COMMENT

Technology and Privacy: The Need for an Appropriate Mode of Analysis in the Debate over the Federal DNA Act

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INTRODUCTION

Technology influences the law.[1] Increasingly sophisticated technology has challenged legislators and judges to apply existing laws to novel situations.[2] Nowhere is technology's influence more evident than in criminal procedure.[3] Recently, courts have had to reconcile the protections of the Fourth Amendment with legislation permitting the use of DNA technology to solve crimes.[4] The DNA Analysis Backlog Elimination Act of 2000 ("DNA Act" or "Act"), in its original and amended forms, and similar state laws are at the center of these legal quandaries.[5]

The DNA Act allows states to seize DNA from qualifying federal offenders without a warrant and include it in an FBI indexing system.[6]

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[1] *See, e.g.*, Hall v. Earthlink Network, Inc., 396 F.3d 500, 503 (2d Cir. 2005) (recognizing Congress amended wiretap laws due to technological changes); Hageseth v. Superior Court, 59 Cal. Rptr. 3d 385, 401 (Ct. App. 2007) (recognizing "the dynamic relationship between law and technology"); People v. Hall, 823 N.Y.S.2d 334, 342-43 (App. Div. 2006) (recognizing Congress continues to address issue of privacy in electronics and telecommunications as technology progresses); Robert Berlet, Comment, *A Step Too Far: Due Process and DNA Collection in California After Proposition 69*, 40 UC DAVIS L. REV. 1481, 1483 (2007) (explaining that technology aids law enforcement).

[2] *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 34-35 (2001) (holding use of thermal imager constituted search); Smith v. Maryland, 442 U.S. 735, 745-46 (1979) (holding pen register did not constitute search); Katz v. United States, 389 U.S. 347, 353 (1967) (concluding electronic eavesdropping violated privacy); Kenneth Hwang, Note, *Blizzard Versus Bnetd: A Looming Ice Age for Free Software Development?*, 92 CORNELL L. REV. 1043, 1064 (2007) (concluding new technology necessitates "flexible laws"); *see also* sources cited *supra* note 1.

[3] *See supra* note 2.

[4] *See infra* Parts I.B, II.

[5] *See generally* DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, 114 Stat. 2726 (codified as amended in scattered sections of 10 U.S.C., 18 U.S.C., and 42 U.S.C.) (authorizing Attorney General to make grants to eligible states to analyze DNA samples from crime scenes); *infra* Part I.C (discussing state DNA database statutes). Although Congress expanded the DNA Act in 2004, this Comment argues that even in its original, narrower form, the DNA Act was unconstitutional as applied to probationers and supervised releasees. *See generally* Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (expanding DNA Act); *infra* Part I.B (describing DNA Act).

[6] Richard P. Shafer, *Validity, Construction, and Application of DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C.A. §§ 14135 et seq. and 10 U.S.C.A. § 1565*, 187 A.L.R. FED. 373, 373 (2003); *see* DNA Initiative: Advancing Criminal Justice Through DNA Technology, Convicted Offender/Arrestee DNA Backlog Reduction Program, http://www.DNA.gov/funding/convicted (last visited Apr. 11, 2009). *See generally* DNA Analysis Backlog Elimination Act, 114 Stat. 2726 (outlining federal DNA program); Merriam-Webster's Online Dictionary, *DNA — Definition from the*

The Act extends to "suspicionless" DNA takings — seizures of DNA from those not suspected of any current wrongdoing.[7] These warrantless seizures raise constitutional questions about the DNA Act.[8] The United States Courts of Appeal disagree about whether to apply a "totality of the circumstances" or a "special needs" test to determine if the DNA Act is constitutional.[9]

These two tests operate in different ways. Under the totality of the circumstances test, the court balances an individual's privacy right against the government's interest.[10] On the other hand, to pass the special needs test, the government must first show that a search or seizure serves a "special need" beyond normal law enforcement (i.e., the search or seizure is not directed at finding evidence of wrongdoing or solving specific crimes).[11] Only if the government shows a special

Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/DNA (last visited Apr. 16, 2009) ("Any of various nucleic acids that are usually the molecular basis of heredity, are constructed of a double helix held together by hydrogen bonds between purine and pyrimidine bases which project inward from two chains containing alternate links of deoxyribose and phosphate, and that in eukaryotes are localized chiefly in cell nuclei.")

[7] *See* discussion *infra* Parts I.B, III.A-B.

[8] Shafer, *supra* note 6, at 373; *see, e.g.*, United States v. Weikert, 504 F.3d 1, 6, 9 (1st Cir. 2007) (analyzing suspicionless DNA extractions); United States v. Amerson, 483 F.3d 73, 89 (2d Cir. 2007) (considering privacy implications of DNA extraction); United States v. Hook, 471 F.3d 766, 773 (7th Cir. 2006) (stating that "taking a DNA sample is a Fourth Amendment search"); *see also* discussion *infra* Part II.

[9] *See* discussion *infra* Part II. *Compare Weikert*, 504 F.3d at 3 (using totality of circumstances test), United States v. Kraklio, 451 F.3d 922, 924 (8th Cir. 2006) (same), Johnson v. Quander, 440 F.3d 489, 496 & n.2 (D.C. Cir. 2006) (same), United States v. Sczubelek, 402 F.3d 175, 184 (3d Cir. 2005) (same), United States v. Kincade, 379 F.3d 813, 832 (9th Cir. 2004) (same), *and* Groceman v. U.S. Dep't of Justice, 354 F.3d 411, 413-14 (5th Cir. 2004) (per curiam) (same), *with Amerson*, 483 F.3d at 89 (using special needs test), *Hook*, 471 F.3d at 773 (same), *and* United States v. Kimler, 335 F.3d 1132, 1146 (10th Cir. 2003) (same).

[10] *See, e.g.*, Samson v. California, 547 U.S. 843, 848 (2006) (citing United States v. Knights, 534 U.S. 112, 118-19 (2001)) (explaining totality of circumstances test); *Weikert*, 504 F.3d at 11 (same); *see also* United States v. Herndon, 501 F.3d 683, 688 (6th Cir. 2007); United States v. O'Connor, No. 06-20583, 2007 WL 4126357, at *6 (E.D. Mich. Nov. 20, 2007).

[11] *See* New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) ("Only in those exceptional circumstances in which special needs, beyond the normal 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."); *see, e.g.*, *Amerson*, 483 F.3d at 80 (explaining special needs test); *O'Connor*, 2007 WL 4126357, at *3 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987)) (same); Keeney v. State, 873 N.E.2d 187, 188 (Ind. Ct. App. 2007) (citing City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000)) (same); State v. Jackson, 741 N.W.2d 146, 150 (Minn. Ct. App. 2007) (same); Berlet, *supra* note 1, at 1494 (citing

need does the court then apply the totality of the circumstances balancing test.[12]

Every circuit court, whether applying the totality of the circumstances or the special needs test, has found the DNA Act constitutional.[13] A majority of the Courts of Appeal have applied the totality of the circumstances in determining the constitutionality of the DNA Act.[14] For example, in *United States v. Weikert*, the Court of Appeals for the First Circuit applied this test to conclude that it was constitutional to require Leo Weikert, a supervised releasee, to provide a blood sample for FBI indexing.[15] A minority of the Courts of Appeal have used the special needs test to analyze the DNA Act.[16] For instance, in *United States v. Amerson*, the Court of Appeals for the Second Circuit determined that seizing a DNA sample from Karen Amerson as a condition of her probation qualified as a special need.[17]

All of the circuits have erred in upholding the DNA Act. The majority has erred by using the totality of the circumstances test instead of the special needs test. [18] The minority, on the other hand, has erred by misapplying the appropriate test — the special needs test — to uphold suspicionless DNA takings from probationers and supervised releasees.[19] This Article proceeds as follows. Part I

O'Connor v. Ortega, 480 U.S. 709, 732 (1987)) (same).

[12] *See, e.g.*, *Amerson*, 483 F.3d at 83-84 (explaining second prong of special needs test); Green v. Berge, 354 F.3d 675, 677-78 (7th Cir. 2004) (citing *Kimler*, 335 F.3d at 1146) (same).

[13] *See infra* Part I.D-E.

[14] *See Samson*, 547 U.S. at 848; *Weikert*, 504 F.3d at 3; *Kraklio*, 451 F.3d at 924; *Johnson*, 440 F.3d at 496; *Sczubelek*, 402 F.3d at 184; Padgett v. Donald, 401 F.3d 1273, 1280 (11th Cir. 2005); *Kincade*, 379 F.3d at 832; *Groceman*, 354 F.3d at 413-14; *cf.* Jones v. Murray, 962 F.2d 302, 307 (4th Cir. 1992) (declining to apply special needs test).

[15] *Weikert*, 504 F.3d at 14-15.

[16] *See Amerson*, 483 F.3d at 79; United States v. Hook, 471 F.3d 766, 773 (7th Cir. 2006); United States v. Kimler, 335 F.3d 1132, 1146 (10th Cir. 2003).

