

## COMMENTS

### A “SPECIAL NEED” FOR CHANGE: FOURTH AMENDMENT PROBLEMS AND SOLUTIONS REGARDING DNA DATABANKING

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#### I. INTRODUCTION

DNA evidence has exonerated over 140 wrongly convicted capital defendants in the United States.<sup>1</sup> Just as DNA is often effective in providing a remedy to the wrongly accused, it is also an extremely powerful resource for law enforcement.<sup>2</sup> At first blush, this may appear to be a “win-win” scenario for all concerned (except, of course, for defendants who are actually guilty), but the expanding use of DNA evidence, particularly in cases in-

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1. Innocence Project, *The Innocence Project: Home*, <http://www.innocenceproject.org/index.php> (accessed May 17, 2004).

2. D.H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 Wis. L. Rev. 413, 414. As of October 2002, police had used the FBI's DNA databank to solve 5,700 crimes. Henry C. Lee & Frank Tirnady, *Blood Evidence: How DNA Is Revolutionizing the Way We Solve Crime* 170 (Perseus Publ. 2003).

volving DNA databanking, has met substantial resistance on the civil-liberties front.<sup>3</sup> When examining the privacy implications involved with DNA sampling, it is enlightening to compare constitutional analyses of two DNA databanks—one from convicted criminals and a similar sampling required of members of the United States Armed Forces.

In the Author's experience, military servicemembers sometimes joke that they have fewer rights than convicts do, but it is a jest that is moving frightfully closer to reality. Recent developments in the law applicable to law enforcement's use of DNA databanking, particularly the United States Court of Appeals for the Ninth Circuit's original three-judge panel majority in *United States v. Kincade*, (*Kincade I*)<sup>4</sup> suggest that in the near future members of the armed forces may receive less protection from warrantless or suspicionless searches than federal parolees and probationers do.

The distinction, in *Kincade I* and other cases, centers on the "special[-]needs" exception to the Fourth Amendment's warrant or probable cause requirements.<sup>5</sup> In criminal cases, the special-needs doctrine allows the government to use evidence gleaned from an administrative search or seizure even in the absence of probable cause, provided that the search or seizure does not serve the "normal need[s] of law enforcement."<sup>6</sup> The *Kincade I* panel found that requiring parolees and probationers to submit to blood extraction amounted to an unconstitutional search and seizure, because it served a "law enforcement purpose."<sup>7</sup> The law-enforcement purpose in *Kincade* was the augmentation of the FBI's Combined DNA Index System (CODIS) for use in investigating future crimes.<sup>8</sup> In contrast, at least one court has found it constitutional to require military personnel to submit DNA blood samples for the Armed Forces Repository of Specimen Samples for

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3. Kaye & Smith, *supra* n. 2, at 414.

4. 345 F.3d 1095 (9th Cir. 2003), *vacated*, 2004 WL 1837840 at \*17 (9th Cir. Aug. 18, 2004) (en banc) (*Kincade II*).

5. *Id.* at 1096.

6. *N.J. v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). The origin and development of the special-needs test are discussed *infra* at pt. III(A)(2)–(3).

7. 345 F.3d at 1113.

8. *Id.*

the Identification of Remains (Repository).<sup>9</sup> Applying the special-needs analysis, it becomes clear that law-enforcement agencies can access these samples for investigative or prosecutorial use.<sup>10</sup> Because the Repository serves a non-law-enforcement “special need”—identifying the remains of combat and mishap casualties—it is exempt from the same requirements that would protect convicted criminals like Thomas Kincade under *Kincade I*.<sup>11</sup> Civilian law-enforcement authorities have used DNA information from the Repository at least once to investigate and prosecute a military member.<sup>12</sup>

These results are difficult to reconcile. On one hand, *Kincade I* would deprive law-enforcement agencies of a valuable resource to investigate and prosecute crimes.<sup>13</sup> On the other hand, the men and women who volunteer to support and defend the Constitution in the armed forces are not even afforded the full extent of the Constitution’s protections. It seems in this case that science and technology have expanded faster than the law. Balancing privacy concerns against the government’s interest (law enforcement or otherwise) would be a better approach than applying the special-needs test.

The Ninth Circuit Court recently reheard *Kincade* en banc and vacated the three-judge panel’s opinion.<sup>14</sup> Upholding mandatory DNA sampling from probationers, the en banc court (*Kincade*

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9. *Mayfield v. Dalton*, 901 F. Supp. 300, 304 (D. Haw. 1995), *vacated*, 109 F.3d 1423 (9th Cir. 1997) (vacating the trial court’s judgment because, as the plaintiffs had been discharged and were no longer required to give DNA samples, the case had become moot). Requiring military personnel to submit DNA for this purpose is a lawful order under the Uniform Code of Military Justice. *U.S. v. Vlacovsky*, 1995 WL 935062 at \*4 (Navy-Marine Crim. App. Oct. 25, 1995).

10. Patricia A. Ham, *An Army of Suspects: The History and Constitutionality of the U.S. Military’s DNA Repository and Its Access for Law Enforcement Purposes*, Army Law. 1, 18 (July–Aug. 2003).

11. *Id.*

12. E-mail from David A. Boyer, Dir. of Repository Operations, Armed Forces Repository of Specimen Samples for the Identification of Remains (AFRSSIR), Armed Forces Inst. of Pathology, U.S. Dept. Def., to H. Brendan Burke, Author, Stetson Univ. College L., *Research Project Involving AFRSSIR* (Feb. 25, 2004) (copy on file with *Stetson Law Review*). This investigation helped to close a two-year homicide investigation. *Id.*

13. See Beverly A. Ginn, *Mandatory DNA Testing and the Fourth Amendment* slide 10, <http://www.aele.org/bg-dna.ppt> (accessed Jan. 9, 2004) (expressing concern that *Kincade* will interrupt the flow of information to the CODIS, hampering law enforcement nationwide).

14. *Kincade II*, 204 WL 1837840 at \*17.

*II*) plurality applied a “totality of the circumstances” analysis very similar to the balancing test that this Comment proposes,<sup>15</sup> essentially avoiding the special-needs problem altogether.<sup>16</sup> This Comment’s Author agrees with this result but recognizes that it is contrary to the great weight of case law. Until the United States Supreme Court considers this issue, the special-needs test remains the law, and *Kincade I*, despite its awkward result, applied this test more soundly than most courts,<sup>17</sup> many of which have had difficulty determining exactly what is a special need unrelated to law enforcement.<sup>18</sup> The en banc court’s unprecedented plurality opinion suggests a worthy alternative but certainly does not put these issues to rest. Because other circuits and state courts still use the special-needs test in DNA databank cases,<sup>19</sup> and because the Author’s position is that *Kincade I* applied the test more candidly than any other court facing the issue,<sup>20</sup> this Comment focuses on *Kincade I* more than *Kincade II*. Put another way, this Comment asserts that *Kincade I* has applied the test correctly but that the test itself is inappropriate.

This Comment examines the rationales behind the *Kincade* decisions. Applying the same logic to legislation allowing law-enforcement access to the Armed Forces Repository, this Comment uses the differing result obtained to suggest that the special-needs test is inappropriate for this issue. Part II of this Comment briefly describes DNA fingerprinting. Part III outlines the legislative provisions and case law that are relevant to DNA databanking. Part IV of this Comment contrasts the original *Kincade* decision with the way in which the law applies to law-enforcement use of the military’s DNA Repository. Additionally, Part IV suggests that the disparity in the results that the special-needs test achieves in each area exposes the weakness of that test. Part IV also recommends that the special-needs test should be replaced by a balancing test—not necessarily to disallow use of the military’s DNA Repository in criminal investigations, but

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15. *Infra* pt. IV(B)(3).

16. *Infra* pt. IV(B)(3).

17. *Infra* pt. IV(B)(1).

18. *Infra* nn. 53, 110.

19. *Infra* n. 110.

20. *Infra* pt. IV(B)(1).

rather to ensure that convicts' DNA is also available for that purpose.

