued that, like the Court’s previous cases, its checkpoint program also served to keep highways safe by checking license and registration, and spotting impaired drivers. But the Court rejected that argument, pointing out that if secondary purposes could invoke the special needs exception, police would be able to establish checkpoints for virtually any purpose,

\textsuperscript{86} Id. at 36.
\textsuperscript{87} Id. at 35.
\textsuperscript{88} Id. at 41. Moreover, the program was quite successful, netting about a 9% arrest rate. In a four-month period, police stopped 1161 vehicles and arrested 104 motorists, including forty-nine arrested for offenses unrelated to drugs. See id. at 34–35.
\textsuperscript{89} Id. at 41–42.
\textsuperscript{90} Id. at 45, 48.
\textsuperscript{91} Id. at 42. The principle that the primary purpose of a government program approving suspicionless searches must be distinguishable from the general interest in crime control is not a new concept. In 1979, the Court in \textit{Delaware v. Prouse} explained that a hypothetical roadblock established to check vehicle license and registration for highway safety purposes would be permissible, because it was distinguishable from the government’s general interest in controlling automobile theft. 440 U.S. 648 n.18 (1979).
\textsuperscript{92} \textit{Edmond}, 531 U.S. at 42.
provided they included sobriety or license checks. The Edmond court did not change the balancing test under which it had traditionally approved suspicionless searches. Rather, it established that, as a threshold determination, the government purpose in conducting the program must, at the programmatic level, be something other than the discovery of ordinary criminal wrongdoing. Where the primary purpose of the program is ordinary law enforcement, however, the Fourth Amendment standard remains a warrant based on probable cause, unless an imminent threat or other emergency triggers another established exception.

The Court did not say that a government program was unconstitutional if its primary purpose is in any way related to criminal law enforcement. After all, earlier cases condoning checking drivers for signs of intoxication (Sitz) and spotting illegal aliens coming from the border (Martinez-Fuerte) certainly involved law enforcement officers doing what they were paid to do. Nevertheless, because the focus of those programs was highway safety and protecting our nation's borders, respectively, as opposed to investigating crime and gathering criminal evidence, these programs passed constitutional muster.

In a later checkpoint case, however, the Court softened its imminent threat position. In Illinois v. Lidster, 124 S. Ct. 885, 888 (2004), the Supreme Court allowed police to establish a checkpoint for the purpose of detaining motorists for ten to fifteen seconds to inquire whether they had any information about a fatal hit and run accident that had occurred in the area a week earlier. In holding that the checkpoint did not violate the Fourth Amendment, Justice Breyer explained that the primary purpose of the detention was to ask members of the public for their help in investigating a crime that was committed by others, and not to investigate the motorists themselves. Id. at 889. Thus, the court held the brief intrusion constitutional, even absent reasonable suspicion that any individual motorist had committed a crime. Lidster seems to contradict the reasoning of Edmond in that Lidster sets precedent for the detention of persons under the special needs exception for what seemingly is a law enforcement purpose. The reasoning of Lidster, however, would not likely extend to allow the seizure of persons, whether arrestees or convicted offenders, for the purpose of extracting a DNA sample to be run against CODIS. This is so because the primary purpose of the DNA extraction would be to investigate whether any other crimes might have been committed by that person, as well as to store the DNA for crime-solving purposes in the event that person might commit a crime in the future. In addition, the forcible taking of a bodily fluid is certainly more intrusive than the ten-to fifteen-second motorist detention presented in Lidster.

93. Id. at 46.
94. Id. at 47. The Court stated its holding does not alter the status of its previous checkpoint programs that "still depend[,] on a balancing of the competing interests at stake and the effectiveness of the program." Id. at 47.
95. Id. at 48.
96. Id. at 44 (stating that the Fourth Amendment would "almost certainly" permit a roadblock to thwart an imminent terrorist attack, or to catch a dangerous criminal fleeing on a particular route).
97. Edmond, 531 U.S. at 43.
C. Ferguson v. City of Charleston

In Ferguson v. City of Charleston, the Court shed additional light on its primary purpose test, this time in the context of bodily fluids extracted and examined by a state hospital, but ultimately for law enforcement purposes. Over concerns about the increase in cocaine use of its maternity patients, a task force consisting of hospital staff, local police, and other officials, devised a policy setting forth procedures for maternity patients suspected of drug use to be identified, and their urine tested for the presence of illegal drugs. Patients with positive drug screens could avoid criminal prosecution by entering a substance abuse clinic. The policy contained detailed procedures concerning the chain of custody and the particular offenses with which the women could be charged, and allowed for interrogation regarding the source of their drugs.

Women patients who had been arrested in accordance with the policy brought suit against the city, hospital representatives, and law enforcement officials who helped create and enforce the policy, alleging that their Fourth Amendment rights had been violated by these suspicionless searches. Although the District Court had recognized that the police and the hospital were too closely intertwined in the searches to render them constitutionally acceptable, the court, nonetheless, ruled in favor of the state actors, because the jury found the women had consented to the urine tests as part of their regular medical procedures. The Fourth Circuit affirmed, but did so because it found the searches reasonable as a matter of law under the "special needs" exception. That court concluded that the state's interest in limiting both pregnancy complications resulting from cocaine use and the medical costs associated with those complications outweighed the minimal intrusion upon patient privacy, because the screens had been con-

98. 532 U.S. 67 (2001). Ferguson was argued before the Court only one day after Edmond, but the Court did not decide the case until nearly four months later.
99. Ferguson, 532 U.S. at 70-72.
100. Id. at 72. During the initial stages of the program, a positive test was reported immediately to the police, and the patient was arrested. The policy was later modified to allow for the substance abuse treatment option. Id. at 72 n.5.
101. Id. at 71-73.
102. Id. at 73.
103. See id. at 73-74. The jury instructions read: "There were no search warrants issued by a magistrate or any other proper judicial officer to permit these urine screens to be taken. There not being a warrant issued, they are unreasonable and in violation of the constitution of the United States, unless the defendants have shown by the greater weight or preponderance of the evidence that the plaintiffs consented to those searches." Id. at 74 n.6
104. Id. at 74.
ducted for independent medical purposes.105 The Supreme Court granted certiorari to review the special needs issue.106

The Court distinguished its prior line of special needs cases107 by emphasizing that in each of those cases, the absence of a warrant or individualized suspicion was justified by a special need that was "divorced from the State's general interest in law enforcement."108 The Court rejected the government's "ultimate purpose—namely, protecting the health of both mother and child."109 Instead, it focused on "the immediate objective" of the search, "which was to generate evidence for law enforcement purposes"110—a purpose that, the Court said, was "ultimately indistinguishable from the general interest in crime control."111 Given that the primary purpose of the hospital's program was to ensure criminal prosecution for women who did not agree to a treatment program, the case did not fit within the "closely guarded category" of special needs.112 The program was, "at its core, predicated on the use of law enforcement,"113 and the involvement of law enforcement was essential to its success.114 Thus, the hospital program did not fit within the special needs exception, and it violated the Fourth Amendment.115