[17] *Amerson*, 483 F.3d at 83-89 (considering broader, 2004 version of DNA Act).

[18] *See Weikert*, 504 F.3d at 18 (Stahl, J., dissenting); discussion *infra* Part III.A-B. (discussing flaws of totality of circumstances test and unconstitutionality of DNA Act); *cf. Amerson*, 483 F.3d at 79 (applying special needs test to suspicionless search of probationer but ultimately finding DNA Act constitutional); *Hook*, 471 F.3d at 773 (applying special needs test).

[19] *See* discussion *infra* Part III.A-B.; *cf. Weikert*, 504 F.3d at 18-19 (Stahl, J., dissenting) (arguing suspicionless searches authorized by DNA Act are unconstitutional because they are neither programmatic nor special needs searches, nor are they part of program "genuinely designed to improve the monitoring and reintegration of conditional releasees").

examines the historical underpinnings of the Fourth Amendment.[20] It also describes the relevant elements of the DNA Act, when it applies, and the consequences of noncompliance.[21] In addition, Part I reviews state analogues to the DNA Act.[22] Part I concludes with an overview of the totality of the circumstances and special needs tests.[23] Part II then reviews the circuit split.[24] Part III argues courts should use the special needs test to analyze suspicionless searches and seizures of probationers and supervised releasees.[25] The DNA Act fails this constitutional test.[26] Thus, the majority of the circuits wrongly use the totality of the circumstances test, and the minority misapplies the special needs test, to sanction the DNA Act.[27]

I. BACKGROUND

The U.S. Supreme Court originally recognized that the Framers of the Fourth Amendment envisioned a broad-based warrant requirement with limited exceptions to restrict discretionary searches and seizures.[28] Over time, however, courts have used the concept of reasonableness to expand the scope of permissible warrantless searches and seizures.[29] By shifting focus from the "Warrant Clause"

[20] *See* discussion *infra* Part I.A.

[21] *See* discussion *infra* Part I.B.

[22] *See* discussion *infra* Part I.C.

[23] *See* discussion *infra* Part I.D-E.

[24] *See* discussion *infra* Part II.

[25] *See* discussion *infra* Part III.A.

[26] *See* discussion *infra* Part III.B.

[27] *See* discussion *infra* Part III.A-B.

[28] *See* U.S. GOV'T PRINTING OFFICE, ANALYSIS AND INTERPRETATION OF THE CONSTITUTION: ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES, S. DOC. NO. 108-17, at 1285 (2002), *available at* http://www.gpoaccess.gov/constitution/pdf2002/022.pdf (stating during late 1970s to early 1980s Supreme Court held "view that warrantless searches are per se unreasonable, with a few carefully prescribed exceptions"); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 724 (1999) (stating "[Fourth] Amendment's ban on too-loose warrants served to reaffirm the common law's general resistance to conferring discretionary authority on ordinary officers"); *cf.* S. DOC. NO. 108-17, at 1281-82 (citing Entick v. Carrington, (1705) 95 Eng. Rep. 807 (K.B.)) (stating importance of particularized warrants and emphasizing need for probable cause); Charles J. Nerko, *Assessing Fourth Amendment Challenges to DNA Extraction Statutes After* Samson v. California, 77 FORDHAM L. REV. 917, 921 (2008) (explaining that "[h]istorically, the Supreme Court interpreted [Fourth Amendment]" in manner that "would deem a search reasonable only if based on individualized suspicion sufficient to constitute probable cause and executed pursuant to a warrant with the requisite specificity").

[29] *See* S. DOC. NO. 108-17, at 1285-86; *see, e.g.*, Terry v. Ohio, 392 U.S. 1, 19

of the Fourth Amendment to the "Reasonableness Clause," courts have often disregarded the Framers' intent.[30]

A. The History of the Fourth Amendment

Judicial recognition of privacy rights and the colonists' aversion to British search and seizure law prompted the Fourth Amendment.[31] As early as 1603, in *Semayne's Case*, British jurists recognized the right to protect one's house from "unlawful entry even by the King's agents."[32] In *Entick v. Carrington*, decided in 1765, a British citizen sued officers who seized purportedly seditious writings from his house pursuant to a general warrant.[33] The court stated that general warrants were illegal because they granted officers excessive discretion in executing searches and seizures.[34] The court condemned the officers' lack of probable cause and the warrant's general character.[35]

The way British officials treated American colonists also influenced the Framers of the Fourth Amendment.[36] To enforce revenue laws, British authorities used writs of assistance.[37] Writs of assistance allowed authorities to enter any place to search for and seize goods.[38] In 1760, the colonists, led by James Otis, opposed these writs as contrary to English law.[39] Although Otis was unable to abolish writs of assistance, his arguments heavily influenced the Framers.[40]

(1968) (using reasonableness test to evaluate Fourth Amendment claim); Davies, *supra* note 28, at 557-59 (quoting Delaware v. Prouse, 440 U.S. 648, 653-54 (1979)).

[30] *See* Davies, *supra* note 28, at 551; discussion *infra* Parts I.A., III.A. *See generally* Katz v. United States, 389 U.S. 347 (1967) (stating warrantless searches and seizures are unreasonable unless they fall within one of few narrow exceptions to warrant requirement); *infra* notes 42-45 and accompanying text.

[31] *See* Davis v. United States, 328 U.S. 582, 602 (1946) (Frankfurter, J., dissenting); S. DOC. NO. 108-17, at 1281 (citing Entick v. Carrington, (1705) 95 Eng. Rep. 807 (K.B.) (stating importance of particularized warrants)); Davies, *supra* note 28, at 577 n.67.

[32] S. DOC. NO. 108-17, at 1281 (citing Semayne's Case, (1604) 77 Eng. Rep. 194 (K.B.)).

[33] *Id.* (citing Entick v. Carrington, (1705) 95 Eng. Rep. 807 (K.B.)).

[34] *See id.* at 1282.

[35] *Id.* The Supreme Court has applauded the *Entick* decision and noted that it provides insight into the Framers' intent when drafting the Fourth Amendment. *Id.* (citing Boyd v. United States, 116 U.S. 616, 626-27 (1886)).

[36] *Id.* at 1281-82; *see* United States v. Verdugo-Urquidez, 494 U.S. 259, 287-88 (1990); Davies, *supra* note 28, at 601.

[37] *Verdugo-Urquidez*, 494 U.S. at 266 (citing Boyd v. United States, 116 U.S. 616, 625-26 (1886)); Gilbert v. California, 388 U.S. 263, 286 (1967); S. DOC. NO. 108-17, at 1282.

[38] *See* sources cited *supra* note 37.

[39] S. DOC. NO. 108-17, at 1282; *see* James Otis, *Against Writs of Assistance*, Feb.

Congress adopted the Fourth Amendment in 1789, and the states ratified it in 1791.[41] The Fourth Amendment protects "[t]he right of the people to be secure . . . against unreasonable searches and seizures."[42] This protection is called the Reasonableness Clause of the Fourth Amendment.[43] The Fourth Amendment also stipulates that "no Warrants shall issue, but upon probable cause . . . particularly describing the place to be searched, and the person or things to be seized."[44] This stipulation is known as the Warrant Clause.[45]

Courts have struggled with how to apply the Reasonableness and Warrant Clauses.[46] Some courts consider both of the clauses together to mean that generally only searches and seizures conducted pursuant to a valid warrant are reasonable.[47] Other courts assert that the clauses act independently to permit warrantless, but reasonable, searches.[48]

1761, http://www.nhinet.org/ccs/docs/writs.htm (stating that writ of assistance is "worst instrument of arbitrary power" and "most destructive of English liberty and the fundamental principles of law, that ever was found in an English law-book").

[40] S. DOC. NO. 108-17, at 1282.

[41] Davies, *supra* note 28, at 557.

[42] U.S. CONST. amend. IV.

[43] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 294 (Brennan, J., dissenting) (referring to "Reasonableness Clause" and "Warrant Clause"); Michigan v. Clifford, 464 U.S. 287, 303 n.5 (1984) (Stevens, J., concurring) (referring to "Reasonableness Clause"); S. DOC. NO. 108-17, at 1295 (citing Marshall v. Barlow's, Inc., 436 U.S. 307, 327 (1978) (Stevens, J., dissenting) (referring to Reasonableness Clause of Fourth Amendment)); Davies, *supra* note 28, at 574 (citing Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1178-80 (1931)).

[44] U.S. CONST. amend. IV.

[45] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 670 (1995) (O'Connor, J., dissenting) (analyzing "the text of the Warrant Clause"); S. DOC. NO. 108-17, at 1295 (citing Marshall v. Barlow's, Inc., 436 U.S. 307, 326 (1978) (Stevens, J., dissenting) (referring to Warrant Clause of Fourth Amendment)); Davies, *supra* note 28, at 552 (referring to "[W]arrant [C]lause").