## II. A BRIEF DISCUSSION OF DNA FINGERPRINTING

Deoxyribonucleic acid ("DNA") "constitut[es] the primary genetic material of all cellular organisms."<sup>21</sup> Developed in 1985, DNA fingerprinting allows scientists or investigators to compare individuals' genetic materials at the molecular level.<sup>22</sup> This process is useful to forensic investigators because each person's genetic makeup is distinct.<sup>23</sup>

The "fingerprint" information used in criminal investigations is derived from "junk DNA"—that which is useful for identifying a subject but, ostensibly, reveals no other information about him or her.<sup>24</sup> Researchers determined in 2001, however, that the junk DNA police use can also predict the subject's susceptibility to diabetes.<sup>25</sup> In this rapidly expanding area of science, it is unclear what other revelations might be made in the future about "junk DNA"—a fact that contributes mightily to DNA databanking opponents' privacy concerns.<sup>26</sup> One commentator noted that "[o]ne person's 'junk' DNA might prove to be another's future wealth of information about genetic conditions," such as predilection for criminal behavior, physical characteristics, sexual orientation, et cetera.<sup>27</sup>

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21. *Dorland's Illustrated Medical Dictionary* 475 (29th ed., W.B. Saunders Co. 2000).

22. *Stedman's Medical Dictionary* 476 (27th ed., Lippincott Williams & Wilkins 2000).

23. *Id.* *Stedman's* explains the technical aspects of DNA fingerprinting as follows:

The most distinctive features of an individual's genome are not the genes themselves but the variable number of tandem repeats (VNTRs) that occur between genes. While these do not transmit genetic information, they are highly consistent within the cells of an individual and highly variable from one individual to another. In DNA fingerprinting, the specimen is split into nucleotide fragments by treatment with restriction enzymes and then subjected to gel electrophoresis so as to yield a characteristic pattern of banding . . . DNA fingerprinting offers a statistical basis for evaluating the probability that samples of blood, hair, semen, or tissue have originated from a given person. It also offers a means of determining lineages of humans and animals.

*Id.*

24. *Stedman's Medical Dictionary*, *supra* n. 22, at 476; David Concar, *Fingerprint Fear* ¶ 6, <http://www.newscientist.com/news/news.jsp?id=ns9999694> (May 2, 2001).

25. *Id.*

26. Christine Rosen, *Liberty, Privacy, and DNA Databases* ¶ 16, <http://www.thenewatlantis.com/archive/1/rosen.htm> (accessed Feb. 5, 2004) (originally published in 1 *New Atlantis* (Spring 2003)).

27. *Id.* at ¶¶ 16, 45, 48. While these concerns are important to the arguments against

### III. LEGAL IMPLICATIONS OF DNA DATABANKING

This Part of the Comment explores the constitutional and statutory laws that apply to DNA databanking.<sup>28</sup> It also addresses the judicial decisions that have shaped the special-needs test, both generally and as applied to law-enforcement access to DNA databanks.

#### A. Fourth Amendment Prohibition of Warrantless Searches

This subsection explains the history of the Fourth Amendment as it relates to administrative searches and seizures. It also explains the genesis and development of the special-needs doctrine.

##### 1. Early History of the Fourth Amendment and Regulatory Searches

One of the principal grievances that American colonists had against England was the intrusion caused by warrantless searches and seizures.<sup>29</sup> The United States Supreme Court, in *Boyd v. United States*,<sup>30</sup> pointed to this jeremiad and the debates surrounding it as “perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.”<sup>31</sup> The Framers of the United States Constitution

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DNA databanks, this Comment deals specifically with using identifying information for law-enforcement purposes. The ethical and legal implications of obtaining information other than identification from DNA samples originally intended for identification are beyond the scope of this Comment. They are subjects perhaps best explored in the broader context of DNA misuses in general, in relation to applications such as paternity tests, medical diagnoses, and scientific research. See generally *id.* (discussing possible downfalls of DNA databanking).

28. Although courts and commentators use the terms “databank” and “database” interchangeably in the DNA context, “databank” appropriately broadly refers to a collection of DNA specimens or information, methodology, or legislation, while “database” specifically describes a computer file of DNA information. Lee & Tirnady, *supra* n. 2, at 169.

29. Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* vol. 1, § 1.1(a), 3–6 (3d ed., West 1996). English customs officers typically used writs of assistance to search private property for smuggled goods. *Id.* at 4.

30. 116 U.S. 616 (1886).

31. *Id.* at 625. Recalling the 1761 debates on the subject of English writs of assistance, the Court quoted John Adams: “[T]hen and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.” *Id.*

provided protection from unreasonable searches and seizures through the Fourth Amendment, which reads as follows:

The right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>32</sup>

The first part of the Amendment is commonly referred to as the reasonableness clause, while the remainder is referred to as the Warrants Clause.<sup>33</sup>

Over time, federal, state, and local governments have sought to grant their agents the authority to conduct “administrative” searches without warrants or probable cause.<sup>34</sup> These searches, distinguishable from other Fourth Amendment searches because they do not serve criminal-law-enforcement ends, are also referred to as “regulatory” searches.<sup>35</sup> The Supreme Court originally dealt with this issue by recognizing that administrative searches are subject to Fourth Amendment constraints, but focused its analysis on the reasonableness clause rather than the Warrants Clause.<sup>36</sup> In determining whether an administrative search is constitutional in the absence of individualized suspicion, the Court balanced the public’s interest in the search against the invasion of the searched party’s privacy.<sup>37</sup>

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32. U.S. Const. amend. IV (emphasis added).

33. LaFave, *supra* n. 29, at vol. 1, § 1.1(a), 6. The Supreme Court has held that intrusions into the body (the type of intrusion necessary to obtain a blood sample for DNA) implicate the Fourth Amendment. *See Winston v. Lee*, 470 U.S. 753, 767 (1984) (holding that a surgical intrusion into the defendant’s chest was an unreasonable search); *see also Rochin v. Cal.*, 342 U.S. 165, 166, 174 (1952) (holding that pumping a suspect’s stomach to obtain evidence violated the Fourteenth Amendment’s Due Process Clause).

34. *See generally* LaFave, *supra* n. 29, at vol. 4, ch. 10, 366–842. Some examples of administrative searches are housing inspections, business inspections, border searches, vehicle safety inspections, student searches, and searches directed toward prisoners, parolees, and probationers. *Id.*

35. Robert M. Bloom & Mark S. Brodin, *Criminal Procedure: Examples and Explanations* 105 (3d ed., Aspen L. & Bus. 2000).

36. *Camara v. Mun. Ct. of S.F.*, 387 U.S. 523, 533, 538–539 (1967) (holding that, because of the public’s interest in housing, code inspections outweighed the invasion of a lessee’s privacy, then a search of the lessee’s home would be permissible under an administrative warrant).

37. *Id.* at 534–537.

## 2. New Jersey v. T.L.O.: *The Origin of the Special-Needs Test*

What happens when, during a reasonable search for purposes other than law enforcement, the government procures evidence of a crime? *New Jersey v. T.L.O.*<sup>38</sup> posed this question to the Supreme Court in 1985. In *T.L.O.*, a high school teacher found the fourteen-year-old defendant smoking in a school restroom, in violation of school rules.<sup>39</sup> When a school administrator confronted her, the defendant denied that she was smoking.<sup>40</sup> The administrator subsequently searched the defendant's purse, finding marijuana, drug paraphernalia, and evidence that the defendant had sold marijuana to other students.<sup>41</sup> The administrator turned that evidence over to the police, and the State charged the student with juvenile delinquency.<sup>42</sup> The defendant moved to suppress the evidence found in her purse on the grounds that the warrantless search violated her Fourth Amendment rights.<sup>43</sup> The trial court denied the defendant's motion to suppress and adjudicated her as a delinquent.<sup>44</sup> On appeal, the state appellate court affirmed the trial court's decision to allow the evidence from the purse, but vacated the adjudication on other grounds.<sup>45</sup> The New Jersey Supreme Court reversed the appellate court's decision on the search, suppressing the evidence from the purse.<sup>46</sup>

The United States Supreme Court ruled that the search was reasonable.<sup>47</sup> The Court struck a balance between the school's interest in maintaining discipline and students' privacy expectations.<sup>48</sup> Justice Blackmun's concurring opinion later became the benchmark for administrative search cases.<sup>49</sup> In that opinion, he rejected the usual balancing analysis, proposing instead that, in

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38. 469 U.S. 325 (1985).

39. *Id.* at 328.

40. *Id.*

41. *Id.*

42. *Id.* at 328–329.