V. THE SEARCH FOR A NON-LAW ENFORCEMENT PRIMARY PURPOSE

Not unexpectedly, in the wake of Edmond and Ferguson, trial courts across the country faced—and are now facing—new challenges to state and federal DNA statutes, with most defendants claiming that the involuntary and suspicionless extraction of their DNA for CODIS is not constitutionally permissible under the threshold special needs primary purpose test. Although lower courts recognize that the reasoning of earlier state and federal precedent upholding the DNA Statutes has been undermined by Edmond/Ferguson, early indications from the trial courts continue to signal confusion over the application

105. Id. at 75.
106. Id. at 76.
107. See supra subsection III.B.3 (discussing the Court's "special needs" cases).
108. Ferguson, 532 U.S. at 79.
109. Id. at 81.
110. Id. at 83 (emphasis omitted).
111. Id. at 81 (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000)).
112. Id. at 84.
113. Id. at 83 n.20.
114. Id. The Court stated, "[T]he immediate objective of the searches was to generate evidence for law enforcement purposes." Id. at 83. The Court explained its use of italics, stating: "We italicize those words lest our reasoning be misunderstood. . . . In none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes." Id. at 83 n.20 (citation omitted).
115. Id. at 86.
of the primary purpose test to DNA data bank challenges. While most lower courts agree that Edmond/Ferguson requires them first to determine the primary purpose of the CODIS program, they have remained inconsistent in their holdings and reasoning. Two federal district courts within the Ninth Circuit, in addressing the issue, have reached opposite results, even though both courts rejected existing Ninth Circuit precedent.\(^\text{116}\)

In United States v. Reynard,\(^\text{117}\) a district court upheld the Federal DNA Act, finding that the primary purpose of the statute was to fill the gap left by the fifty State DNA Statutes, and to permit federal probation officers to fill the CODIS database with the DNA identifiers of all qualifying federal offenders on supervised release.\(^\text{118}\) Relying on Ferguson's "immediate v. ultimate purpose" guideline, the court reasoned that adding these federal offenders to the CODIS database was the immediate purpose of the statute, a purpose that was beyond the normal need for law enforcement, and within the special needs exception.\(^\text{119}\) This was so, reasoned the court, even though a more complete database would ultimately aid law enforcement agencies with their basic function of solving crime.\(^\text{120}\) Relying on the legislative history of the Act, the court found a second purpose that went beyond the normal need for law enforcement—that DNA searches help to create a more accurate criminal justice system, which would ultimately exonerate wrongly-charged or -convicted persons.\(^\text{121}\)

Rejecting the reasoning of its Southern District sister court in Reynard, the court in United States v. Miles\(^\text{122}\) held that the Federal DNA Act violated a defendant's Fourth Amendment rights, because it required him to supply a blood sample absent any individualized suspicion that his blood may provide evidence of any particular offense. The Miles court stated that because the Act's express purpose was to

\(^{116}\) The Ninth Circuit in Rise v. Oregon upheld the state's DNA Statute, holding that, in light of the reduced expectation of privacy of convicted felons, it was appropriate to abandon the normal requirement of probable cause as well as the lesser requirement of individualized suspicion, "even if [the statute's] only objective is law enforcement." 59 F.3d 1556, 1559–60 (9th Cir. 1995). The reasoning in Rise most likely contravenes the requirement that the government program must have a primary purpose beyond ordinary law enforcement. Rise construed the State DNA Statute, and the more recent Ninth Circuit cases construe the Federal DNA Act; nevertheless, the Reynard and Miles courts expressly rejected the reasoning in Rise.

\(^{117}\) 220 F. Supp. 2d 1142 (S.D. Cal. 2002).

\(^{118}\) Id. at 1167–68.

\(^{119}\) Id. The Reynard court looked at the DNA statute as "programmatic" in scope, a concept explained in Edmond, where the Court required that the government's primary purpose must, at the programmatic level, be something other than the discovery of ordinary criminal wrongdoing.

\(^{120}\) Reynard, 220 F. Supp. 2d at 1168.

\(^{121}\) Id.; see infra section V.A (discussing legislative history).

\(^{122}\) 228 F. Supp. 2d 1130, 1141 (E.D. Cal. 2002).
authorize DNA test results to be given to law enforcement officials and to be used in criminal prosecutions, it fell outside the special needs exception. Further, the goals of ensuring accurate prosecution and creating a more complete DNA database were indistinguishable from general law enforcement objectives. Thus, said the court, the Federal DNA Act is merely a general law enforcement tool, and thereby fails to comport with Edmond and Ferguson.

A. Discerning the Primary Purpose of the Federal DNA Act

According to its legislative history, the DNA Analysis Backlog Elimination Act of 2000 accomplishes two major purposes: (1) it authorizes federal funds to states to reduce the backlog of thousands of DNA samples from crime scenes and unprocessed samples belonging to convicted offenders; and (2) it completes the national CODIS system by authorizing collection of DNA from offenders convicted of crimes under federal, armed forces, or District of Columbia law. As would be expected, the government's effort to use CODIS to control crime is documented throughout the legislative history. But, given

123. Id. at 1138-39.
124. Id. at 1141.
125. Id. In a bold move, a Ninth Circuit three-judge split panel in United States v. Kincade, 345 F.3d 1095, 1104 (9th Cir. 2003), held that Fourth Amendment principles, as set forth in Edmond and Ferguson, demanded individualized suspicion of wrongdoing prior to extracting the DNA of parolees pursuant to the Federal DNA Act. The court stated that "a search of the parolee's body to obtain DNA—the compulsory extraction of blood for a law enforcement purpose—is reasonable only if the search is supported by individualized reasonable suspicion." The court reasoned that the primary purpose of the DNA Act is to obtain DNA samples that may be used in criminal investigations, to solve crimes, and to prosecute the donors—all law enforcement objectives. Id. at 1110. In January 2004, however, the Ninth Circuit vacated the panel opinion and agreed to hear the case en banc. United States v. Kincade, 543 F.3d 1000 (9th Cir. 2004). As of the date of publication of this Article, the case is pending rehearing en banc.
126. See infra subsection V.A.1 and note 133 (discussing the backlog problem).
127. H.R. Rep. No. 106-900, supra note 17, pt. 1, at 8, provides:

Purpose and Summary: H.R. 4640 would authorize a new program of Federal assistance to States to enable them to clear their backlogs of DNA samples which have been collected from convicted offenders or crime scenes and which the States have been unable to analyze, or to reanalyze in light of recent developments in DNA identification technology, because of shortfalls in resources and the failure of available laboratory capacity to keep pace with the growth of the DNA identification system. H.R. 4640 would also fill a gap in the system by authorizing collection, analysis, and indexing of DNA samples from persons convicted of Federal crimes, crimes under the laws of the District of Columbia, or offenses under military law.
128. See, H.R. Rep. No. 106-900, supra note 17, pt. 1, at 10 ("[Due to backlogs], killers, rapists, and other dangerous offenders who might be successfully identified through DNA matching remain at large to engage in further crimes against the public."); id. at 17 ("[T]he unique potential of the DNA identification system to
CODIS's value as a crime-fighting law enforcement tool, it is little wonder that most post-Edmond/Ferguson courts have struggled to find a primary purpose for their state or federal DNA statutes that will bring these suspicionless DNA searches under the protective umbrella of the special needs exception. Among the justifications for the DNA statutes, the few lower courts hearing these challenges since Edmond/Ferguson have claimed a variety of primary purposes, declaring each beyond normal law enforcement needs. Following is an analysis of these various approaches, in light of the Supreme Court’s explanation of the special needs doctrine.

1. The Accurate Prosecution of Crime/Exoneration of the Innocent

The language of the Federal DNA Act, which supports exoneration of innocent persons, is an important part of the CODIS program. The “Sense of Congress” provision, attached to the Bill and codified as part of the Act, encourages states to recognize their obligation to provide post-conviction DNA testing.129 Congress observed that DNA testing has resulted in the exoneration of over seventy-five innocent men and
women, including some on death row, and that testing or re-testing
evidence has even, on occasion, led to the apprehension of the actual
guilty party. In addition, the legislative history of the Act supports
the importance of exoneration of the innocent. The House Report to
accompany H.R. 4640 (the Federal DNA Act) observed that "[p]romptly identifying the actual perpetrator of a crime through DNA
matching exonerates any other persons who might wrongfully be sus-
ppected, accused, or convicted of the crime." 

Despite Congress's indications regarding the importance of exoner-
ating innocent persons, however, the Federal DNA Act itself provides
no funds to the states for this purpose. Given that one express pur-
pose of the bill is to appropriate funds to make the system more effi-
cient, the failure to provide funds for post-conviction exoneration
makes it difficult to contend that exoneration of the innocent is the
statute's immediate or primary purpose. Thus, read in context, Con-
gress' concern over the wrongful prosecution of innocent persons
stems from the fact that hundreds of thousands of DNA samples are
backlogged, waiting analysis. The Act appropriates funds to assist
states in clearing these backlogs so that CODIS can be fully used

viding evidence that led to the apprehension of the actual
perpetrator...  

130. Id. See also EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCI-
ENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AF-
TER TRIAL (1996).

131. H.R. REP. No. 106-900, supra note 17, pt. 1, at 10. See also United States v.
Reynard, 220 F. Supp. 2d 1142, 1168 (S.D. Cal. 2002) (citing the House Report as
evidence that exoneration of innocent persons is the statute's primary purpose).

132. H.R. REP. No. 106-900, supra note 17, pt. 1, at 10 ("As a result of these backlogs,
killers, rapists, and other dangerous offenders who might be successfully identi-
fied through DNA matching remain at large to engage in further crimes against
the public. . . . In addition to these obvious public safety costs, the current inade-
quacies of the system also endanger the innocent. Promptly identifying the ac-
tual perpetrator of a crime through DNA matching exonerates any other persons
who might wrongfully be suspected, accused, or convicted of the crime. Where
this cannot be done because of an inability to analyze and index convicted of-
fender or crime scene samples in a timely manner, the risks of convicting an inno-
cent person increase.").

133. On August 21, 2001, Attorney General John Ashcroft directed the National Insti-
tute of Justice ("NIJ") to assess the existing delays in processing crime scene
DNA evidence, and to develop recommendations to eliminate the backlog of sam-
ples piling up across the country. In its March 3, 2003 Special Report, the NIJ
acknowledges a significant backlog of casework samples caused by the insuffi-
cient capacity of existing forensic laboratories to handle the massive demand for
sample analysis, as well as the lack of trained scientists. See NAT'L INST. OF JUS-
TICE, U.S. DEP'T OF JUSTICE, NCJ 199425, NIJ SPECIAL REPORT: REPORT TO THE
ATTORNEY GENERAL ON DELAYS IN FORENSIC DNA ANALYSIS (2003), available at
http://www.ncjrs.org/pdffiles1/niij/199425.pdf. The NIJ reports that approxi-
mately 350,000 rape and homicide cases remain unprocessed across the country.
Id. Given that there are 17,000 law enforcement agencies, and 90% of these sam-
for the purpose for which it was designed—solving crime. The reality is that a convicted offender needs no coaxing to voluntarily submit his DNA in order to be exonerated of a crime he did not commit, so it is not logical that the Act's provisions, which force the involuntary submission of DNA, are necessary for the protection of these persons. And, although an offender's DNA may later prove someone else is innocent of a crime, it can do so only by proving that offender's guilt.

The first step in the accurate prosecution of crime is for law enforcement officials to arrest the proper suspect; and, in so doing, the innocent may go free. For every guilty person going to prison, all other innocent persons who might have been wrongly convicted for the same crime are, by default, exonerated. Exoneration of the innocent, then, seems indistinguishable from an ordinary law enforcement function of arresting the right person. What is more, the goal of accurate prosecution of crime is achieved far more often through the government's use of DNA to incriminate a suspect than it is to exonerate one. In the post-conviction context, the government often vigorously fights a prisoner's request for a DNA analysis to prove his innocence.

2. The Prevention of Recidivism Among Offenders

Undeniably, the government has a strong interest in preventing recidivism among convicted offenders, who are more likely to violate
the law than are ordinary citizens. Violent offenders in federal prisons re-offend at a higher rate than felony offenders overall. Statistics for the year 2000 reveal that 14% of those on probation for violent offenses commit a new crime during their probationary period, compared to 5.4% for all felons on probation; and 19.9% of violent offenders on supervised release commit new crimes during their supervisory period, compared to 12.7% for all felons on supervised release. Further, 20.5% of violent felons on parole commit a new crime while on parole, compared to 14.3% of all felons on parole. A report on the recidivism of state inmates tracked for three years after their release from prisons in fifteen states in 1994, representing two-thirds of all inmates released that year, showed that released prisoners with the highest re-arrest rates were robbers, at 70.2%; the percentage of released rapists who were arrested for another rape was, in contrast, only 2.5%.