[46] *See* S. DOC. NO. 108-17, at 1284 (citing Trupiano v. United States, 334 U.S. 699 (1948) (espousing broad-based warrant requirement) *and* Carroll v. United States, 267 U.S. 132 (1925) (focusing on reasonableness requirement)) (explaining that "[t]he Court has drawn a wavering line" regarding how to interpret two clauses of Fourth Amendment); Ricardo J. Bascuas, *Property and Probable Cause: The Fourth Amendment's Principled Protection of Privacy*, 60 RUTGERS L. REV. 575, 596-97 (2008) (explaining two competing theories of how to interpret two clauses); Nerko, *supra* note 28, at 921-22; *see, e.g.*, Groh v. Ramirez, 540 U.S. 551, 571 (2004) (Thomas, J., dissenting) ("The precise relationship between the [Fourth] Amendment's Warrant Clause and Unreasonableness Clause is unclear.").

[47] *See* United States v. Amerson, 483 F.3d 73, 79 n.6, 80 (2d Cir. 2007) (espousing special needs test, which emphasizes warrant requirement by assuming Fourth Amendment, in spite of Reasonableness Clause, requires warrant except in limited circumstances); United States v. Hook, 471 F.3d 766, 773 (7th Cir. 2006) (same); Davies, *supra* note 28, at 552 (noting that, at times, Court has emphasized

The U.S. Supreme Court has considered both interpretations.[49] The Court has recognized that the Framers' aversion to general warrants and writs of assistance animated the Fourth Amendment.[50] The Court has also noted that Congress, shortly after adopting the Fourth Amendment, approved warrantless searches that were reasonable.[51] Specifically, Congress passed the Collection Act of 1789,[52] which permitted warrantless searches of ships.[53] The Court's consideration of both the Reasonableness and Warrant Clauses illustrates that it often supports its holdings with what the Framers intended.[54]

Recently, the Court's determination of the Framers' intent has shifted from an emphasis on the warrant requirement to an emphasis on the reasonableness requirement.[55] A focus on the reasonableness requirement affords law enforcement officers greater discretion

warrant requirement). *See generally* Trupiano v. United States, 334 U.S. 699, 705 (1948) (emphasizing warrant requirement because "the [F]ramers of the Fourth Amendment required adherence to judicial processes wherever possible").

[48] *See* Samson v. California, 547 U.S. 843, 848 (2006) (using totality of circumstances test, which emphasizes reasonableness); United States v. Weikert, 504 F.3d 1, 6, 9, 11 (1st Cir. 2007) (same); United States v. Kraklio, 451 F.3d 922, 924 (8th Cir. 2006) (same); Johnson v. Quander, 440 F.3d 489, 496 (D.C. Cir. 2006) (same); United States v. Sczubelek, 402 F.3d 175, 184 (3d Cir. 2005) (same); United States v. Kincade, 379 F.3d 813, 821, 832, 835 (9th Cir. 2004) (same); Groceman v. U.S. Dep't of Justice, 354 F.3d 411, 413 (5th Cir. 2004) (same). *See generally* Carroll v. United States, 267 U.S. 132, 168 (1925) (focusing on reasonableness requirement).

[49] *See supra* note 46.

[50] Virginia v. Moore, 128 S. Ct. 1598, 1603 (2008) ("The immediate object of the Fourth Amendment was to prohibit the general warrants and writs of assistance that English judges had employed against the colonists."); Steagald v. United States, 451 U.S. 204, 220 (1981); United States v. U.S. Dist. Court for E. Dist. of Mich., 407 U.S. 297, 327 (1972) ("For it was such excesses as the use of general warrants and the writs of assistance that led to the ratification of the Fourth Amendment."); *see supra* notes 28, 31-40.

[51] *See Carroll*, 267 U.S. at 146; Davies, *supra* note 28, at 606-07 (citing *Carroll*, 267 U.S. at 150-51).

[52] Collection Act of July 31, 1789, ch. 5, 1 Stat. 29 (repealed Aug. 4, 1790).

[53] *See id.* § 24.

[54] *See supra* notes 50-51; *see, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 671 (1995) (O'Connor, J., dissenting) (citing Carroll v. United States, 267 U.S. 132, 150-51, 154 (1925)) (examining Framers' intent as evidenced by Collection Act of 1789).

[55] U.S. GOV'T PRINTING OFFICE, ANALYSIS AND INTERPRETATION OF THE CONSTITUTION: ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES, S. DOC. NO. 108-17, at 1285-86 (2002), *available at* http://www.gpoaccess.gov/constitution/pdf2002/022.pdf; Davies, *supra* note 28, at 559; *see, e.g.*, Samson v. California, 547 U.S. 843, 848 (2006) (using totality of circumstances test, which emphasizes reasonableness).

because they do not need judicial approval to search or seize.[56] A majority of circuits espouse this focus on the Reasonableness Clause in the debate over DNA searches and seizures.[57]

B. The DNA Analysis Backlog Elimination Act of 2000 and the Justice for All Act of 2004

In 1986, for the first time, British authorities used DNA to identify and convict a criminal defendant.[58] The next year, American law enforcement personnel began to use DNA to solve crimes.[59] In 1989, Virginia became the first of many states to create a DNA database.[60]

In 1990, the FBI created the Combined DNA Index System ("CODIS") as a pilot software program to coordinate national, state, and local DNA databases.[61] In 1994, Congress passed the Violent Crime Control and Law Enforcement Act, which authorized the FBI to create the National DNA Index System ("NDIS").[62] CODIS software allows NDIS-participating laboratories (and their state and local counterparts) to "identify[] suspects by matching DNA profiles from crime scenes with profiles from convicted offenders."[63] Soon after the

[56] Davies, *supra* note 28, at 559-60; *see Samson*, 547 U.S. at 857-58 (Stevens, J., dissenting) (arguing against majority's interpretation of reasonableness, which resulted in upholding system that amounts "to a blanket grant of discretion" to officers); *cf.* Johnson v. United States, 333 U.S. 10, 13-14 (1948) ("Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.").

[57] *See* cases cited *supra* note 14; discussion *infra* Parts I.D, II.A.

[58] Berlet, *supra* note 1, at 1486 (citing Debra A. Herlica, Note, *DNA Databanks: When Has a Good Thing Gone Too Far?*, 52 SYRACUSE L. REV. 951, 952 n.8 (2002)); *see* Patrick Haines, Comment, *Embracing the DNA Fingerprint Act*, 5 J. TELECOMM. & HIGH TECH. L. 629, 632 (2007).

[59] Jeffrey Lee Ashton, *Foundation for DNA Fingerprint Evidence*, 8 AM. JUR. 3D *Proof of Facts* § 2 (2008) (citing Andrews v. State, 533 So. 2d 841, 842-43 (Fla. Dist. Ct. App. 1988), *review denied*, 542 So. 2d 1332, 1332 (Fla. 1989)) (discussing conviction of Tommie Lee Andrews for rape and burglary based on DNA identification evidence); Berlet, *supra* note 1, at 1486.

[60] Berlet, *supra* note 1, at 1486; *cf.* Haines, *supra* note 58, at 632.

[61] Federal Bureau of Investigation, CODIS 1, http://www.fbi.gov/hq/lab/pdf/codisbrochure.pdf (last visited Jan. 6, 2009); DNA Initiative: Advancing Criminal Justice Through DNA Technology, What is CODIS?, http://www.DNA.gov/uses/solving-crimes/cold_cases/howdatabasesaid/codis/ (last visited Jan. 6, 2009).

[62] FBI, *supra* note 61, at 1.

[63] *See* DNA Initiative, *supra* note 61.

FBI implemented CODIS, state and local laboratories had more DNA samples than they could analyze and input into the system.[64]

To address this mounting problem, Congress passed the DNA Act.[65] The DNA Act helps states analyze DNA samples collected from crime scenes by granting them the funds to improve their resources.[66] In passing the DNA Act, Congress expressed the need to solve "suspectless" crimes.[67]

The DNA Act also requires probation officers to collect DNA from certain felons on probation, parole, and supervised release.[68] Originally, the DNA Act only applied to violent or sexual federal offenses.[69] However, in 2004 Congress passed the Justice for All Act, expanding the DNA Act.[70] As amended, qualifying federal offenses under the DNA Act include all felonies, all crimes of violence, certain sexual offenses, and any attempt or conspiracy to commit these crimes.[71] Thus, the DNA Act now requires DNA sampling from

[64] *How Effectively Are State and Federal Agencies Working Together to Implement the Use of New DNA Technologies?: Hearing Before the Subcomm. on Government Efficiency, Financial Management, and Intergovernmental Relations of the H. Comm. on Government Reform*, 107th Cong. 51-52 (2001) (statement of Dwight E. Adams, Deputy Assistant Director, Laboratory Division, FBI), *available at* http://bulk.resource.org/gpo.gov/hearings/107h/78050.pdf [hereinafter *Dwight Hearing*].