43. *Id.* at 329. The defendant also challenged the admissibility of her confession to the police, given after the school turned over the evidence, on the grounds that the earlier search tainted her confession. *Id.*

44. *Id.* at 329–330.

45. *Id.* at 330.

46. *Id.*

47. *Id.* at 347.

48. *Id.* at 342–343.

49. *Kincade I*, 345 F.3d at 1104 n. 24.



“circumstances [involving] special needs, beyond the normal need for law enforcement,” courts may find that a suspicionless search is reasonable.<sup>50</sup> He noted that public schools have a special need to ensure discipline, and that because this is not a law-enforcement need, the warrantless search was reasonable.<sup>51</sup>

### 3. Further Special-Needs Development

Justice Blackmun’s analysis eventually carried the day.<sup>52</sup> Many early cases involving DNA sampling included special-needs analyses, and these cases are indicative of the difficulty courts have had in determining precisely what was, and what was not, a law-enforcement purpose.<sup>53</sup> Partly due to that confusion, some critics feel that administrative searches without probable cause severely undermine the Fourth Amendment.<sup>54</sup>

In response to these criticisms, the Supreme Court placed the first major limitation on the special-needs exception in *City of Indianapolis v. Edmond*.<sup>55</sup> In *Edmond*, the Court struck down a city program of highway-checkpoint searches for illegal narcotics.<sup>56</sup> The Court rejected the city’s argument that general crime control was beyond a normal law-enforcement need.<sup>57</sup> Additionally, the Court noted that the existence of a non-law-enforcement purpose

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50. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

51. *Id.* at 352–353.

52. See *Skinner v. Ry. Lab. Execs. Assn.*, 489 U.S. 602, 633–634 (1989) (holding that routine breath and urine tests of railroad workers were reasonable because the government has a special need to ensure railroad safety); *Griffin v. Wis.*, 483 U.S. 868, 875–876 (1987) (holding that the “special needs” of operating a probation program legitimized the search of a probationer’s home).

53. See e.g. *Rise v. Or.*, 59 F.3d 1556, 1559 (9th Cir. 1995) (holding that a statute requiring forced blood extraction for DNA sampling from inmates was not unconstitutional “even if its only objective is law enforcement”); *Jones v. Murray*, 763 F. Supp. 842, 845 (W.D. Va. 1991) (holding that a Virginia statute requiring DNA sampling from all convicted felons was constitutional because the databank served the “special need” of solving future crimes, which was outside of the normal needs of law enforcement), *aff’d in part and rev’d in part*, 962 F.2d 302 (4th Cir. 1992); *State v. Olivas*, 856 P.2d 1076, 1086, 1088 (Wash. 1993) (holding that the special-needs exception allowed DNA sampling from violent or sex offenders, and that the test ensured appropriate privacy protection). The dissenting judge in *Olivas* criticized the majority for allowing the special-needs exception, arguing that the “DNA testing of convicted sex and violent offenders is clearly related to the normal need for law enforcement.” 856 P.2d at 1090 (Utter, J., dissenting).

54. Bloom & Brodin, *supra* n. 35, at 105.

55. 531 U.S. 32 (2000).

56. *Id.* at 48.

57. *Id.* at 44.

secondary to crime control—keeping the streets safe—did not make the searches reasonable.<sup>58</sup>

The Court refined this analysis in *Ferguson v. City of Charleston*,<sup>59</sup> a case involving a state hospital's drug testing of pregnant patients.<sup>60</sup> To curb prenatal drug abuse, hospital officials joined with police and other local officials to initiate a program of testing all maternity patients for drug use.<sup>61</sup> The stated aim of the policy was to ensure the health of mothers and babies by “identify[ing] and] assist[ing] pregnant patients suspected of drug abuse.”<sup>62</sup> The hospital offered positive drug-test results to the authorities, who in turn, arrested several patients.<sup>63</sup> The Court held that the drug tests were unconstitutional searches, ruling that the “special need” (in this case, ensuring the health of mothers and babies) needed to be completely “divorced” from the law-enforcement purpose.<sup>64</sup> Because the coordination with police was so central to the hospital's program, the Court found that the purposes were not so divorced, and that the test results could not be used as evidence against the patients.<sup>65</sup>

All fifty states have statutory policies requiring certain parolees, probationers, or convicts to provide blood samples for DNA identification.<sup>66</sup> Courts have consistently upheld the state programs under either the standard Fourth-Amendment balancing test or the special-needs test.<sup>67</sup> Since 1994, states have provided these samples to the FBI to augment the CODIS.<sup>68</sup>

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58. *Id.* at 46–47.

59. 532 U.S. 67 (2001).

60. *Id.* at 69–70.

61. *Id.* at 70–71.

62. *Id.* at 71 (quoting the joint hospital and city policy provisions).

63. *Id.* at 72–73.

64. *Id.* at 79, 85–86.

65. *Id.* at 84.

66. Ginn, *supra* n. 13, at slide 2. Every state takes DNA samples from sex offenders, while some also require sampling from other classes of criminals, such as violent felons or even misdemeanants. Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?* 34 Wake Forest L. Rev. 767, 775 (1999).

67. Ginn, *supra* n. 13, at slide 5; compare *e.g. Rise*, 59 F.3d at 1560 (upholding Oregon's DNA statute by “balanc[ing] the gravity of the public interest served by the creation of a DNA data bank, the degree to which the data bank would advance the public interest, and the severity of the resulting interference with individual liberty”); *State v. Steele*, 802 N.E.2d 1127, 1137 (Ohio App. 1st Dist. 2003) (upholding Ohio's DNA statute partly because “prisoners and probationers have diminished expectations of privacy”); with *e.g. Murray*, 763 F. Supp. at 844–845 (upholding Virginia's DNA statute by applying the spe-

## B. DNA Analysis Backlog Elimination Act of 2000

On December 19, 2000, Congress passed the DNA Analysis Backlog Elimination Act<sup>69</sup> (DNA Act), which requires federal and District of Columbia offenders to provide samples much as state convicts do.<sup>70</sup> The DNA Act also provided federal funding to states and territories for DNA sampling of convicts and from crime scenes to augment the CODIS.<sup>71</sup>

### 1. Pre-Kincade Case Law Interpreting the DNA Act

The first prominent DNA-databank cases interpreting the DNA Act were *United States v. Reynard*<sup>72</sup> and *United States v. Miles*.<sup>73</sup> These cases, both decided in California federal district courts, were also the first major DNA cases after *Edmond* and *Ferguson*.<sup>74</sup> Both cases involved defendants on supervised release subject to the DNA Act.<sup>75</sup> Both courts applied the special-needs test to determine whether the statute was constitutional as applied to the defendants, but they arrived at markedly different results.<sup>76</sup>

Although *Reynard* cited *Ferguson* and *Edmonds*, the District Court for the Southern District of California reached a result more similar to the earlier cases that blurred the line between what is and is not a law-enforcement purpose.<sup>77</sup> Looking at the language of the statute, the court determined that the purpose of the DNA Act is “to permit probation officers to fill the CODIS da-

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cial-needs test); *In re D.L.C.*, 124 S.W.3d 354, 372 (Tex. App. 2d Dist. 2003) (upholding Texas’s DNA statute by applying the special-needs test).

68. FBI, *CODIS—Mission Statement and Background*, <http://www.fbi.gov/hq/lab/codis/program.htm> (accessed May 19, 2004).

69. 42 U.S.C.A. §§ 14135–14135a (West 2003).

70. *Id.* at § 14135a. Because of its relevance to this Comment, § 14135a is reproduced in its entirety in Appendix A. The DNA Act’s implementing regulation is *Regulations under the DNA Analysis Backlog Elimination Act of 2000*, 68 Fed. Reg. 74855 (Dec. 29, 2003).

71. 42 U.S.C.A. § 14135.

72. 220 F. Supp. 2d 1142 (S.D. Cal. 2002).

73. 228 F. Supp. 2d 1130 (E.D. Cal. 2002).

74. Ham, *supra* n. 10, at 14–16.

75. *Miles*, 228 F. Supp. 2d at 1132; *Reynard*, 220 F. Supp. 2d at 1145.

76. *Miles*, 228 F. Supp. 2d at 1141; *Reynard*, 220 F. Supp. 2d at 1169.