The legislative history of the Federal DNA Act supports, to some extent, the notion that a primary purpose of the DNA Act may be to protect the community by discouraging recidivism among offenders on probation, parole, or supervised release. Much of the recidivism problem is attributed to the backlog of crime scene DNA samples waiting to be analyzed, which contributes to the inability of law enforcement officials to identify and apprehend offenders on release before they commit another crime.

The Supreme Court has readily recognized that those with prior convictions are more likely than ordinary citizens, to violate the

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137. The federal parole system is being phased out. Pursuant to the Sentencing Reform Act of 1984, parole was abolished and defendants are required to serve the imposed sentence (less fifty-four days per year good-time for sentences greater than one year, but not life imprisonment) followed by a term of supervised release. See Pub. L. No. 98-473, § 212, 98 Stat. 1837, 1987 (1984). These figures reflect those who are on parole status under the old system.


139. Id.

140. See United States v. Reynard, 220 F. Supp. 2d 1142, 1168 (S.D. Cal. 2002) (“[C]ongress desired to prevent violent felons from repeating their crimes in the future.”); see also 146 CONG. REC. S11,646 (daily ed. Dec. 6, 2000) (statement of Sen. DeWine) (“Statistics show that many of these violent felons will repeat their crimes once they are back in society.”).

141. H.R. REP. NO. 106-900, supra note 17, pt. 1, at 10 (“As a result of these backlogs, killers, rapists, and other dangerous offenders who might be successfully identified through DNA matching remain at large to engage in further crimes against the public.”).
law.\textsuperscript{142} But it has never condoned suspicionless searches of persons based on their previous criminal convictions.\textsuperscript{143} Typically, some level of individualized suspicion is required.

To the extent that a convicted offender would choose the law-abiding path out of fear that any new crime would be immediately detected, CODIS may prevent recidivism, although no evidence specifically supports this. Existing laws and penalties apparently provide insufficient incentive for would-be criminals to avoid incarceration, presumably because criminals don't expect to be caught. Just as likely, such persons may learn to take greater care not to leave DNA at the crime scene, or perhaps, to tamper with any DNA that is left behind.\textsuperscript{144}

3. To Solve Future or Past Crimes—Not Pending Crimes

In a post-\textit{Edmond}/\textit{Ferguson} case, a New York district court, construing that state's DNA indexing statute, declared it beyond the normal need for law enforcement, because the database's primary purpose was to maintain information available to solve future crimes.\textsuperscript{145} This court distinguished \textit{Edmond} and \textit{Ferguson}, observing that both cases involved searches undertaken to obtain evidence that the searched individual had committed a specific crime,\textsuperscript{146} although a DNA sample, itself, provides no evidence of an identifiable criminal

\textsuperscript{142} Griffin v. Wisconsin, 483 U.S. 868, 880 (1987) (recognizing that "it is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law").

\textsuperscript{143} See id. (upholding state regulation requiring reasonable grounds to search a probationer's home for contraband); see also United States v. Crawford, 323 F.3d 700 (9th Cir. 2003) (holding that the search of a probationer's home must be based on reasonable suspicion); United States v. Knights, 534 U.S. 112, 114 (2001) (condoning search of probationer's home based on reasonable suspicion that probationer was involved in a crime, but expressly declining to discuss whether a search based on less than reasonable suspicion would be constitutionally permissible); infra subsection V.B.2 (discussing the reduced expectation of privacy of probationers).


\textsuperscript{145} Nicholas v. Goord, No. 01 Civ. 7891, 2003 WL 256774, at *13 (S.D.N.Y. Feb. 6, 2003) ("[I]t was apparently the expectation of the New York State legislature that the data bank's primary utility would not be to investigate past crimes but to maintain information available to solve future crimes."); see also Reynard, 220 F. Supp. 2d at 1168 (finding that the need for a more complete DNA database in order to solve future crimes not yet committed is a need beyond the normal need for law enforcement).

\textsuperscript{146} Nicholas, 2003 WL 256774, at *13. In \textit{Edmond}, the seizures were undertaken to check for signs of narcotics in vehicles stopped at the drug checkpoint, 531 U.S. 32, 35 (2000), and in \textit{Ferguson}, the searches were undertaken to obtain evidence of cocaine possession by hospital patients receiving prenatal treatment, 532 U.S. 67, 70 (2001).
act, and most likely never would be used at all.\textsuperscript{147} A DNA sample, the court reasoned, merely provides a very small chance that it "may be relevant to solving a crime that in all likelihood has not even been committed at the time of the search."\textsuperscript{148} Another court found that the DNA collection statute fit within the special needs exception, because the statute created a database for solving not only future crimes, but "crimes that have occurred but are not specifically being looked at when taking any one individual's blood sample."\textsuperscript{149} Thus, this court reasoned, the investigation is beyond ordinary law enforcement needs, because the primary purpose is not investigating "some specific wrongdoing."\textsuperscript{150}

In the above scenarios, a database "hit" would lead law enforcement officials to obtain another DNA sample from the individual for confirmation, and it is this second sample that may be used as evidence of a "specific crime." Nonetheless, under traditional Fourth Amendment principles, the second sample is arguably "fruit of the poisonous tree," unless the original search was justified at its inception.\textsuperscript{151} The Supreme Court has never set aside the individualized suspicion requirement to sanction a search or seizure justified only by the possibility that the intrusion might reveal that a particular person has committed some crime, or because law enforcement officials were not thinking of anything specific at the time.\textsuperscript{152} Were it not for Fourth Amendment prohibitions against suspicionless law enforcement searches for crime-solving purposes, many future crimes could, no doubt, be foiled before they happen or discovered more timely after they happen.

True, unlike the \textit{Edmond} searches that revealed narcotics or the \textit{Ferguson} searches that revealed cocaine possession, a DNA sample, alone, is simply blood and nothing more. Yet, it seem disingenuous to say that DNA is not evidence of an identifiable criminal act simply

\begin{itemize}
\item \textsuperscript{147} Nicholas, 2003 WL 256774, at *13 ("[S]amples of blood for the DNA databank prove nothing by themselves regarding whether the donor has committed a crime.").
\item \textsuperscript{148} Id.
\item \textsuperscript{149} Miller v. United States Parole Comm'n, 259 F. Supp. 2d 1166, 1176 (D. Kan. 2003).
\item \textsuperscript{150} Id. (quoting Nicholas, 2003 WL 256774 at *13).
\item \textsuperscript{151} See New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) ("Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the . . . action was justified at its inception' [and] second . . . whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place."") (quoting Terry v. Ohio, 392 U.S. 1, 20 (1967)).
\item \textsuperscript{152} See City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) ("We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.").
\end{itemize}
because it must first be handed over to law enforcement for laboratory analysis, then run against unsolved crimes in the DNA database. Moreover, suspicionless crime control searches are no less objectionable simply because the odds are against turning up a match.