[65] *See id. See generally* DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, 114 Stat. 2726 (codified as amended in scattered sections of 10 U.S.C., 18 U.S.C., and 42 U.S.C.) (authorizing grants to states to relieve backlog).

[66] 42 U.S.C. § 14135(a)(1)-(5) (2000).

[67] *See Dwight Hearing*, *supra* note 64, at 46; 146 CONG. REC. S11,647 (2000) (statement of Sen. Leahy) (stating adding DNA profiles to CODIS would help solve crimes and prevent future ones); 146 CONG. REC. H8575-6 (daily ed. Oct. 2, 2000) (statement of Rep. Canady) (explaining purpose of CODIS is to match DNA samples from suspectless crime scenes to DNA of convicted offenders).

[68] 42 U.S.C. § 14135a(a)(2) (2000).

[69] United States v. Amerson, 483 F.3d 73, 76-77 (2d Cir. 2007) (explaining that DNA Act originally only included "(a) murder, voluntary manslaughter, or other offense relating to homicide; (b) an offense relating to sexual abuse, to sexual exploitation or other abuse of children, or to transportation for illegal sexual activity; (c) an offense relating to peonage and slavery; (d) kiDNAping [sic]; (e) an offense involving robbery or burglary; (f) any violation of 18 U.S.C. § 1153, which concerns offenses committed 'within the Indian Country' involving murder, manslaughter, kiDNAping [sic], maiming, a felony offense relating to sexual abuse, incest, arson, burglary, or robbery; and (g) any attempt or conspiracy to commit any of the above offenses").

[70] *See generally* Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (expanding DNA Act to include nonviolent and nonsexual felonies, thereby encompassing offenses such as drug trafficking).

[71] 42 U.S.C. § 14135a(d)(1)-(4).

nonviolent and nonsexual convicts.[72] Probation officers may use any means "reasonably necessary" to obtain DNA from an uncooperative individual.[73] Courts may sentence uncooperative individuals to a maximum of one year in prison and fine them up to $100,000.[74]

Requiring DNA samples from qualifying felons on probation, parole, and supervised release raises privacy issues.[75] Probation occurs when courts release convicted people, subject to certain conditions, instead of incarcerating them.[76] Parole, by contrast, occurs when courts release prisoners, subject to certain conditions, before they have completed their full prison term.[77] The Sentencing Reform Act of 1984 abolished parole from the federal sentencing guidelines.[78] Instead, prisoners must serve the sentence the court imposes, "less approximately fifteen percent for good behavior."[79] In certain situations, after prisoners complete their entire prison term, courts order supervised release.[80] Thus, none of the groups required to provide DNA samples includes current prisoners.[81]

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[72] *See id.*

[73] *Id.* § 14135a(a)(4).

[74] 18 U.S.C. § 3571(b)(5) (2006); 42 U.S.C. § 14135a(a)(5).

[75] *See* Samson v. California, 547 U.S. 843, 857-58 (2006) (Stevens, J., dissenting) (disagreeing with majority's assertion that parolees have no more privacy rights than prisoners); United States v. Weikert, 504 F.3d 1, 18-19 (1st Cir. 2007) (Stahl, J., dissenting) (lamenting majority's downplaying of supervised releasees' interests); Daniel J. Grimm, *The Demographics of Genetic Surveillance: Familial DNA Testing and the Hispanic Community*, 107 COLUM. L. REV. 1164, 1164 (2007) (arguing DNA Act is unconstitutional under Fourth Amendment probable cause requirement); Heather Bennett, Comment, *Taking the "Banks" Out of* Banks v. Gonzales*: DNA Databanks and the Fourth Amendment Prohibition on Unreasonable Searches and Seizures*, 15 AM. U. J. GENDER SOC. POL'Y & L. 547, 550 (2007) (arguing application of DNA Act to nonviolent and nonsexual offenders violates Fourth Amendment protection against unreasonable searches and seizures); Robert Cacace, Recent Development, Samson v. California*: Tearing Down a Pillar of Fourth Amendment Protections*, 42 HARV. C.R.-C.L. L. REV. 223, 223 (2007) (arguing *Samson* ruling opened door to excessive government intrusions). *See generally* Berlet, *supra* note 1 (discussing constitutional ramifications of DNA extraction).

[76] BLACK'S LAW DICTIONARY 1240 (8th ed. 2004).

[77] *Id.* at 1149.

[78] *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2008), *available at* http://www.ussc.gov/2008guid/1a1.htm.

[79] *Id.* § 1A1.3.

[80] *See* J. Owen Brainard, *Supervised Release*, 86 GEO. L.J. 1806, 1807 & n.2330 (citing 18 U.S.C. § 3583 (1994)).

[81] *See supra* notes 75-80 and accompanying text.

The DNA Act assumes that some will become prisoners again, however.[82] So far, CODIS has assisted law enforcement officers in over 68,860 investigations by helping them match DNA at crime scenes with the DNA of convicted offenders.[83] Hoping for similar results, states have enacted their own DNA statutes.[84]

C. State DNA Database Statutes

All fifty states have passed laws creating DNA databases.[85] Although many convicted offenders have challenged these statutes on various grounds, state courts have generally upheld them.[86] State courts have used the same tests as the federal courts — the totality of the circumstances and the special needs tests — to determine the constitutionality of state DNA database laws under state constitutions and the federal Constitution.[87]

The Supreme Court of Arkansas, for instance, espoused the totality of the circumstances test in *Polston v. State*.[88] Using this test, the court sanctioned Arkansas's extraction of DNA from Polston, a nonviolent felony drug offender, pursuant to the State Convicted Offender DNA Database Act.[89] This act requires DNA sampling from all convicted felons, either "upon intake to confinement, as a condition of any disposition that does not require confinement, or, if already confined, immediately after sentencing."[90] Polston was ordered to surrender a

[82] *See* sources cited *supra* notes 67, 81. *See generally* DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, 114 Stat. 2726 (codified as amended in scattered sections of 10 U.S.C., 18 U.S.C., and 42 U.S.C.) (authorizing grants to states to monitor people convicted of qualifying offenses).

[83] Federal Bureau of Investigation, Today's FBI: Law Enforcement Support & Training, http://www.fbi.gov/facts_and_figures/law_enforcement_support.htm (last visited Jan. 6, 2009) ("As of April 2008, CODIS has achieved 68,860 investigations aided, over 50,000 total offender hits, and more than 12,000 forensic hits.").

[84] *See infra* Part I.C; *cf.* Padgett v. Donald, 401 F.3d 1273, 1274-75 (11th Cir. 2005) (analyzing Georgia analogue to DNA Act); Jones v. Murray, 962 F.2d 302, 303 (4th Cir. 1992) (examining Virginia analogue to DNA Act).

[85] Robin Cheryl Miller, *Validity, Construction, and Operation of State DNA Database Statutes*, 76 A.L.R.5th 239 § 2[b] (2000).

[86] *Id.* § 2[a] (explaining courts have upheld state DNA database statutes in face of challenges based on following grounds: cruel and unusual punishment, equal protection, ex post facto law, bill of attainder, free exercise of religion, procedural due process, right to privacy, self-incrimination, separation of powers, substantive due process, unreasonable search and seizure, and vagueness).

[87] *Id.* § 14.

[88] 201 S.W.3d 406, 410 (Ark. 2005).

[89] *Id.* at 410-12.

[90] *Id.* at 408.

DNA sample after he pled guilty to several drug charges and was sentenced to confinement.[91] The court concluded Polston's DNA extraction was reasonable under the Fourth Amendment based on the following factors: the defendant's diminished expectation of privacy as a convicted felon, the minimal intrusiveness of a blood test, and the state's significant interest in deterring recidivism.[92] The court also rejected Polston's argument that DNA extraction violated his right to privacy under the Arkansas Constitution.[93]

Other state courts, such as the Supreme Court of Vermont, have used the special needs test to uphold state DNA database statutes.[94] Vermont's DNA statute covers all felonies and attempted felonies.[95] The statute mandates DNA sampling from two groups of people. First, it requires sampling from people convicted on or after the date of the statute.[96] In addition, it requires sampling from people convicted prior to the statute who are on probation, parole, or supervised community sentence after the effective date of the statute.[97] In *State v. Martin*, the court applied the special needs test to uphold the DNA sampling of Martin, a nonviolent convicted felon, pursuant to the Vermont DNA statute.[98] Martin was forced to submit a DNA sample upon his conviction for "boating while intoxicated, death resulting."[99] Although the court admitted that the Vermont Constitution's analogue to the Fourth Amendment oftentimes provides more robust search and seizure protection, it still ruled against Martin.[100] The court explained that the state statute served a special need beyond normal law enforcement because it did "'not have the *immediate* objective of gathering evidence against the offender.'"[101] After finding a special need, the court balanced Martin's and Vermont's competing interests.[102] The court considered the following factors: the state's interests in future crime solving and identifying missing persons, the minimal intrusiveness of a cheek swab, and the

[91] *Id.* at 407.
[92] *Id.* at 408.
[93] *Id.* at 414.
[94] State v. Martin, 955 A.2d 1144, 1151 (Vt. 2008).
[95] *Id.* at 1146.
[96] *Id.*
[97] *Id.*
[98] *Id.* at 1151.
[99] *Id.* at 1147.
[100] *See id.* at 1148, 1151.
[101] *See id.* at 1151 (quoting State v. O'Hagen, 914 A.2d 267, 279 (N.J. 2007)).
[102] *Id.* at 1153-59.

narrow purposes for which the state could use the DNA.[103] After weighing these factors, the court upheld the Vermont statute as applied to all nonviolent felons.[104]

Thus, like the DNA Act, state DNA statutes also raise Fourth Amendment concerns. These state statutes authorize suspicionless searches and seizures when courts convict individuals. If the Supreme Court resolves the circuit split and rules that the DNA Act is unconstitutional, it will force state courts to reconsider the validity of their state DNA statutes.