77. 220 F. Supp. 2d at 1165, 1169. For a discussion of those earlier cases, consult *supra* nn. 38–65 and the accompanying text (describing how various courts have interpreted the “law enforcement purpose” concept).

tabase with the DNA fingerprints of all qualifying supervisees.”<sup>78</sup> After discussing the legislative history of the DNA Act, the court determined that there were actually two “special needs” beyond normal law-enforcement purposes: exoneration of innocent defendants (leading to a “more accurate criminal justice system”), and “a more complete DNA database, which will assist law-enforcement agencies to solve future crimes that have not yet been committed.”<sup>79</sup> Ruling that these were not normal law-enforcement aims, the court decided that the special-needs exception applied.<sup>80</sup>

A few hundred miles north and two months later, this reasoning did not persuade the *Miles* court.<sup>81</sup> In fact, that court found that it was “intellectually dishonest” to try to divorce the “special need” of DNA-databank augmentation from the normal needs of law enforcement.<sup>82</sup> The court suggested, in dicta, that the government could have prevailed under a straight balancing test of public interest versus invasion of privacy.<sup>83</sup> However, citing *Edmond* and *Ferguson*, the court applied the special-needs test and found the DNA Act unconstitutional as applied to the defendant parolee.<sup>84</sup>

## 2. Kincade I: *Did the Ninth Circuit Panel Get It Right?*

Both *Reynard* and *Miles* were decided in federal district courts located in California.<sup>85</sup> A three-judge panel on the Ninth Circuit Court of Appeals took the opportunity in *Kincade I* to resolve the issue of what qualifies as a law-enforcement purpose (the point of contention between *Reynard* and *Miles*), and did so squarely on the *Edmond-Ferguson-Miles* side of the fence.<sup>86</sup>

Thomas Kincade was convicted of armed robbery in 1993.<sup>87</sup> The district court sentenced him to ninety-seven months confine-

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78. *Reynard*, 220 F. Supp. 2d at 1167.

79. *Id.* at 1168.

80. *Id.* at 1169.

81. 228 F. Supp. 2d at 1138 n. 6.

82. *Id.*

83. *Id.* at 1135.

84. *Id.* at 1141.

85. *Id.* at 1130; 220 F. Supp. 2d at 1142.

86. 345 F.3d at 1110.

87. *Id.* at 1098.

ment followed by three years' probation.<sup>88</sup> He was released from prison in 2000, and in 2002, the Bureau of Prisons ordered him to provide a blood sample pursuant to the DNA Act.<sup>89</sup> When he refused, the government charged Kincade with a misdemeanor, and the district court subsequently found him in violation of his probation.<sup>90</sup> Kincade's defense was that he felt the law was unconstitutional and that his incarceration was punishment enough.<sup>91</sup>

The panel found that the DNA Act was unconstitutional as applied to Kincade.<sup>92</sup> The majority found that the blood extraction was a "search" for Fourth Amendment purposes, and that because it did not serve a "special need" unrelated to law enforcement, such a search required individualized suspicion supported by probable cause.<sup>93</sup> There was no individualized suspicion here.<sup>94</sup> The government argued that, because Kincade, as a parolee, had a lesser expectation of privacy than the ordinary citizens in *Edmond* and *Ferguson*, the search should not have required individualized suspicion.<sup>95</sup> The panel rejected this argument and pointed out that, "while parolees enjoy lesser Fourth Amendment rights than other citizens, their rights are not *extinguished*."<sup>96</sup>

In excluding the DNA Act from the special-needs exception under *Edmond* and *Ferguson*, the *Kincade I* majority flew in the face of a considerable body of case law on the subject.<sup>97</sup> There was concern among law-enforcement officials that, at a minimum, the *Kincade I* decision would cause an interruption in the provision of DNA samples from jurisdictions in the Ninth Circuit to the CODIS, reducing the databank's usefulness to its nationwide con-

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88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at n. 9.

92. *Id.* at 1113.

93. *Id.* at 1099, 1105. The government argued that the "immediate purpose" of the DNA Act was "to create a comprehensive national DNA database that can exonerate and inculcate individuals in the future" rather than to prosecute the probationer, and therefore was not related to law enforcement under the special-needs test. Br. of Appellee at 21–22, *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003).

94. *Kincade I*, 345 F.3d at 1098.

95. *Id.* at 1102.

96. *Id.* (emphasis in original).

97. *Padgett v. Ferrero*, 294 F. Supp. 2d 1338, 1342 (N.D. Ga. 2003) (observing that "the overwhelming majority of courts have held that DNA collection and typing laws are constitutional").

sumers.<sup>98</sup> A greater fear was that other courts would follow the Ninth Circuit's lead in strictly interpreting the notion of a purpose unrelated to law enforcement.<sup>99</sup> This fear, though well-founded, has not been fulfilled at the time of the writing of this Comment.<sup>100</sup>

### 3. *Kincade II: If We Ignore the Special-Needs Test, Maybe It Will Go Away*

On August 18, 2004, the Ninth Circuit Court issued a new *Kincade* decision after rehearing the case en banc.<sup>101</sup> Of an eleven-judge panel, five judges joined in a plurality opinion upholding the DNA Act based on a “totality of the circumstances” approach.<sup>102</sup> One judge concurred with the result—allowing mandatory DNA sampling from probationers—but applied the special-needs test to reach that opinion.<sup>103</sup> The five dissenting judges would have affirmed *Kincade I*, finding the DNA Act unconstitutional under a special-needs analysis.<sup>104</sup>

*Kincade II*'s plurality measured the government's interest in mandatory DNA sampling with a ruler of policy:

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98. Ginn, *supra* n. 13, at slide 10.

99. *Id.*

100. Since *Kincade I*, a few cases outside of the Ninth Circuit have upheld the DNA Act and similar state statutes under the special-needs exception. See *Green v. Berge*, 354 F.3d 675, 677 (7th Cir. 2004) (quoting *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003) and holding that “build[ing] a DNA database goes beyond the ordinary law enforcement need”); *U.S. v. Plotts*, 347 F.3d 873, 877 (10th Cir. 2003) (citing *Kimler*, 335 F.3d at 1146, as authority that DNA Act survives the special-needs test due to probationer defendant's reduced expectation of privacy); *Steele*, 802 N.E.2d at 1136 (deciding that “solving future crimes” was a special need bringing a state DNA sampling statute into the exception); *D.L.C.*, 124 S.W.3d at 372 (holding that, because the state DNA statute was not intended to produce evidence from a specific individual of a specific crime, it served a “special need”). Other courts have dodged the special-needs analysis altogether, validating the DNA Act based on a more traditional Fourth-Amendment balancing test. See *Groceman v. U.S. Dept. of Just.*, 354 F.3d 411, 413 (5th Cir. 2004) (relying on a theory of prisoners' reduced privacy rights to find the DNA Act constitutional); *Padgett*, 294 F. Supp. 2d at 1143 (holding that the “special needs” exception is not applicable to prisoner searches); *U.S. v. Stegman*, 295 F. Supp. 2d 542, 550 (D. Md. 2003) (refusing to apply the “special needs” test due to probationers' lessened expectation of privacy).

101. *U.S. v. Kincade II*, 379 F.3d 813 (9th Cir. 2004).

102. *Id.* at 839.

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

104. *Id.* at 842 (Reinhardt, Pregerson, Kozinski, & Wardlaw, JJ., dissenting); *id.* at 871 (Kozinski, J., dissenting); *id.* at 875 (Hawkins, J., dissenting).

We believe that such a severe and fundamental disruption in the relationship between the offender and society, along with the government's concomitantly greater interest in closely monitoring and supervising conditional releasees, is in turn sufficient to suspicionless searches of his person and property even in the absence of some non-law enforcement "special need"—at least where such searches meet the Fourth Amendment touchstone of reasonableness as gauged by the totality of the circumstances.<sup>105</sup>

The circumstances to be totaled, according to the plurality, were the probationers' reduced expectation of privacy, the benign character of the intrusion for a blood sample, and "the overwhelming societal interest" of augmenting the CODIS.<sup>106</sup> The court rejected the *Kincade I* panel's assertion that the DNA Act smothered all of Kincade's privacy rights by emphasizing the fact that this search was reasonable; an unreasonable search—judged by the totality of the circumstances— would still be unconstitutional.<sup>107</sup>

Lacking a true majority, *Kincade II* probably does not carry sufficient weight to persuade other circuits to abandon the special-needs test when considering searches like the one the DNA Act prescribes, especially considering the ease with which many jurisdictions seem to narrow the definition of a "law-enforcement purpose."<sup>108</sup> Judge Ronald Gould's *Kincade II* concurrence suggested that deterring recidivism and enhancing probationers' supervision qualify as "special needs."<sup>109</sup> It is important to note that six of the eleven judges, including Judge Gould, favored the special-needs test.<sup>110</sup> Had Judge Gould agreed with the dissenters, and the *Kincade I* majority, that solving future crimes was a law-enforcement purpose (not a "special need"), then an en banc majority would have affirmed *Kincade I*—a result which would have been significantly more persuasive than a plurality creating new law at the circuit level.