4. To Close Gaps Left by State DNA Statutes

The Federal DNA Act’s legislative history supports the argument that its immediate purpose was to close the gap in CODIS left by the absence of samples from Federal offenders.\textsuperscript{153} Citing this legislative history, two courts, addressing a post-\textit{Edmond}/\textit{Ferguson} DNA Act challenge, found the Act’s immediate purpose was to fill the CODIS system with samples from qualifying federal offenders to bring CODIS in line with the requirements of all fifty states.\textsuperscript{154} Those courts reasoned that this was a purpose beyond ordinary law enforcement, which brought the Act’s requirements within the special needs exception.\textsuperscript{155}

This argument seems weak in light of the Supreme Court’s admonition to examine a governmental program to determine whether it is “\textit{driven} by an impermissible [law enforcement] purpose”\textsuperscript{156} and to “consider all the available evidence in order to determine the relevant primary purpose.”\textsuperscript{157} The DNA Act’s legislative history is replete with examples of Congress’s intention to promote the goal of general crime control through a comprehensive national law enforcement DNA database.\textsuperscript{158} This goal cannot be achieved on a national basis unless it contains DNA from federal, military, and Washington, D.C. offenders, as well as offenders in all fifty states. But, filling the gaps in the CODIS system has no meaning outside of CODIS’s law enforcement purposes—it is merely an inseparable step toward achieving CODIS’s full crime control potential.


\textsuperscript{155} Sczubelek, 255 F. Supp. 2d at 322; Reynard, 220 F. Supp. 2d at 1168.

\textsuperscript{156} \textit{Edmond}, 531 U.S. at 47 (emphasis added).

\textsuperscript{157} \textit{Ferguson} v. City of Charleston, 532 U.S. 67, 81 (2001); \textit{see also} \textit{Edmond}, 531 U.S. at 46.

\textsuperscript{158} \textit{See supra} note 128 (discussing legislative history of the Federal DNA Act); \textit{see also} H.R. Rep. No. 106-900, \textit{supra} note 17, pt. 1, at 26 (stating that the database was created to “solve crimes . . . by matching DNA from crime scenes to convicted offenders” and to provide a nationwide database for “law enforcement identification purposes.”).
B. Attempts to Take DNA Act Analysis Outside of the Special Needs Doctrine

1. The Non-Law Enforcement Probation Office

The Federal DNA Act designates the Probation Office as the entity responsible for collecting a DNA sample from qualifying offenders on probation, parole, or supervised release. One court contended that the special needs exception can be applied to the DNA database cases, because law enforcement officials are not executing the DNA searches; instead, such searches are conducted by the Federal Probation Office. The status of probation officers as members of the judicial branch, this court reasons, is evidence of Congress's intent to remove this area from the realm of ordinary federal law enforcement, which falls under the auspices of the Executive Branch. The Supreme Court in Griffin v. Wisconsin provides some support for this argument, describing the duties of probation officers as not typical of police, and focusing on the supervisory relationship between the probation officer and the probationer.

The Supreme Court has never limited the Fourth Amendment's prohibition against unreasonable government searches and seizures to those carried out by law enforcement officers. Neither has it limited Fourth Amendment protections to those government agents whose work descriptions fall only under the Executive Branch. Which government agents are conducting the search is not pivotal; rather, the inquiry must be whether or not the evidence obtained is to be used for law enforcement purposes. Even allowing that the Federal Probation Office may implement the federal DNA program with

159. 42 U.S.C.A. § 14,135a(a)(2) (2002) ("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 such individual who is, or has been, convicted of a qualifying Federal offense ... ").
161. Id.
162. 483 U.S. 868, 876 (1987) ("[A] probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen.").
163. Id. at 878–79 (explaining that the probation officer and the probationer have an "ongoing supervisory relationship—and one that is not, or at least not entirely, adversarial.").
164. See, e.g., New Jersey v. T.L.O., 469 U.S. 325, 334–36 (1985) (noting that school officials are not exempt from the Fourth Amendment's protections by virtue of the special nature of their authority over the schoolchildren within their charge); see also supra subsection III.B.1 (discussing the Court's administrative cases).
165. See Ferguson v. City of Charleston, 532 U.S. 67, 88 (2001) (Kennedy, J., concurring) ("The traditional warrant and probable-cause requirements are waived in our previous cases on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes.").
respect to its supervisees, the statute specifically requires the Probation Office to turn over the DNA samples to the FBI for inclusion in its database, where it will be used to investigate unsolved crimes.

2. A Reduced Expectation of Privacy

Proponents of the reduced privacy theory would contend that in the special situation of the convicted offender, the primary purpose test would not apply—that offenders have no Fourth Amendment protections against involuntary extraction of their DNA for CODIS. Convicted offenders do have a reduced expectation of privacy, which varies depending on the stage in the correctional process. With respect to inmates, prison administrators—not the courts—make the decisions and judgments needed to facilitate the safe and efficient operation of their institutions. For obvious reasons in the prison context, achieving safe and secure institutions requires a vigorous program of suspicionless searches of prison inmates, their belongings, and their cells. Even so, a prisoner is not wholly without constitutional rights, and prison regulations allowing prisoner searches must be related to legitimate institutional concerns. Challenges to prison regulations typically involve prison security or the health of the prisoners and the guards. For example, the forced administration of anti-psycotic drugs to a mentally-disordered inmate has been held

166. As a practical matter, in most cases probation officers would not actually collect the samples themselves; rather, the offenders would be required to report to a federally-operated laboratory, or private or state entity with whom the Office has contracted. See 42 U.S.C.A. § 14,135b(a)(4)(B) (2002); see also H.R. REP. No. 106-900, supra note 17, pt. 1, at 18.

167. The Act provides: "The Director of the Bureau of Prisons or the probation office responsible... shall furnish each DNA sample collected... to the Director of the Federal Bureau of Investigation, who shall carry out a DNA analysis on each such DNA sample and include the results in CODIS." 42 U.S.C.A. § 14,135a(b).


169. See id. at 84 ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."); Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974) (stating that no "iron curtain" is drawn between the Constitution and the prisons of this country); see also Canedy v. Boardman, 16 F.3d 183, 185 (7th Cir. 1994) (explaining that although rights are diminished according to institutional needs, a prisoner is not wholly without constitutional protection when imprisoned for a crime).