D. The Totality of the Circumstances Test

A majority of circuits have ruled that the DNA Act is constitutional under the totality of the circumstances test, a form of balancing test.[105] Under this test, the court balances an individual's privacy interest against the government's interest.[106] The Supreme Court's most famous totality of the circumstances case is arguably *Illinois v. Gates*.[107] In *Gates*, defendants Lance and Susan Gates moved to suppress drugs police officers seized from their home and car pursuant to a warrant.[108] Illinois state courts granted the Gates' motion and the Supreme Court of Illinois affirmed.[109] The Illinois Supreme Court explained that the affidavit the police officers had submitted in support of their application for a warrant was deficient under prior Supreme Court precedent.[110] The Supreme Court, however, abandoned its own precedent.[111] In its place, the Court used the totality of the circumstances to determine whether probable cause existed for a warrant.[112] After considering a variety of circumstances, including a

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[103] *Id.*

[104] *Id.* at 1158-59.

[105] *See* Samson v. California, 547 U.S. 843, 848, 857 (2006); United States v. Weikert, 504 F.3d 1, 6, 9 (1st Cir. 2007); United States v. Kraklio, 451 F.3d 922, 924-25 (8th Cir. 2006); Johnson v. Quander, 440 F.3d 489, 496 (D.C. Cir. 2006); United States v. Sczubelek, 402 F.3d 175, 184 (3d Cir. 2005); Padgett v. Donald, 401 F.3d 1273, 1274-75, 1280 (11th Cir. 2005); United States v. Kincade, 379 F.3d 813, 832, 835 (9th Cir. 2004); Groceman v. U.S. Dep't of Justice, 354 F.3d 411, 413 (5th Cir. 2004); Jones v. Murray, 962 F.2d 302, 307 (4th Cir. 1992).

[106] *See supra* note 10.

[107] 462 U.S. 213, 267 (1983) (White, J., concurring) (commenting on Court's new totality of circumstances approach).

[108] *Id.* at 216.

[109] *Id.*

[110] *Id.* at 216-17.

[111] *Id.* at 238.

[112] *Id.*

corroborated anonymous tip, the Court reversed the Illinois Supreme Court's ruling.[113]

The Supreme Court subsequently used the totality of the circumstances test to approve the suspicionless search of a California parolee pursuant to a state statute in *Samson v. California*.[114] Officer Alex Rohleder stopped Donald Curtis Samson because Rohleder believed there was a warrant out against Samson.[115] Rohleder knew Samson was on parole.[116] After questioning Samson and conferring with dispatchers, Rohleder determined that Samson did not have any outstanding warrants.[117] Nevertheless, Rohleder searched Samson and found a cigarette box containing methamphetamine.[118] The State charged Samson with possession of methamphetamine, and the trial court sentenced him to seven years in prison.[119] After an unsuccessful appeal, Samson petitioned the Supreme Court.[120]

The Supreme Court used the totality of the circumstances test to determine if the suspicionless search was constitutional.[121] Applying a balancing test, the Court determined the government's interest outweighed Samson's right to privacy.[122] The Court explained that parolees have a diminished expectation of privacy.[123] Moreover, authorities advised Samson that suspicionless searches attached to his parole, further reducing his expectation of privacy.[124] The government also had a strong interest in preventing recidivism because parolees are likely to reoffend.[125] The Court concluded that a condition of release diminishes a prisoner's reasonable expectation of privacy and thereby authorizes suspicionless searches of a parolee's person.[126] Moreover, the Court affirmatively held that the totality of the circumstances test was the correct test to apply to suspicionless

[113] *Id.* at 241-46.

[114] 547 U.S. 843, 846, 848, 857 (2006) (upholding suspicionless search of parolee).

[115] *Id.* at 846.

[116] *Id.*

[117] *Id.*

[118] *Id.* at 846-47.

[119] *Id.* at 847.

[120] *Id.*

[121] *See id.* at 848 (quoting United States v. Knights, 534 U.S. 112, 118 (2001)).

[122] *See id.* at 849-50.

[123] *Id.*

[124] *Id.* at 852.

[125] *Id.* at 853 (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 365 (1998)).

[126] *See id.* at 851.

searches.[127] However, because the Court only considered California law and officials never seized Samson's DNA, the circuits remain split regarding which test to apply when considering the federal DNA Act.

E. The Special Needs Test

A minority of circuits have ruled that the DNA Act is constitutional under the special needs test.[128] The special needs test is more rigorous than the totality of the circumstances test because it requires the government to demonstrate a special need before the court balances the government's and individual's competing interests.[129] First, the court determines whether a search is justified by a special need beyond normal law enforcement.[130] If the court finds a special need, the court then decides if the search is reasonable using the totality of the circumstances balancing test.[131]

The Supreme Court famously applied the special needs test in *Skinner v. Railway Labor Executives' Ass'n*.[132] In *Skinner*, the Court considered the constitutionality of two types of federal railroad regulations.[133] The first type mandated blood- and urine-based drug and alcohol testing for railroad employees who had been involved in certain train accidents.[134] The second type allowed railroads to conduct breath and urine tests of employees who had violated particular safety rules.[135] The Court first determined that the government's interest in ensuring the safety of the railroads

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[127] *See id.* at 848.

[128] *See* United States v. Amerson, 483 F.3d 73, 79 (2d Cir. 2007); United States v. Hook, 471 F.3d 766, 773 (7th Cir. 2006); United States v. Kimler, 335 F.3d 1132, 1146 (10th Cir. 2003).

[129] *See Amerson*, 483 F.3d at 79 n.6 (citing Nicholas v. Goord, 430 F.3d 652, 664 n.22 (2d Cir. 2005)) (explaining special needs test is more rigorous than general balancing test); discussion *infra* Part III.A. *Contra* United States v. Kraklio, 451 F.3d 922, 924 (8th Cir. 2006) (arguing totality of circumstances test is more rigorous than special needs test); United States v. Sczubelek, 402 F.3d 175, 184 (3d Cir. 2005) (same).

[130] *E.g.*, United States v. O'Connor, No. 06-20583, 2007 WL 4126357, at *3-4 (E.D. Mich. Nov. 20, 2007) (quoting Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987)); Keeney v. State, 873 N.E.2d 187, 188 (Ind. Ct. App. 2007); State v. Jackson, 741 N.W.2d 146, 150 (Minn. Ct. App. 2007) (quoting Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987)); *supra* note 11 and accompanying text.

[131] *E.g.*, *Amerson*, 483 F.3d at 79 n.6; *see Keeney*, 873 N.E.2d at 188.

[132] 489 U.S. 602 (1989).

[133] *Id.* at 606.

[134] *Id.*

[135] *Id.*

constituted a special need beyond normal law enforcement.[136] Next, the Court compared the minimal intrusiveness of the tests and the employees' diminished expectations of privacy (because they worked in a highly regulated industry), with the government's strong interest in ensuring public safety.[137] On balance, the Court held that the federal regulations were reasonable.[138] Whether the Court would apply this test to the DNA Act, however, has split the circuits.

II. THE STATE OF THE LAW

Only a minority of circuits use the special needs test to analyze suspicionless searches of probationers and supervised releasees.[139] The majority of circuits use the totality of the circumstances test.[140] Although the circuits are split regarding which test to use, all agree that suspicionless DNA searches and seizures are constitutional.[141]

A. The Majority View

In *United States v. Kraklio*, the Eighth Circuit Court of Appeals applied the totality of the circumstances test to a suspicionless search of Ray Kraklio.[142] The court balanced Kraklio's and the government's competing interests.[143] The Eighth Circuit recognized that Kraklio, as a probationer, had diminished privacy rights and that DNA extraction is minimally intrusive.[144] The court also found that the government

[136] *Id.* at 620.

[137] *Id.* at 620-34.

[138] *Id.* at 633-34.