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105. *Id.* at 835 (plurality).

106. *Id.* at 839.

107. *Id.* at 835.

108. *Supra* n. 53; *infra* n. 130.

109. *Kincade II*, 379 F.3d at 840.

110. *Id.* at 843 (Reinhardt, Pregerson, Kozinski & Wardlaw, JJ., dissenting).

### C. National Defense Authorization Act of 2003

To better understand the Fourth Amendment implications of mandatory DNA sampling under the special-needs test (or otherwise), it is helpful to examine the test as applied to a similar search of a completely different class of people—military service-members. The Department of Defense requires all members of the United States Armed Forces, and certain civilian employees and contractors, to submit blood or tissue samples to the Armed Forces Repository of Specimen Samples for the Identification of Remains (Repository).<sup>111</sup> The Repository's mission is "to assist in . . . human remains identification while assuring the protection of privacy interests."<sup>112</sup> The Repository currently has well over four million DNA samples on file.<sup>113</sup>

On December 2, 2002, President George W. Bush signed the 2003 National Defense Authorization Act,<sup>114</sup> which allows law-enforcement agencies to access the Repository for investigative purposes.<sup>115</sup> This Act was, in some respects, essentially a codification of already-established policy.<sup>116</sup> Prior to the 2002 law, certain members of the service branches' and Defense Department's bureaucratic organizations could approve requests for access to the Repository for law-enforcement investigations.<sup>117</sup> Now, federal courts can order access.<sup>118</sup>

The Repository maintains blood or tissue samples in cold storage until they are required for remains identification (or some

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111. Armed Forces Inst. of Pathology, *Armed Forces Repository of Specimen Samples for the Identification of Remains (AFRSSIR)*, "Repository History," <http://www.afip.org/Departments/oafme/dna/afrssir/> (accessed May 19, 2004).

112. *Id.* at "Mission," <http://www.afip.org/Departments/oafme/dna/afrssir/>.

113. Telephone Interview with David A. Boyer, Dir. of Repository Operations, Armed Forces Repository of Specimen Samples for the Identification of Remains, Armed Forces Inst. of Pathology, U.S. Dept. Def. (Mar. 5, 2004). This is more than twice the number reported on file in the CODIS (convicted felons and unmatched forensic samples combined) as of March 2004. FBI, *supra* n. 61, at <http://www.fbi.gov/hq/lab/codis/clickmap.htm>. One of the more than four million samples in the Repository (Specimen No. 1,348,586) contains the DNA of the Author of this Comment. Telephone Interview, *supra*.

114. 10 U.S.C.A. §§ 1565–1565a (West 2003).

115. *Id.* at § 1565a; Ham, *supra* n. 10, at 2. Because of its relevance to this Comment, § 1565a is reproduced in its entirety in Appendix A. *See also* 10 U.S.C.A. § 1565 (imposing requirements similar to the DNA Act on servicemembers convicted of crimes in the military-justice system).

116. Ham, *supra* n. 10, at 2.

117. *Id.* at 5.

118. *Id.* at 8.



other purpose, as provided for by the 2003 National Defense Authorization Act).<sup>119</sup> Because they are not actually typed until needed for identification, the government cannot scan the entire catalog of samples to match an unknown suspect's DNA.<sup>120</sup> This invites the supposition that individualized suspicion, supported by probable cause, must be present. However, to obtain a court order, a law-enforcement agency requesting access to the Repository must demonstrate to the judge only "that there is no reasonable alternate source of DNA."<sup>121</sup> Repository personnel will then review both the request and order to ensure that they comply with Defense Department instructions—specifically, that the offense in question is a felony or a sex crime, and that provision of the DNA sample will not compromise the Repository's stated mission of remains identification.<sup>122</sup>

As of February 25, 2004, there had been only one court-ordered release of DNA information from the Repository.<sup>123</sup> That release resulted in a former servicemember's arrest in a two-year-old murder investigation.<sup>124</sup>

There is relatively little case law examining the Fourth-Amendment implications of the Repository or its use for criminal

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119. Telephone Interview, *supra* n. 113.

120. E-mail, *supra* n. 12.

121. *Id.* It may be helpful to consider the Repository in the light of two distinct searches. First, the government intrudes into military members' bodies to obtain DNA samples for the Repository, obviously with no suspicion of each subject's future criminal activity. This type of search was upheld in the public-school context by the Supreme Court in *Vernonia School District 47J v. Acton*, a case involving random drug testing of grade-school athletes. 515 U.S. 646, 658 (1995) (holding that controlling drug use in the schools was a valid special need, and noting that the drug-test results were "not turned over to law enforcement authorities or used for any internal disciplinary function"). Ultimately, when a future crime is committed, the government makes a second search, this time into a servicemember's blood or tissue sample from the Repository. Because individualized suspicion is now involved, though without probable cause or a warrant, the second search is more analogous to the search in *T.L.O.* *Supra* nn. 38–51 and accompanying text. Under the special-needs test, because the purpose of the first search does not involve law enforcement, the second search is also legitimate. *Infra* n. 133. Because this Comment uses the Repository as compared with the CODIS to explore whether the fruits of each databank (particularly the latter) should be excluded from criminal prosecutions, and not to challenge the primary purpose of the Repository, the second search is more relevant here.

122. Telephone Interview, *supra* n. 113; Dept. Def. Instr. 5154.30, *Armed Forces Inst. of Pathology Operations*, enclosure E2.5.4.5 (Mar. 18, 2003). In theory, the Repository's inquiries are redundant, because the same requirements are listed almost verbatim in the National Defense Authorization Act of 2003. 10 U.S.C.A. § 1565a.

123. E-mail, *supra* n. 12.

124. *Id.*

investigations. One case predating the 2002 Act held that it was constitutional to require servicemembers to give samples for the Repository.<sup>125</sup> Since *Edmond* and *Ferguson*, no reported opinions have examined the Repository through the lens of the special-needs exception. At least one commentator has noted that courts are likely to find law-enforcement access to the Repository under the National Defense Authorization Act of 2003 to be constitutional under this exception.<sup>126</sup> This is because the primary purpose of the Repository is human-remains identification, a purpose divorced from any law-enforcement need.<sup>127</sup>

#### IV. PROBLEMS AND SOLUTIONS

This Comment now turns to illustrations of the difficulties courts have found in interpreting the special-needs test, and the disparity of protection that the test offers. This Part also proposes the adoption of a balancing test in lieu of the special-needs test to determine the constitutionality of administrative searches of people with a reduced expectation of privacy.

##### A. The Disparate Results Reached through Special-Needs Analysis

If the original opinion in *Kincade I* should become the emerging standard regarding DNA databanks, then with that standard emerges a troubling dichotomy when the CODIS is compared with the Repository, at least when the Repository is used as a criminal-investigation tool. Two separate databanks. Two different classes of people identified. Both offer prosecutors a chance to exonerate the innocent and convict the guilty.<sup>128</sup> Both carry noteworthy privacy concerns. Yet through the lens of the special-needs test, one is permissible and the other is not.<sup>129</sup>

*Edmond*, *Ferguson*, and *Kincade I* are compelling interpretations of Justice Blackmun's original vision: "Only in those exceptional circumstances in which special needs, *beyond the normal*

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125. *Mayfield*, 901 F. Supp. at 304. The court found that the government's interest in identifying remains outweighed the slight intrusion into the servicemembers' privacy. *Id.*

126. Ham, *supra* n. 10, at 17–18.

127. *Id.* at 17.

128. Arguably, the CODIS is even more useful in this regard than the Repository, given the prevalence of recidivism discussed *infra* at notes 163–165 and the accompanying text.