170. Turner, 482 U.S. at 89. In Turner, the Court held that prison regulations that impinge on an inmate's constitutional rights must be "reasonably related to legitimate penological interests." Id. The "Turner Test" is the standard to determining a prisoner's constitutional claims. Id. In determining whether the penological regulation is reasonable, a court must consider (1) whether there is a valid, rational connection between the regulation and a legitimate government interest; (2) whether there are alternative means of exercising the inmate's right; (3) the impact on guards, other inmates, and on prison resources if the prisoner's right is accommodated; and (4) whether there are ready alternatives to the regulation. Id. at 89–90.
THE PRIMARY PURPOSE TEST

Forced blood tests of prisoners are allowed in light of the penological interest in diagnosing a serious disease and preventing its transmission among the prison population, as are mandatory HIV screening of all prisoners in light of the legitimate penological objective of protecting prisoner health and preventing the spread of the virus that causes AIDS.

The Federal DNA Act directs the Bureau of Prisons to collect DNA from individuals convicted of qualifying federal offenses for inclusion in the law enforcement DNA data banks. However, neither the Act itself nor the legislative history reflects any penological or institutional objective involving prison safety or security, and the Bureau of Prisons does not control the database. To the contrary, the statute directs the Bureau of Prisons to turn the samples over to the Federal Bureau of Investigation for analysis and inclusion in the DNA database.

For individuals on release, parole, or probation, the DNA Act requires the probation office responsible for supervision to collect the DNA sample and turn it over to the FBI for analysis and inclusion of the results in CODIS. The Supreme Court has never upheld the suspicionless search of convicted offenders released into the community on probation or parole, although these individuals do not have the same liberties as others. Courts are free to impose conditions of release that do not allow the offender many freedoms which are enjoyed by law-abiding citizens. But, conditions of release must further the "primary goals of probation—rehabilitation and protecting society from future criminal violations." In Griffin v. Wisconsin, the Court upheld a Wisconsin regulation permitting a probation officer to search a probationer’s home without a warrant, based on reasonable grounds to believe contraband would be found. The Court

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172. See Thompson v. City of Los Angeles, 885 F.2d 1439, 1447–48 (9th Cir. 1989).
173. See, e.g., Harris v. Thigpen, 941 F.2d 1495 (11th Cir. 1991); see also Walker v. Sumner, No. 92-15297, 1993 U.S. App. LEXIS 26517, at *2 (9th Cir. 1993) (finding that the need to prevent spread of the virus that causes AIDS justified the threatened use of taser gun to coerce prisoner’s submission to mandatory blood test).
175. Id. § 14,135a(b).
176. Id. § 14,135a(a)(2), (b).
177. Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (stating that probationers do not enjoy “the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.”).
179. Id.
recognized that the State's operation of its probation system presented a "special need" for the officers to supervise the probationers to assure that they were, in fact, observing the conditions of probation.\textsuperscript{181} The lower level of individualized suspicion reflects a probationer's reduced expectation of privacy, but this exception to the warrant requirement in \textit{Griffin} did not arise out of a generalized concern for community safety. More immediately, the regulation was tied to the institutional concerns of the probation office, and reflected the need of the probation officer, as an employee of the Wisconsin Department of Health and Social Services, to be the person who determined how close the supervision of an individual probationer should be.\textsuperscript{182}

In \textit{United States v. Knights},\textsuperscript{183} a post-\textit{Edmond} case, the Court again upheld the search of a probationer's home by a detective who had reasonable suspicion that Knights was involved in a crime. Knights, as a condition of probation, had signed a "Fourth Waiver,"—essentially, an agreement to waive Fourth Amendment rights and allow any probation or law enforcement officer to search his person, property, home or vehicle, with or without individualized suspicion of wrongdoing.\textsuperscript{184} In light of the fact that the sheriff conducting the search had reasonable suspicion to do so, the court held that \textit{no more than} reasonable suspicion was required in this case.\textsuperscript{185} The Court expressly declined to decide, however, whether the search would have been constitutionally permissible if conducted pursuant to the Fourth Waiver, based on \textit{less than} reasonable suspicion, or no suspicion at all.\textsuperscript{186} And, since \textit{Knights} was not a suspicionless search case, the Court stated that "there is no basis for examining official purpose,"\textsuperscript{187} as required by its special needs and administrative search cases.

\textit{Knights} has implications for challenges to the DNA database statutes. The Federal DNA Act, and many state statutes, require providing a DNA sample for CODIS as a condition of probation or supervised release.\textsuperscript{188} As long as some level of individualized suspicion is required before a search, the DNA Act is difficult to uphold, since the

\begin{itemize}
\item \textsuperscript{181} Id. at 873–75.
\item \textsuperscript{182} Id. at 876.
\item \textsuperscript{183} 534 U.S. at 114–16.
\item \textsuperscript{184} See id. at 114.
\item \textsuperscript{185} Id. at 121 (emphasis added).
\item \textsuperscript{186} See id. at 120 n.6 (emphasis added). The \textit{Knights} Court also expressly did not decide whether the probationer's acceptance of the search conditions expressed in the Fourth Waiver constituted voluntary consent. \textit{Id.} at 118.
\item \textsuperscript{187} Id. at 122. ("Because our holding rests on ordinary Fourth Amendment analysis that considers all the circumstances of a search, there is no basis for examining official purpose") (citing \textit{City of Indianapolis v. Edmond}, 531 U.S. 32, 45 (2000)).
\item \textsuperscript{188} The Act provides: "If the collection of a DNA sample from an individual on probation, parole, or supervised release is authorized . . . the individual shall cooperate in the collection of a DNA sample as a condition of that probation, parole, or supervised release." 42 U.S.C.A. § 14,135c (2002).
\end{itemize}
DNA searches are suspicionless. If the Court should ever decide, however, that suspicionless searches are constitutionally permissible in the probation, parole, or supervised release contexts as a condition of release, DNA searches may be valid, so long as the probationer voluntarily accepts the condition. The voluntariness aspect is troublesome in light of the Federal DNA Act, however, which authorizes DNA samples to be taken by force, if necessary, and carries a misdemeanor penalty for failure to provide the sample voluntarily.

The Supreme Court in *Knights* explicitly left open the question of whether probationer or parolee searches could be conducted on less-than-reasonable suspicion. In 2003, the Ninth Circuit addressed the issue squarely in *United States v. Crawford*, holding that the suspicionless search of a parolee's home, made pursuant to a Fourth Waiver, violated the parolee's Fourth Amendment rights. The court reasoned that a parolee retains an expectation of privacy in his home, and any search of the home must be based on reasonable suspicion, even when the parolee has signed a Fourth Waiver accepting such searches as a condition of parole. In so holding, Judge Reinhardt, writing for a split panel, looked to the Supreme Court's recent clarifications of the "special needs" exception in *Edmond* and *Ferguson*, noting the Court's emphasis on not condoning suspicionless special needs searches conducted for law enforcement purposes. The court reasoned that what characterized the common practice of conducting parolee searches pursuant to Fourth Waivers, particularly searches of the home, is that the searches were designed to obtain evidence that would be turned over to the police for subsequent prosecution. For

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189. *Id.* § 14,135a(a)(4)(A) ("The Director of the Bureau of Prisons or the probation office responsible . . . may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual who refuses to cooperate in the collection of the sample.").