[139] *See* United States v. Amerson, 483 F.3d 73, 79 (2d Cir. 2007); United States v. Hook, 471 F.3d 766, 773 (7th Cir. 2006); United States v. Kimler, 335 F.3d 1132, 1146 (10th Cir. 2003); discussion *infra* Part II.B.

[140] *See* United States v. Weikert, 504 F.3d 1, 3, 9 (1st Cir. 2007); United States v. Kraklio, 451 F.3d 922, 924 (8th Cir. 2006); Johnson v. Quander, 440 F.3d 489, 496 (D.C. Cir. 2006); United States v. Sczubelek, 402 F.3d 175, 184 (3d Cir. 2005); Padgett v. Donald, 401 F.3d 1273, 1280 (11th Cir. 2005); United States v. Kincade, 379 F.3d 813, 832 (9th Cir. 2004); Groceman v. U.S. Dep't of Justice, 354 F.3d 411, 413 (5th Cir. 2004); Jones v. Murray, 962 F.2d 302, 307 (4th Cir. 1992); discussion *infra* Part II.A.

[141] *See, e.g.*, *Weikert*, 504 F.3d at 3, 9, 18 (using totality of circumstances test to uphold suspicionless search); *Amerson*, 483 F.3d at 89 (using special needs test to uphold suspicionless seizure); *Hook*, 471 F.3d at 773, 777 (same); *Kraklio*, 451 F.3d at 924-25 (same).

[142] *See generally Kraklio*, 451 F.3d 922 (applying totality of circumstances test to search of probationer).

[143] *Id.* at 924-25.

[144] *Id.*

had a legitimate interest in using DNA to investigate crimes.[145] Thus, the Eighth Circuit held that the government's interest outweighed Kraklio's and that DNA extraction was valid.[146]

Recently, in *Weikert*, the First Circuit similarly upheld the DNA Act's constitutionality as applied to a supervised releasee.[147] The district court sentenced Leo Weikert to supervised release.[148] Once he began his supervised release, Weikert's probation officer informed him that he needed to submit a DNA sample.[149] In response, Weikert filed a motion for a preliminary injunction, which the district court granted.[150] On appeal, however, the First Circuit reversed, holding that the seizure of Weikert's DNA under the DNA Act was constitutional.[151]

In addressing the constitutionality of the DNA Act, the First Circuit concluded that it was required to follow the *Samson* totality of the circumstances test.[152] Under the totality of the circumstances test, Weikert, as a supervised releasee, had a "substantially diminished expectation of privacy."[153] Drawing blood is an ordinary and insignificant intrusion.[154] Moreover, the government had a compelling interest in rehabilitation, deterrence, and crime solving.[155] After weighing these interests, the court found no Fourth Amendment violation under the totality of the circumstances test.[156] The Third, Fourth, Fifth, Ninth, Eleventh, and District of Columbia Circuits follow this reasoning as well.[157] Thus, the majority of the circuits

[145] *Id.*

[146] *Id.*

[147] *See generally* United States v. Weikert, 504 F.3d 1 (1st Cir. 2007) (approving suspicionless DNA seizure from supervised releasee).

[148] *Id.* at 4-5.

[149] *Id.* at 5.

[150] *Id.*

[151] *Id.* at 18.

[152] *Id.* at 3 (citing Samson v. California, 547 U.S. 843 (2006)).

[153] *Id.* at 11.

[154] *Id.* at 12 (quoting Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 625 (1989)).

[155] *Id.* at 13-14 (quoting Samson v. California, 547 U.S. 843, 853 (2006)).

[156] *See id.* at 18.

[157] *See* Johnson v. Quander, 440 F.3d 489, 496 (D.C. Cir. 2006); United States v. Sczubelek, 402 F.3d 175, 184 (3d Cir. 2005); Padgett v. Donald, 401 F.3d 1273, 1280 (11th Cir. 2005); United States v. Kincade, 379 F.3d 813, 832 (9th Cir. 2004); Groceman v. U.S. Dep't of Justice, 354 F.3d 411, 413-14 (5th Cir. 2004); Jones v. Murray, 962 F.2d 302, 307 (4th Cir. 1992).

apply the totality of the circumstances test to uphold suspicionless searches of probationers and supervised releasees.[158]

B. The Minority View

A minority of circuits use the special needs test to address the constitutionality of the DNA Act.[159] Some circuits espousing this test confronted suspicionless DNA takings before the Supreme Court decided *Samson*.[160] Even after the *Samson* holding, however, the Second and Seventh Circuits continue to apply the special needs test.[161] The Second Circuit distinguished *Samson*, while the Seventh Circuit did not address it.[162]

In *United States v. Amerson*, the Second Circuit analyzed the DNA Act using the special needs test.[163] The trial court sentenced Karen Amerson to probation.[164] As a condition of probation, the court required her to submit a DNA sample.[165] Amerson appealed.[166]

The Second Circuit distinguished *Samson* because *Samson* dealt with parolees and *Amerson* involved probationers.[167] The court recognized that a parolee's expectation of privacy is closer to a prisoner's than a

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[158] *See Weikert*, 504 F.3d at 14; United States v. Kraklio, 451 F.3d 922, 924-25 (8th Cir. 2006); *supra* note 157.

[159] *See* cases cited *supra* note 139.

[160] *See, e.g.*, Nicholas v. Goord, 430 F.3d 652, 667 (2d Cir. 2005) (applying special needs test). *See generally* Samson v. California, 547 U.S. 843 (2006) (espousing totality of circumstances test for suspicionless searches).

[161] *See* United States v. Amerson, 483 F.3d 73, 79 (2d Cir. 2007); United States v. Hook, 471 F.3d 766, 773 (7th Cir. 2006).

[162] *Amerson*, 483 F.3d at 79. *See generally Hook*, 471 F.3d 766 (declining to mention *Samson* decision).

[163] *See generally Amerson*, 483 F.3d 73 (utilizing special needs test to examine 2004 version of DNA Act).

[164] *Id.* at 77.

[165] *Id.*

[166] *Id.*

[167] *Id.* at 79 & n.5 (citing Samson v. California, 547 U.S. 843, 849-50 (2006)). The *Amerson* court also acknowledged *United States v. Knights*, which upheld the warrantless search of a probationer's apartment using a general balancing test. *Id.* at 78 (citing United States v. Knights, 534 U.S. 112 (2001)). Nevertheless, the *Amerson* court distinguished *Samson*. *Id.* (citing Nicholas v. Goord, 430 F.3d 652, 664-67 (2d Cir. 2005)). The court explained that the search in *Knights* involved individualized suspicion, unlike the suspicionless DNA seizures at issue in *Amerson*. *Id.* (citing Nicholas v. Goord, 430 F.3d 652, 665 (2d Cir. 2005)). A general balancing test was appropriate in *Knights* because of the presence of individualized suspicion. *Id.* (citing Nicholas v. Goord, 430 F.3d 652, 665 (2d Cir. 2005)).

probationer's.[168] The court then followed its own circuit precedent and applied the special needs test.[169]

The court first distinguished between normal and special law enforcement objectives, stating that some special law enforcement objectives qualified as a special need.[170] The court determined that the creation of a DNA database served the special need of providing identifying information.[171] The court explained that DNA samples are not part of an ordinary investigation because they do not provide evidence of wrongdoing at the time of collection.[172]

Having found a special need, the court used the balancing test to determine the reasonableness of the search.[173] Just like the majority of circuits, the court upheld the DNA Act, citing diminished privacy expectations, minimal intrusiveness, and compelling government interests.[174] The court noted, however, that although the government may have a special need, the search or seizure is not automatically valid.[175]

Unlike the Second Circuit, however, the Seventh Circuit ignored *Samson* altogether. In *United States v. Hook*, the Seventh Circuit upheld the DNA Act as applied to a supervised releasee.[176] The district court convicted George Hook of wire fraud, money laundering, and theft and sentenced him to imprisonment, followed by supervised release.[177] After Hook completed his prison term and a year of supervised release, his probation officer tried to collect his DNA.[178] Hook petitioned the district court.[179] When the district court denied his petition, Hook appealed.[180]

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[168] *Amerson*, 483 F.3d at 79 (citing Samson v. California, 547 U.S. 843, 850-52 & n.2 (2006)).

[169] *Id.*

[170] *Id.* at 81-82 (quoting Nicholas v. Goord, 430 F.3d 652, 663 (2d Cir. 2005)).

[171] *Id.* (quoting Nicholas v. Goord, 430 F.3d 652, 668-69 (2d Cir. 2005)).

[172] *Id.* (quoting Nicholas v. Goord, 430 F.3d 652, 668-69 (2d Cir. 2005)).

[173] *Id.* at 83-89.

[174] *See id.*; *see also* United States v. Weikert, 504 F.3d 1, 11-15 (1st Cir. 2007); United States v. Kraklio, 451 F.3d 922, 924-25 (8th Cir. 2006); United States v. Kincade, 379 F.3d 813, 838 & n.36 (9th Cir. 2004).