129. *Supra* nn. 93, 127, and accompanying text.

need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.”<sup>130</sup> Before retirement, Justice Blackmun dissented on some of the very cases that blurred the line between a permissible purpose and one that is impermissibly connected to law enforcement.<sup>131</sup> After all, if solving crimes is not a normal law-enforcement function, then what is? But perhaps an even more perplexing question is this—why is the “law enforcement need” distinction so important that the Fourth Amendment should protect criminals but not soldiers from future incrimination by DNA sampling?

Much as the primary purposes of the CODIS and the Repository are different, convicts and servicemembers are different in ways that are important to this analysis. Servicemembers, at least in general, maintain a presumption of innocence like most ordinary citizens.<sup>132</sup> While prison inmates, parolees, and probationers certainly are not presumed guilty of future crimes, they do not share in that presumption as to the offenses for which they are currently, contemporaneously with their obligations under the DNA Act, serving sentences. It is also interesting to note that society as a whole tends to view the military with appreciation, but disdains criminals and convicts.

Despite these notable differences, convicted criminals and servicemembers share one characteristic that sets them apart from ordinary citizens—both have reduced expectations of privacy.<sup>133</sup> Military members are subject to search and inspection for

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130. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring) (emphasis added).

131. See e.g. *Griffin*, 483 U.S. at 881 (Blackmun, J., dissenting) (noting that the Court incorrectly determined that management of the probation system was a special need); *O'Connor v. Ortega*, 480 U.S. 709, 732–733 (1987) (Blackmun, J., dissenting) (calling the Court to task for including the work-related search of a government employee's desk in the special-needs exception).

132. *Courtney v. Williams*, 1 M.J. 267, 271 (Armed Forces App. 1976).

133. For an examination of military members' reduced expectation of privacy, see *U.S. v. Turner*, 33 M.J. 40, 41 (Mil. App. 1991) (deciding that “compulsory urinalysis, as part of a military inspection, may be conducted without probable cause or individualized suspicion”); *U.S. v. Bickel*, 30 M.J. 277, 285 (Mil. App. 1990) (holding that the military's “highly regulated environment” necessitates a reduced expectation of privacy); and *U.S. v. Patterson*, 39 M.J. 678, 682 (Navy-Marine Crim. App. 1993) (holding that “[s]ervice members have a reduced expectation of privacy, and are on notice that they may be subjected to reasonable inspections”). For cases discussing expectation of privacy in the penal context, see *U.S. v. Knights*, 534 U.S. 112, 119 (2001) (holding that a warrantless search was reasonable because probationers enjoy fewer rights than ordinary citizens); *Griffin*, 483 U.S.

various purposes, such as ensuring good order and discipline, maintaining readiness, and protecting health and welfare.<sup>134</sup> The Military Rules of Evidence specifically provide for these suspicionless searches.<sup>135</sup> Entrants are also subject to intrusive background investigations and physiological examinations.<sup>136</sup> Similarly, probationers are subject to searches of their homes and persons, as conditions of their probation.<sup>137</sup>

In every Fourth-Amendment analysis, before the special-needs test even becomes a consideration, courts must ask whether the searched party had an objective expectation of privacy “that society is prepared to recognize as ‘reasonable.’”<sup>138</sup> It seems incredible, offensive even, to conclude that society is prepared to grant convicted criminals serving their sentences a greater expectation of privacy than that allowed to military members serving their nation. All who volunteer to join the military take a solemn oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic.”<sup>139</sup> If *Kincade I* becomes the rule rather than the exception, then enlistees will volunteer to defend a Constitution that provides them with fewer privacy rights than it grants to criminals.

### B. A Proposed Solution

This section suggests that a balancing test is more appropriate when considering regulatory searches of groups with a reduced expectation of privacy.<sup>140</sup> Additionally, the section illus-

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at 875–876 (upholding state regulation allowing warrantless searches of probationers’ homes under the “special needs” exception); and *Hudson v. Palmer*, 468 U.S. 517, 525–526 (1984) (establishing that prison inmates have no objective expectation of privacy regarding prison-cell searches). See also John W. Palmer & Stephen E. Palmer, *Constitutional Rights of Prisoners* § 9.6.2, 221–226 (7th ed., Anderson Publg. Co. 2004) (surveying Fourth Amendment implications of searches as a condition of parole).

134. Mil. R. Evid. 313.

135. *Id.* at 313–314.

136. U.S. Mil. Entrance Processing Command, *Your Future Begins Now!*, “Physical,” “Enlistment,” <http://www.mepcom.army.mil/visitor-info.htm> (accessed May 19, 2004).

137. *Supra* n. 133.

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

139. 5 U.S.C.A. § 3331; 10 U.S.C.A. § 502.

140. The balancing test proposed in this Part is very similar to the “totality of the circumstances” test espoused in the *Kincade II* plurality opinion, which was published very shortly before this Comment went to print. 2004 WL 1837840 at \*17. The major difference between the two analyses is that the balancing test proposed here is specifically invoked by an administrative search when the person searched has a reduced expectation of pri-

trates how the balancing test would be applied to federal probationers and military servicemembers subject to DNA sampling.

*1. Disposing of “Intellectual Dishonesty” and Circular Logic*

A better approach to the Fourth-Amendment analysis of DNA databanks would, at the very least, treat one group the same way as the other.<sup>141</sup> As illustrated in Part IV(A) above, convicts in the penal system and servicemembers on active duty both have reduced expectations of privacy.<sup>142</sup> Convicted felons, however, lose many more rights, even after they have completed their sentences.<sup>143</sup> These lost rights include the following: citizenship,<sup>144</sup> voting rights,<sup>145</sup> the right to hold public office,<sup>146</sup> judicial rights (including the right to sue, serve as a juror, or testify),<sup>147</sup> domestic rights,<sup>148</sup> property rights (including the right to access a checking account or possess currency while in prison),<sup>149</sup> the right to insurance (including pensions and workers’ compensation),<sup>150</sup> and the right to own or purchase firearms.<sup>151</sup> Parolees must get permission to get married, change residences, get a job, or associate with

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vacy. This Comment does not recommend abandoning the special-needs test altogether, as the test remains appropriate for regulatory searches involving the general public. Nor did *Kincade II* propose abandonment. But the plurality, “[w]hile not precluding the possibility that the federal DNA Act could satisfy a special needs analysis,” clearly found greater comfort in upholding the Act under a traditional Fourth-Amendment totality-of-the-circumstances test, and the court justified its choice of law by pointing out that it had used the same test nine years earlier. *Id.* at 831–832 (citing *Rise*, 59 F.3d 1556).

141. This Comment specifically advocates law-enforcement use of DNA databanks for classes of people with reduced expectations of privacy, such as parolees or military members. It does not recommend abandoning the special-needs test when the general public is involved, although some commentators have suggested just that. Kaye & Smith, *supra* n. 2, at 434, 445 (proposing a “biometric exception” to the Fourth Amendment’s probable-cause requirement applicable to “biometric identifiers like fingerprints and DNA profiles,” which would allow the government to create a DNA databank of the entire population for use in investigating future crimes).

142. *Supra* nn. 133–137 and accompanying text.

143. Herbert Ira Handman, *The Rights of Convicts* 70 (Oceana Publications, Inc. 1975); Palmer & Palmer, *supra* n. 133, at § 10.5, 256–258.

144. Handman, *supra* n. 143, at 70.

145. *Id.*

146. *Id.*

147. *Id.*; Palmer & Palmer, *supra* n. 133, at § 10.5, 258.

148. Handman, *supra* n. 143, at 70; Palmer & Palmer, *supra* n. 133, at § 9.6.1, 219, § 10.5, 256–258.

149. Handman, *supra* n. 143, at 70; Palmer & Palmer, *supra* n. 133, at § 10.5, 258.

150. Handman, *supra* n. 143, at 70.

151. Palmer & Palmer, *supra* n. 133, at § 10.5, 258.

certain people.<sup>152</sup> There are even restrictions on the First-Amendment rights of inmates and parolees.<sup>153</sup>

The *Kincade I* majority acknowledged that Thomas Kincade, as a probationer, had a reduced expectation of privacy.<sup>154</sup> But the court made an unsubstantiated leap of logic when it reasoned that to require a blood submission from him would extinguish his Fourth Amendment rights altogether.<sup>155</sup> To borrow a phrase from the *Miles* court, this conclusion is “intellectually dishonest.”<sup>156</sup> It seems similarly dishonest to reason that a non-law-enforcement justification should distinguish the rights of servicemembers from those of convicts, or from any class of people.