190. *Id.* § 14,135a(a)(5) ("An individual from whom the collection of a DNA sample is authorized under this subsection who fails to cooperate in the collection of that sample shall be . . . guilty of a class A misdemeanor . . . ").

191. 323 F.3d 700 (9th Cir. 2003), *petition for reh'g en banc granted*, 343 F.3d 961 (9th Cir. 2003). The *Crawford* decision was short-lived—the opinion was vacated pending rehearing en banc. *Id.* See infra note 196.

192. *Id.* at 707, 714. In *Crawford*, FBI agents conducted a search of the parolee's home pursuant to a "Fourth waiver" parole condition, hoping to pressure the parolee to incriminate himself in a two-year-old bank robbery. *Id.* at 702–03. The agent admitted they had no level of individualized suspicion, but that they "hoped" he might find something to show Crawford was doing, or had done, something illegal. *Id.* at 703. After nearly an hour of fruitless searching and questioning of Crawford, agents pressured him to leave his home to go to the FBI offices, where he was questioned again for an hour and a half, ultimately confessing to being a participant in the bank robbery. *Id.* at 704.

193. *Id.* at 713.

194. *Id.* at 713–14.
this reason, such suspicionless searches fell outside the special needs exception to the Fourth Amendment.\textsuperscript{195}

If suspicionless searches of parolees are not constitutionally permissible, then requiring a DNA sample as a condition of parole (or probation or supervised release) would violate the Fourth Amendment. Even considering that the home may have a greater expectation of privacy than a minimally intrusive DNA extraction that reveals only identifying information, under the \textit{Crawford} court's analysis, some level of individualized suspicion would still be required for parolee searches.\textsuperscript{196}

\section*{VI. A NEW CATEGORICAL EXCEPTION?}

The Supreme Court's primary purpose test aside, CODIS is potentially the best crime-fighting tool since the advent of fingerprints. The literature is replete with examples of its identifications of murderers and rapists, and CODIS is understandably popular with legislators and law enforcement officials. Attorney General Ashcroft has publicly praised CODIS's remarkable crime-solving ability,\textsuperscript{197} and President Bush has proposed a total commitment of over $1 billion to improve the use of DNA technology in the criminal justice system.\textsuperscript{198}

\begin{itemize}
\item \textsuperscript{195} In so holding, the \textit{Crawford} court rejected an opportunity to create a new category of Fourth Amendment searches based on the California Supreme Court standard for parolee searches, which allowed such searches if not "arbitrary, capricious, or harassing." \textit{Id.} at 715 (citing People v. Reyes, 968 P.2d 445 (Cal. 1998)).
\item \textsuperscript{196} The \textit{Crawford} panel's dissenting member, Judge Trott, recognized the effect that the majority's holding may have on challenges to the CODIS system, stating that the opinion "blows an ill wind for California. We may have just thrown open the habeas gates to a flood of petitions, disabled electronic monitoring, crippled DNA banks, and who knows what else." \textit{Crawford}, 323 F.3d at 737 (Trott, J., dissenting). Any potential flood of petitions was abruptly halted, however, on June 21, 2004, when the Ninth Circuit, in an \textit{en banc} opinion, affirmed Crawford's conviction, but did so on grounds not related to the legality of the parole search at his home. \textit{United States v. Crawford}, 372 F.3d 1048 (9th Cir. 2004). The court expressly declined to decide whether Fourth Waivers were valid, or whether suspicionless parole searches were unconstitutional. \textit{Id.} at 1054. Instead, the majority reasoned that, even assuming the parole search was illegal, the parolee's conviction was valid because his confession, given later at the police station, did not have a "sufficiently close relationship" to the assumed illegal search of defendant's home. \textit{Id.} at 1059.
\end{itemize}
THE PRIMARY PURPOSE TEST

Given its current constitutional infirmities, however, maintaining CODIS would likely call for the Supreme Court to create a new category of suspicionless searches. One criminal procedure expert, Professor David Kaye, has raised the possibility of a new Fourth Amendment exception, a "DNA Database Exception."\(^{199}\) Certainly, the Supreme Court may, given the opportunity, create another exception to the Fourth Amendment's warrant preference. As Professor Kaye notes: "[T]he existing exceptions to the warrant requirement are not ancient specimens of an extinct species frozen in amber. They are living creations whose structures continue to evolve and whose number is not fixed."\(^{200}\) Nonetheless, the Court has not created a new exception to the Fourth Amendment in decades, and would likely do so now with great hesitation. The Supreme Court has never approved a suspicionless search involving bodily intrusion for a law enforcement purpose, and to do so here would be a substantial departure from traditional Fourth Amendment principles.\(^{201}\)

\(^{199}\) See D.H. Kaye, The Constitutionality of DNA Sampling on Arrest, 10 CORNELL J.L. & PUB. POL'Y 455, 498–504 (2001) [hereinafter Kaye, Constitutionality]. Professor Kaye recognizes certain constitutional difficulties after Edmond and Ferguson, but argues that the Court could create a new exception for a DNA database for convicted offenders, and even arrestees. Such a database could be established with minimal physical intrusion, and with sufficient safeguards to protect privacy. See also David H. Kaye, Commentary, Two Fallacies About DNA Data Banks for Law Enforcement, 67 BROOK. L. REV. 179 (2001) (discussing the issues relating to DNA testing and the Fourth Amendment, and proposing a new theory in light of constitutional decisions).

Even more intriguing are the ideas of Professor Kaye, along with Professors Smith and Imwinkelried, regarding establishing a comprehensive population-wide DNA database. Such a comprehensive database, they say, would be more fair because it would not consist primarily of minorities (who are disproportionately represented in the criminal justice system), it would keep the DNA samples themselves out of the hands of law enforcement, and would eliminate the need for coercive DNA dragnets. The professors point out that such a database may even be constitutional if it consists of the DNA currently taken from newborns for certain medical purposes. The primary purpose of the DNA would be medical; thus, its use to law enforcement would be a constitutionally permissible secondary purpose. David H. Kaye, Michael E. Smith, & Edward J. Imwinkelried, Is a DNA Identification Database in Your Future?, 16 CRIM. JUST. 4 (2001).

\(^{200}\) Kaye, Constitutionality, supra note 199, at 499.