[175] *Amerson*, 483 F.3d at 83.

[176] *See generally* United States v. Hook, 471 F.3d 766 (7th Cir. 2006) (upholding suspicionless DNA seizure of supervised releasee pursuant to 2004 DNA Act).

[177] *Id.* at 769.

[178] *Id.*

[179] *Id.*

[180] *Id.*

The Seventh Circuit did not address the *Samson* holding.[181] Instead, it followed its own circuit precedent.[182] The court concluded the DNA Act served a special need because its purpose was identifying felons, rather than finding evidence of wrongdoing.[183] The court then balanced Hook's privacy interest against the government's special need and determined that the DNA Act is constitutional.[184]

III. ANALYSIS

The Second and Seventh Circuits were correct to apply the special needs test because it better embodies the Framers' intent.[185] These circuit courts, however, should not have found that DNA extraction serves a special need.[186] Quite simply, the DNA Act serves ordinary law enforcement purposes and unconstitutionally intrudes on the privacy of probationers and supervised releasees.[187]

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[181] *See generally id.* (employing special needs test without addressing *Samson*).

[182] *See id.* at 773 (citing Green v. Berge, 354 F.3d 675 (7th Cir. 2004)).

[183] *Id.* at 771-72 (quoting Green v. Berge, 354 F.3d 675, 678-79 (7th Cir. 2004)).

[184] *Id.* at 772-73.

[185] *See* Samson v. California, 547 U.S. 843, 857-58, 866 (2006) (Stevens, J., dissenting) (rejecting totality of circumstances test and approving special needs test because it more closely adheres to "[t]he requirement of individualized suspicion" which "is the shield the Framers selected to guard against the evils of arbitrary action, caprice, and harassment"); New Jersey v. T.L.O, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (citations omitted) (explaining that Framers already decided which searches were reasonable and that "[o]nly in those exceptional circumstances in which special needs, beyond the normal 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"); Davies, *supra* note 28, at 551; *infra* Part III.A.

[186] *See* Julie Rikelman, *Justifying Forcible DNA Testing Schemes Under the Special Needs Exception to the Fourth Amendment: A Dangerous Precedent*, 59 BAYLOR L. REV. 41, 43, 51-68 (2007) (arguing broad interpretation of special needs test sets dangerous precedent by justifying intrusions so long as they are not related to present criminal investigation); *cf.* Grimm, *supra* note 75, at 1164 (arguing DNA Act is unconstitutional under Fourth Amendment probable cause requirement); Bennett, *supra* note 75, at 549 (arguing application of DNA Act to nonviolent and nonsexual offenders violates Fourth Amendment protection against unreasonable searches and seizures).

[187] *See supra* note 186; *cf.* Milton Hirsch, *A Nation of Suspects*, 31 CHAMPION 52, 55 (2007) (arguing DNA Act gives government too much power); Paul M. Monteleoni, *DNA Databases, Universality, and the Fourth Amendment*, 82 N.Y.U. L. REV. 247, 249 (2007) (explaining DNA Act would only be constitutional if it applied to everyone equally).

A. The Special Needs Test Better Embodies the Framers' Intent

Judicial recognition of privacy rights and colonial opposition to British law enforcement influenced the Framers.[188] The decision in *Semayne's Case* emphasized the importance of individual privacy rights.[189] Moreover, *Entick* and British officials' use of writs of assistance and general warrants encouraged the Framers to mandate specific warrants based on probable cause.[190] The Fourth Amendment therefore establishes as a general guiding principle the need for individualized suspicion.

Abrogating individualized suspicion only in limited circumstances better conforms to the Framers' intent.[191] The special needs test captures the spirit of the Framers' aversion to suspicionless searches and seizures by requiring warrants unless the government can demonstrate a special need beyond ordinary crime solving.[192] The totality of the circumstances test, however, upholds any reasonable suspicionless search.[193] This disregards the Framers' intent by giving undue weight to the Reasonableness Clause.[194]

Some argue that the totality of the circumstances test better embodies the Framers' intent.[195] Shortly after the First Congress

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[188] *See supra* note 31.

[189] *See supra* note 32.

[190] *See supra* notes 33-40.

[191] *See* United States v. Kincade, 379 F.3d 813, 852, 854 (9th Cir. 2004) (Reinhardt, J., dissenting) (explaining historical background of Fourth Amendment demonstrates that Framers "were steadfastly committed to the ideal that general warrants and searches conducted in the absence of reasonable and particular suspicion were intolerable"); *supra* notes 31-40, 185.

[192] *See* New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring); *Kincade*, 379 F.3d at 840 (Gould, J., concurring) (noting "the Supreme Court's reluctance to apply special needs analysis to endorse warrantless searches aimed at general law enforcement"); cases cited *supra* note 47.

[193] *See* Samson v. California, 547 U.S. 843, 848, 857 (2006); United States v. Weikert, 504 F.3d 1, 9 (1st Cir. 2007); United States v. Kraklio, 451 F.3d 922, 924 (8th Cir. 2006).

[194] *See supra* note 191.

[195] *See* Davies, *supra* note 28, at 731-33 (citing United States v. Rabinowitz, 339 U.S. 56, 66 (1950)) (explaining that *Carroll v. United States*, 267 U.S. 132, 150-53 (1925), "relaxed the new constitutional warrant requirement" and "set search and seizure doctrine on a course . . . toward the generalized-reasonableness construction . . . by pointing to the fact that the Framers had approved of warrantless ship searches"); *cf. Samson*, 547 U.S. at 848 (explaining totality of circumstances test is standard approach to determining Fourth Amendment reasonableness); United States v. Leon, 468 U.S. 897, 972 (1984) (Stevens, J., concurring in part and dissenting in part) (stating that "'our constitutional fathers were not concerned about warrantless searches'" and that they were in fact "deeply suspicious of warrants"). *See generally supra* note 48

proposed the Fourth Amendment for ratification, Congress approved warrantless searches and seizures of ships.[196] Many Framers had seats in Congress; they, better than anyone, understood the meaning of the Fourth Amendment.[197] This is evidence that they only intended to prohibit unreasonable searches rather than all warrantless searches.[198] Thus, the totality of the circumstances test honors the Framers' intent by emphasizing reasonableness.[199]

The totality of the circumstances test does not embody the Framers' intent, however.[200] Although the Collection Act of 1789 authorized warrantless searches of ships, Congress strictly limited collectors' powers under the statute.[201] Congress stated that collectors could only search "those ships and vessels 'in which [a collector] *shall have reason to suspect* any goods, wares, or merchandise subject to duty shall be concealed."[202] Thus, the Framers applied the standard warrant requirement of individualized suspicion even to warrantless searches.[203] In fact, the Framers believed that individualized suspicion was a necessary component of reasonable searches and seizures.[204] Therefore, the more stringent special needs test is appropriate for analyzing the DNA Act because it affords courts less discretion to abrogate individualized suspicion.[205]

(explaining totality of circumstances test emphasizes reasonableness rather than warrants).

[196] Collection Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29 (repealed Aug. 4, 1790); Davies, *supra* note 28, at 731-33 (citing Carroll v. United States, 267 U.S. 132, 150-53 (1925)) (noting "that the Framers had approved of warrantless ship searches in the 1789 Collections Act").

[197] Jack N. Rakove, *Creating Congress*, 59 WM. & MARY Q. 4, 4 (2002) (book review), *available at* http://www.historycooperative.org/cgi-bin/justtop.cgi?act=justtop&url=http://www.historycooperative.org/journals/wm/59.4/br_15.html.

[198] *See supra* notes 195-97.

[199] *See supra* notes 195-97.

[200] *See supra* notes 188-94; *infra* notes 201-05; *see also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 671 (1995) (O'Connor, J., dissenting); Entick v. Carrington, (1705) 95 Eng. 807 (K.B.).

[201] *See Vernonia*, 515 U.S. at 670-71 (O'Connor, J., dissenting) (citing Collection Act § 24 *and* Carroll v. United States, 267 U.S. 132, 150-51 (1924)).

[202] *Id.* (quoting Collection Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29 (repealed Aug. 4, 1790)) (emphasis added).

[203] *Id.*

[204] *Id.* (citing Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 489 (1995)); *see* Collection Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29 (repealed Aug. 4, 1790).