Courts have long had difficulty precisely interpreting the special-needs test, especially as applied to DNA-databank cases.<sup>157</sup> To justify its decision upholding the DNA Act under the special-needs test in *Nicholas v. Goord*,<sup>158</sup> the United States District Court for the Southern District of New York employed circular logic:

Obviously, obtaining a DNA sample for a databank is within the scope of law enforcement, broadly defined, and certainly has a relationship to the solving of crimes. But the primary purpose of collecting samples for the databank is not for the State to determine that a particular individual has engaged in some specific wrongdoing.<sup>159</sup>

Recalling that a search lacking individualized suspicion is what implicates the special-needs analysis to begin with, one can break down the New York court’s logic in this way: in the absence of individualized suspicion, a search is permissible if its primary purpose does not involve individualized suspicion.

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152. Handman, *supra* n. 143, at 64; Palmer & Palmer, *supra* n. 133, at § 9.6.1, 219.

153. Palmer & Palmer, *supra* n. 133, at § 9.6.1, 218–221, § 10.5, 258. Examples of First-Amendment restrictions on parolees include a prohibition to communicate with victims, even if the victims are the parolee’s own children, and the requirement that the parolee not profit from telling the story of his or her crime. *Id.* at § 9.6.1, 219.

154. 345 F.3d at 1102.

155. *Id.*

156. 228 F. Supp. 2d at 1139 n. 6.

157. *Supra* nn. 53, 100.

158. 2003 WL 256774 (S.D.N.Y. Feb. 6, 2003), *modified*, 2004 WL 1432533 (S.D.N.Y. Jun. 24, 2004).

159. *Id.* at \*13.

The use of DNA in criminal investigations is a complex, cutting-edge issue.<sup>160</sup> Determining when its use is permissible and what rights apply requires a high degree of precision.<sup>161</sup> To accomplish this, however, courts are using a doctrine that was developed in the wake of a schoolteacher catching a schoolgirl smoking in the restroom.<sup>162</sup> The result is the kind of circular, tortured logic employed in *Nicholas*. The test works well in the context of school searches and highway roadblocks, but comes up short when applied to DNA databanks.

*Kincade I*, on its face, would have rightly disposed of the circular logic by applying the special-needs test according to the form espoused by *Edmond* and *Ferguson*.<sup>163</sup> The threatened cost of this preference for form over result, however, is the loss of a valuable investigatory tool that can not only solve crimes, but also prevent them.<sup>164</sup>

## 2. Illustrations of DNA Databanks' Utility in Preventing Future Crimes

In her article, *An Army of Suspects: The History and Constitutionality of the U.S. Military's DNA Repository and Its Access for Law Enforcement Purposes*,<sup>165</sup> Army Lieutenant Colonel Patricia Ham uses the story of Army Specialist Christopher Reyes to illustrate how DNA databanks such as the Repository could help authorities apprehend offenders and prevent future crimes.<sup>166</sup> Reyes was an Army soldier who raped a woman in January 2002.<sup>167</sup> He wore a mask, and evaded both identification and capture.<sup>168</sup> The victim reported that her assailant had the initials "CMR" tattooed on his chest.<sup>169</sup> The subsequent rape kit analysis yielded DNA evidence, but this crime happened before the National Defense Authorization Act of 2003 allowed law-

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160. *Supra* pt. II.

161. *Supra* pt. III.

162. *Supra* nn. 38–48 and accompanying text.

163. *Supra* nn. 93–94.

164. Ginn, *supra* n. 13, at slide 10.

165. Ham, *supra* n. 10.

166. *Id.* at 3–4.

167. *Id.* at 2, 4.

168. *Id.* at 4.

169. *Id.*

enforcement agencies to use military DNA samples from the Repository for criminal investigations.<sup>170</sup> Three months later, Reyes shot and killed a man, attempted to kill two more people, and then turned himself in to authorities.<sup>171</sup> Only then, by the identification of his tattoo, did the police connect him to the earlier rape.<sup>172</sup> Comparison of the forensic DNA from the rape investigation against the Repository could have identified Reyes as the perpetrator, and almost certainly would have prevented the later murder and attempted murders.<sup>173</sup> This case, in part, helped lead to the passage of the relevant portions of the National Defense Authorization Act of 2003.<sup>174</sup>

It is easy to imagine a scenario similar to the Reyes case playing out in the context of a civilian probationer or parolee. Under the DNA Act, if a probationer commits a violent crime, such a rape, after release from prison, then authorities can compare DNA evidence from the crime against the CODIS databank to ensure swift justice.<sup>175</sup> But under the *Kincade I* application of the special-needs test, probationers could more easily get away with such repeat offenses, or graduate to more violent crimes.<sup>176</sup>

There is also a compelling public-policy argument that supports upholding the DNA Act. According to the Justice Department's most recent report on recidivism, 67.5% of federal prisoners released in 1994 were arrested again within three years of

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170. *Id.* at 2, 4.

171. *Id.* at 3–4. Reyes seriously injured one of the victims. *Id.*

172. *Id.* at 4.

173. *Id.*

174. *Id.* at 2, 4.

175. *Kincade I*, 345 F.3d at 1111.

176. They would be well advised, however, not to do so in their own homes, where it is well-settled as a matter of law that probationers are subject to suspicionless searches by law enforcement. *Supra* n. 133. Reyes is now serving a life sentence without parole. Ham, *supra* n. 10, at 4. It is interesting to note, however, that were he eligible for parole, and if *Kincade I* controlled in his jurisdiction, he could have kept his DNA out of both the CODIS and the Repository. Having been discharged from the Army (albeit dishonorably), he is eligible to have his Armed Forces DNA sample destroyed. Armed Forces Inst. of Pathology, *supra* n. 111, at *Armed Forces DNA Repository—(AFRSSIR): FAQ*, “When I separate from the service, can I have my specimen returned to me or destroyed?” <http://www.afip.org/Departments/oafme/dna/afrssir/faq.html>. Under *Kincade I*, if Reyes was paroled, he would have beaten the DNA system both going in and coming out. He would once again be able to leave his DNA freely at whatever crime scene he wished, while the law-abiding soldiers with whom he formerly served enjoy far less Fourth Amendment privacy protection.



their release.<sup>177</sup> Almost half were convicted of new crimes.<sup>178</sup> About 7.6% of those released were arrested in states different from the ones in which they were first incarcerated.<sup>179</sup> This figure, in particular, shows how a nationwide system like the CODIS would greatly assist law-enforcement officers.

### 3. An Alternative to the Special-Needs Test

The Ninth Circuit three-judge panel applied the special-needs test in *Kincade I* as lucidly as any court that has considered DNA databanks post-*Edmond*.<sup>180</sup> But in light of the disparities described above, courts should not apply the special-needs test to cases involving administrative searches when the class of people searched has a reduced expectation of privacy.<sup>181</sup> An ideal test to determine whether such searches are reasonable would be similar to the standard Fourth Amendment balancing test employed outside of administrative searches, except that it should focus on the searched party's reduced expectation of privacy. Such a test should balance the burden—measured by considering the reduced expectation of privacy along with the severity of the intrusion—against the legitimacy of the government interest—law enforcement or otherwise.

To determine the quantum of burden, the court should consider the reason for the reduced expectation of privacy and the scope of the reduction. In other words, is it limited to the workplace, or is it a condition associated with probation? Most important, the judge should ask, to what extent is the expectation of privacy reduced? Reduced expectations of privacy and more compelling reasons for those reductions are factors that bolster the presumption of a reasonable search.

To complete the burden analysis, the court should examine the severity of the intrusion.<sup>182</sup> How much is the searched party

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177. U.S. Dept. of Just., *Bureau of Justice Statistics Special Report: Recidivism of Prisoners Released in 1994* 1 (June 2002). This was an estimated five-percent increase over the 1983 recidivism rate. *Id.*

178. *Id.*

179. *Id.* at 6.

180. *Kincade*, 345 F.3d at 1104.

181. *Supra* pt. IV(A).