\(^{201}\) In United States v. Montoya de Hernandez, the Court refused to adopt a "clear indication" standard for the intrusive search of a person suspected of alimentary canal smuggling at the border. 473 U.S. 531 (1985). The Court stated: "We do not think that the Fourth Amendment's emphasis upon reasonableness is consistent with the creation of a third verbal standard in addition to 'reasonable suspicion' and 'probable cause.'" Id. at 541. See also Crawford, 323 F.3d at 715 (refusing to create a new suspicionless search category for search of parolee's home).
VII. CONCLUSION

In final analysis, attempts to constitutionally justify CODIS fail. The goals of accurate prosecution of crime and solving future crimes are so entangled with ordinary law enforcement as to be indistinguishable from it. Moreover, the criminal justice goal of preventing recidivism is, at best, a broad social purpose,202 a secondary effect insufficient to justify CODIS under the "special needs" doctrine.

Our national enthusiasm for the use of DNA in the criminal justice system often overlooks the potential for inaccuracy in test results. DNA results are only as dependable as the quality of laboratory facilities and the qualifications, expertise, and careful attention to detail of the scientists and technicians responsible for processing the samples and assigning their biometric numbers. Crime labs across the country have experienced problems resulting in loss of accreditation, forced laboratory closing, grand jury inquiry of those responsible for laboratory procedures, and the possible conviction of innocent persons.203 Nevertheless, our national enthusiasm persists.

That CODIS has proven itself remarkably effective in solving crime cannot, alone, justify its existence.204 Disposing of many Fourth, Fifth, and Sixth Amendment protections would, undoubtedly, be a far more effective way to prosecute criminals. But, the Supreme Court has never held that the effectiveness of a program justifies the


203. See Roma Khanna, DA Rosenthal to Support Sutton Pardon, HOUS. CHRON., June 27, 2003, at A1 (inmate who served four years of a twenty-five-year sentence was released from prison after tests found that the Houston Police Department crime lab incorrectly analyzed DNA evidence used to convict him); Janette Rodgers, Retesting Ordered for DNA Evidence, HOUS. CHRON., Jan. 18, 2003, at A15 (DNA testing at a Houston crime lab suspended after independent audit revealed lab did not meet FBI standards for DNA analysis due to deficiencies in training of personnel and in handling, interpretation, and documentation of DNA results); John Solomon, New Allegations Target Two FBI Crime-Lab Scientists, SEATTLE TIMES, April 16, 2003 (writing that an FBI lab technician was under investigation for her alleged failure to complete all steps to assure accurate results in 103 criminal cases); Timothy W. Maier, Inside the DNA Labs, INSIGHT ON THE NEWS, June 2003, at 18 (reporting the following: Florida technician admitted to falsifying DNA data in quality assurance tests; Arizona technicians erred in DNA analysis in nine criminal cases; West Virginia forensic expert testified regarding DNA test results in dozens of rape cases he never conducted; lab scientist proved by FBI tests to have misidentified DNA samples in the past now alleged to have made serious errors in dozens of cases in the states of Montana and Washington).

204. CODIS is unquestionably efficient at criminal investigation. As of March 2004, CODIS has produced over 11,800 hits assisting in more than 16,100 investigations nationwide. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, MEASURING SUCCESS, at http://www.fbi.gov/hq/lab/codis/success.htm (last visited July 1, 2004).
Neither can the program be justified because it addresses a grave threat to society, or may prevent social harms. It is not that the government should not create programs which have the ultimate goal of fighting crime—indeed, it should create such programs. But, the immediate purpose of those programs must address the social problem in a way that ordinary law enforcement cannot.

Moreover, the millions of persons cramming our state and federal prisons are proof that criminal investigation was hardly stymied prior to the advent of CODIS. Overwhelmingly, most convictions result from traditional police methods of cultivating sources of information, interviewing witnesses, collecting physical evidence, and conducting line-ups and photo displays. Police are assisted in their crime-solving pursuits by a myriad of scientific and technological devices, and by laws allowing law enforcement officials to compel blood, hair, saliva, and other personal and bodily evidence when justified by some requisite level of individualized suspicion.

The express language and legislative history of the Act overwhelmingly support crime-solving as its primary purpose. The immediate goals of the Act are to identify criminal suspects, match their DNA to crime scene evidence, and prosecute them—all ordinary law enforcement.

205. Although the effectiveness of a program is an essential consideration in the balancing test, that inquiry is never reached unless a court determines, as a threshold matter, that the primary purpose of the government program is something other than a great way to solve crime. Where the government program is justified at the programmatic level, the constitutionality of the program "still depends on a balancing of the competing interests at stake and the effectiveness of the program." See Edmond, 531 U.S. at 47.

206. See Ferguson, 532 U.S. at 84 n.22 (explaining that searches for the purpose of generating evidence cannot be "justified by reference to the broad social benefits that those laws might bring about (or, put another way, the social harms that they might prevent.")"; see also id. at 83 n.20 ("[T]he extensive entanglement of law enforcement cannot be justified by reference to legitimate needs.").

207. For example, in United States v. Biswell, 406 U.S. 311, 315 (1972), the Court observed that the ultimate purposes of the Gun Control Act was "to prevent violent crime and to assist the States in regulating the firearms traffic within their borders"—certainly police functions. But, the Gun Control Act's immediate purposes were narrower: to ensure that "weapons [were] distributed through regular channels and in a traceable manner and [make] possible the prevention of sales to undesirable customers and the detection of the origin of particular firearms"—goals that could not be achieved by ordinary law enforcement procedures. See id. at 315–16. Similarly, in New York v. Burger, 482 U.S. 691, 712–13 (1987), a New York statute authorizing warrantless inspections of automobile junkyards, had the ultimate purpose of addressing the major social problem of automobile theft and dealing in stolen vehicles and parts, typically subjects of police investigations. But, in contrast with penal laws designed to punish individuals for specific acts of behavior, the state statute addressed the problem in a different way—by an administrative scheme that established rules of operation and business conduct for the closely-regulated vehicle-dismantling industry, and then allowed government officials to ensure that those rules were followed. See id. at 712–14.
ment functions. CODIS was designed by the Federal Bureau of Investigation, for the use of local, state, and federal law enforcement officials. Disclosure of CODIS information regarding stored DNA and sample analysis is limited by statute to "criminal justice agencies for law enforcement identification purposes." The government has established a comprehensive crime control mechanism that can exist only if stocked with information obtained through unjustified suspicionless searches. The only logical conclusion is that the national law enforcement DNA database is unconstitutional.

208. 42 U.S.C. § 14,132(b)(3)(A) (2000) provides that disclosure of CODIS information must be limited "to criminal justice agencies for law enforcement identification purposes." CODIS information may also be disclosed in judicial proceedings to a defendant for criminal defense purposes and for research purposes for a population statistics database when the identifiers are removed. Id. § 14,132(b)(3)(B)–(D).