182. See e.g. *Skinner*, 489 U.S. at 625 (examining the severity and intrusiveness of blood tests).

inconvenienced? Is it a temporary or permanent inconvenience? Is the search narrowly tailored to achieve its aims? A more severe intrusion lowers the presumption that the search is reasonable.<sup>183</sup>

The court should then compare the quantum of burden to the government's legitimate interest in the expected fruits of the search. What is the primary purpose served by the search? Contrary to the special-needs analysis, if the searched party has a reduced expectation of privacy, it is irrelevant whether the purpose pertains to law enforcement. A legitimate government interest lends itself to the presumption that the search is reasonable.<sup>184</sup>

#### 4. *The Balancing Test As Applied to the Repository and the CODIS*

What would be the result if this test were applied to the two DNA databanks discussed in this Comment? The DNA Act would survive this balancing approach. The convict's expectation of privacy is low,<sup>185</sup> and the severity of intrusion (usually a single needle prick or a swab from inside the mouth) is also low.<sup>186</sup> The governmental interests in crime prevention and accurate prosecution are legitimate and substantial. Weighing the low expectation of privacy and benign intrusion (making for a low quantum of burden in total) against a substantial government interest, the court would conclude that the search is reasonable.

When the balancing test is applied to the statute allowing law-enforcement access to the military Repository, the result is closer. Servicemembers' privacy expectations are reduced, but perhaps not as low as for convicts.<sup>187</sup> The intrusion is exactly the

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183. *Id.* at 626 (discussing urine tests as unreasonable under certain circumstances).

184. *Id.* (stating that military personnel are subject to reasonable searches due to the obvious legitimate government interest in the military).

185. *Supra* n. 133.

186. *Skinner*, 489 U.S. at 625 (stating that "the intrusion occasioned by a blood test is not significant, . . . 'and that for most people the procedure involves virtually no risk, trauma, or pain'" (quoting *Schmerber v. Carl*, 384 U.S. 757, 771 (1966))).

187. *Supra* nn. 133, 143–153. It should be noted that the Repository contains DNA not only from uniformed active-duty servicemembers, but also "from civilian government employees and civilian contractors who support military missions in hostile foreign environments." Armed Forces Inst. of Pathology, *supra* n. 111, at "Mission," <http://www.afip.org/Departments/oafme/dna/afrssir/>. This fact could make military members' privacy expectation irrelevant in the determination of whether law-enforcement access to the Repository is constitutional, especially in a case involving prosecution of a civilian contractor. That

same as that described above in the analysis of the DNA Act. The government's interest—identification of remains—is important but perhaps not so compelling as crime prevention and prosecution. The balance is more even, but the search satisfies enough of the balancing test's requirements to support a presumption of reasonableness.

## V. CONCLUSION

Comparing the DNA Act's requirements with law-enforcement use of the military's Repository exposes the flaws in the special-needs test, at least in the context of DNA databanking. This is not the appropriate test for this issue. The present disparity represents the "worst of both worlds." The benefits of DNA sampling to law enforcement outweigh the relatively minor intrusion involved, regardless of the purpose for which the sampling is intended. Law-enforcement agencies should have this powerful tool available, both to convict the guilty and to exonerate the innocent. But if the rights of convicts are to be protected, then there must be a test that likewise protects those citizens whose expectation of protection is at least as high, if not higher, than that of criminals.

If the United States Supreme Court considers *Kincade* or any other DNA databanking case, it should adopt a new standard such as *Kincade II*'s "totality of the circumstances" test, or the balancing test proposed by this Comment. If the court affirms the *Kincade II* result using the strained logic of the special-needs test, that will not be enough. A balancing test, applicable to cases involving DNA sampling or similar searches from people with reduced expectations of privacy, is an appropriate and effective solution. Judges should weigh the individual's expectation of privacy against the severity of intrusion, provided that a legitimate government interest—law enforcement or otherwise—exists. This will obviate the spurious special-needs analysis currently used and ensure that DNA technology remains a "win-win" proposition.

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eventuality would bring the question back into the special-needs exception.

## APPENDIX A

### The DNA Analysis Backlog Elimination Act of 2000

§ 14135a. Collection and use of DNA identification information from certain Federal offenders

(a) Collection of DNA samples

(1) From individuals in custody

The Director of the Bureau of Prisons shall collect a DNA sample from each individual in the custody of the Bureau of Prisons who is, or has been, convicted of a qualifying Federal offense (as determined under subsection (d) of this section) or a qualifying military offense, as determined under section 1565 of Title 10.

(2) From individuals on release, parole, or probation

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 (as determined under subsection (d) of this section) or a qualifying military offense, as determined under section 1565 of Title 10.

(3) Individuals already in CODIS

For each individual described in paragraph (1) or (2), if the Combined DNA Index System (in this section referred to as "CODIS") of the Federal Bureau of Investigation contains a DNA analysis with respect to that individual, or if a DNA sample has been collected from that individual under section 1565 of Title 10, the Director of the Bureau of Prisons or the probation office responsible (as applicable) may (but need not) collect a DNA sample from that individual.

(4) Collection procedures

(A) The Director of the Bureau of Prisons or the probation office responsible (as applicable) may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an indi-

vidual who refuses to cooperate in the collection of the sample.

(B) The Director of the Bureau of Prisons or the probation office, as appropriate, may enter into agreements with units of State or local government or with private entities to provide for the collection of the samples described in paragraph (1) or (2).

(5) Criminal penalty

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--

(A) guilty of a class A misdemeanor; and

(B) punished in accordance with Title 18.

(b) Analysis and use of samples

The Director of the Bureau of Prisons or the probation office responsible (as applicable) shall furnish each DNA sample collected under subsection (a) of this section 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.

(c) Definitions

In this section:

(1) The term "DNA sample" means a tissue, fluid, or other bodily sample of an individual on which a DNA analysis can be carried out.

(2) The term "DNA analysis" means analysis of the deoxyribonucleic acid (DNA) identification information in a bodily sample.

(d) Qualifying Federal offenses

(1) The offenses that shall be treated for purposes of this section as qualifying Federal offenses are the following offenses under Title 18, as determined by the Attorney General:

(A) Murder (as described in section 1111 of such title), voluntary manslaughter (as described in section 1112 of such title), or other offense relating to homicide (as de-

scribed in chapter 51 of such title, sections 1113, 1114, 1116, 1118, 1119, 1120, and 1121).

(B) An offense relating to sexual abuse (as described in chapter 109A of such title, sections 2241 through 2245), to sexual exploitation or other abuse of children (as described in chapter 110 of such title, sections 2251 through 2252), or to transportation for illegal sexual activity (as described in chapter 117 of such title, sections 2421, 2422, 2423, and 2425).

(C) An offense relating to peonage and slavery (as described in chapter 77 of such title).

(D) Kidnapping (as defined in section 3559(c)(2)(E) of such title).

(E) An offense involving robbery or burglary (as described in chapter 103 of such title, sections 2111 through 2114, 2116, and 2118 through 2119).

(F) Any violation of section 1153 involving murder, manslaughter, kidnapping, maiming, a felony offense relating to sexual abuse (as described in chapter 109A), incest, arson, burglary, or robbery.

(G) Any attempt or conspiracy to commit any of the above offenses.

(2) In addition to the offenses described in paragraph (1), the following offenses shall be treated for purposes of this section as qualifying Federal offenses, as determined by the Attorney General:

(A) Any offense listed in section 2332b(g)(5)(B) of Title 18.

(B) Any crime of violence (as defined in section 16 of Title 18).

(C) Any attempt or conspiracy to commit any of the above offenses.

10 U.S.C.A. § 14135a (West 2003).

**APPENDIX B**

## The National Defense Authorization Act of 2003

§ 1565a. DNA samples maintained for identification of human remains: use for law enforcement purposes

(a) Compliance with court order.

(1) Subject to paragraph (2), if a valid order of a Federal court (or military judge) so requires, an element of the Department of Defense that maintains a repository of DNA samples for the purpose of identification of human remains shall make available, for the purpose specified in subsection (b), such DNA samples on such terms and conditions as such court (or military judge) directs.

(2) A DNA sample with respect to an individual shall be provided under paragraph (1) in a manner that does not compromise the ability of the Department of Defense to maintain a sample with respect to that individual for the purpose of identification of human remains.

(b) Covered purpose.--The purpose referred to in subsection (a) is the purpose of an investigation or prosecution of a felony, or any sexual offense, for which no other source of DNA information is reasonably available.

10 U.S.C.A. § 1565a (West 2003).