[205] *See* Samson v. California, 547 U.S. 843, 858-59 (2006) (Stevens, J., dissenting); United States v. Weikert, 504 F.3d 1, 18 (1st Cir. 2007) (Stahl, J., dissenting); United States v. Sczubelek, 402 F.3d 175, 189-204 (3d Cir. 2005) (McKee, J., dissenting);

B. Suspicionless DNA Takings of Probationers and Supervised Releasees Are Unconstitutional Under the Special Needs Test

An appropriately circumscribed application of the special needs test renders the DNA Act unconstitutional as applied to probationers and supervised releasees.[206] To determine whether a special need exists, courts do not look at the ultimate goal of law enforcement.[207] Instead, courts ask whether the government's immediate interest is gathering evidence for ordinary crime-solving purposes.[208] If so, the government does not have a special need.[209]

The DNA Act empowers law enforcement officers to compare DNA from crimes scenes with DNA profiles in NDIS using CODIS software.[210] So far, CODIS has assisted law enforcement officers in over 68,860 investigations.[211] Investigations are a core function of law enforcement and are necessary to solving any crime. Thus, the DNA Act serves an ordinary crime-solving purpose.[212]

United States v. Kincade, 379 F.3d 813, 842-76 (9th Cir. 2004) (Reinhardt, J., dissenting).

[206] *Weikert*, 504 F.3d at 19 (Stahl, J., dissenting) (stating under correct test, special needs test, DNA Act is unconstitutional as applied to supervised releasee); *see* Rikelman, *supra* note 186, at 43, 51-67 (arguing DNA Act and other "forcible DNA testing" schemes fail special needs test); *cf. Samson*, 547 U.S. at 857 (Stevens, J., dissenting) (indicating suspicionless search of California parolee would not pass special needs test because there was "no special interest in the welfare of the parolee"); Grimm, *supra* note 75, at 1164 (arguing DNA Act is unconstitutional under Fourth Amendment probable cause requirement); Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 34 J.L. MED. & ETHICS 165, 178-82 (2006) (concluding that taking DNA from arrestees fails special needs test); Bennett, *supra* note 75, at 549 (arguing application of DNA Act to nonviolent and nonsexual offenders violates Fourth Amendment protection against unreasonable searches and seizures); Rachael A. Lynch, Note, *Two Wrongs Don't Make a Fourth Amendment Right:* Samson *Court Errs in Choosing Proper Analytical Framework, Errs in Result, Parolees Lose Fourth Amendment Protection*, 41 AKRON L. REV. 651, 652-53 (2008) (arguing special needs test does not sanction suspicionless searches of parolees).

[207] Ferguson v. City of Charleston, 532 U.S. 67, 82-84 (2001); Nicholas v. Goord, 430 F.3d 652, 667 (2d Cir. 2005) (citing *Ferguson*, 532 U.S. at 82-83); *Kincade*, 379 F.3d at 855 (Reinhardt, J., dissenting) ("No matter what the 'ultimate goal' of the statute itself may be, the question is whether 'the immediate objective of the searches was to generate evidence *for law enforcement purposes*.'" (quoting *Ferguson*, 532 U.S. at 83)).

[208] *See* cases cited *supra* note 207.

[209] *See* cases cited *supra* note 207.

[210] *See supra* note 67.

[211] *See supra* note 83.

[212] *See* cases cited *supra* note 207.

Some argue, and a minority of courts have held, that the DNA Act, as applied to probationers and supervised releasees, is constitutional under the special needs test.[213] These commentators and courts argue that the government has a special need to deter recidivism.[214] The CODIS database deters recidivists from engaging in future crimes because it makes it easier to catch offenders.[215]

The need to deter future crimes is not a special need, however. The primary purpose of a search or seizure must serve a special need.[216] The primary stated purpose of the DNA Act is solving suspectless crimes, which is an ordinary law enforcement need.[217] When a search or seizure serves ordinary crime-solving interests, it fails the special needs test.[218]

By contrast, as seen in *Skinner*, when the primary purpose of a statute is ensuring public safety, it passes the special needs test.[219] The Federal Railroad Administration ("FRA") did not direct its regulations at enforcing drug laws. Instead, it sought to prevent train accidents caused by drug and alcohol use.[220] Because the FRA did not engage in ordinary law enforcement, its regulations passed the special needs test.

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[213] United States v. Amerson, 483 F.3d 73, 79, 89 (2d Cir. 2007); United States v. Hook, 471 F.3d 766, 773, 777 (7th Cir. 2006); *see* United States v. Kimler, 335 F.3d 1132, 1146 (10th Cir. 2003).

[214] United States v. Kincade, 379 F.3d 813, 840 (9th Cir. 2004) (Gould, J., concurring); *see* Griffin v. Wisconsin, 483 U.S. 868, 875 (1987) (explaining supervision is special need because it may reduce recidivism and protect public); *Hook*, 471 F.3d at 773 (contrasting need to deter recidivism with normal law enforcement needs, which fail special needs test).

[215] *Kincade*, 379 F.3d at 840 (Gould, J., concurring); *cf. Amerson*, 483 F.3d at 88 n.15 (explaining usefulness of DNA in solving many types of crimes); *Hook*, 471 F.3d at 776 (explaining purpose of DNA Act is to create national registry and deter recidivism).

[216] *See* City of Indianapolis v. Edmond, 531 U.S. 32, 41-42 (2000); *see also* Ferguson v. City of Charleston, 532 U.S. 67, 81, 83-84 (2001); *cf. Kincade*, 379 F.3d at 875 (Hawkins, J., dissenting) (explaining that DNA samples taken from supervised releasees will be kept on file to solve future crimes, which is general law enforcement need).

[217] *See supra* note 67.

[218] *See* cases cited *supra* note 207.

[219] *See generally* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) (upholding federal regulations mandating drug and alcohol testing of railway employees to ensure public safety).

[220] *Id.* at 620-21.

C. The Supreme Court's Samson *Decision Permits Further Intrusions on Privacy Rights*

The lack of guidance furnished by *Samson* permits further intrusions on privacy rights.[221] Although *Samson* involved a state parolee, *Weikert*, a post-*Samson* decision, expanded the scope of the Court's decision.[222] The Court should have clarified that it was only considering parolees, not probationers or supervised releasees.[223]

The *Weikert* ruling highlights the ramifications of *Samson*'s lack of guidance.[224] The First Circuit ignored the different privacy expectations of probationers and supervised releasees.[225] In *Samson* the Court recognized that probationers have a greater privacy interest than parolees, although it did not define this interest.[226] In addition, the Court suggested that supervised releasees might have a greater privacy interest than parolees.[227]

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[221] *See* United States v. Amerson, 483 F.3d 73, 79 (2d Cir. 2007) (citing Samson v. California, 547 U.S. 843, 850-52 & n.2 (2006)) (noting *Samson* only commented on parolees', not probationers', privacy rights); Cacace, *supra* note 75, at 223; Lynch, *supra* note 206, at 688-93.

[222] *See* United States v. Weikert, 504 F.3d 1, 3 (1st Cir. 2007) (mistakenly interpreting *Samson* to require use of totality of circumstances test when considering suspicionless search of supervised releasee); *supra* note 221.

[223] *See* Samson v. California, 547 U.S. 843, 850-52 & n.2 (2006). The *Samson* Court only defined parolees' privacy rights. *See generally id.* (defining parolees' privacy rights). The Court did state that probationers have a greater expectation of privacy than parolees do, but it did not define the bounds of this expectation. *See generally id.* (stating that probationers have greater privacy expectation than parolees). Thus, the Court did not address the constitutionality of suspicionless searches of probationers and supervised releasees. *See generally id.* (failing to address constitutionality of suspicionless searches of probationers and supervised releasees).

[224] *See generally Weikert*, 504 F.3d at 3 (extending *Samson* rationale and holding to analysis of suspicionless searches and seizures of supervised releasees).

[225] *See id.* (basing decision on *Samson* even though *Samson* involved parolee rather than supervise releasee); Nerko, *supra* note 28, at 939 (noting that *Weikert* court rejected "the Second Circuit's interpretation of *Samson* in *Amerson* that restricted *Samson*'s holding only to parolees," claiming that "no rationale exists to allow courts to distinguish between the Fourth Amendment tests applicable to supervised releasees and other conditional releasees").

[226] *See supra* note 223.

[227] *Cf.* Samson v. California, 547 U.S. 843, 848, 855 (2006) (quoting United States v. Crawford, 372 F.3d 1048, 1077 (9th Cir. 2004) (en banc) (Kleinfeld, J., concurring)) (building on its continuum analogy for punishments and stating "parolees, in contrast to probationers . . . are 'deemed to have acted more harmfully than anyone except those felons not released on parole,'" thereby indicating that different punishments may merit different degrees of privacy); *supra* note 225.

Due to the Court's lack of clarity, however, the *Weikert* court approved suspicionless searches of supervised releasees by equating their privacy interests with those of parolees (and probationers).[228] Using the flexibility of the totality of the circumstances test, the court was able to sanction these searches based on all conditional releasees' diminished expectations of privacy.[229] The justification to search people with a diminished expectation of privacy applies to a broad group of people.[230] For example, this justification may put at risk people who have jobs that diminish their expectations of privacy.[231] Assuming a sufficient state interest, firefighters and public school teachers may have to submit DNA samples under *Samson*'s reasoning.[232]

Moreover, by applying the totality of the circumstances test, *Samson* has also opened the door for further state intrusions on privacy.[233] All fifty states have their own DNA database statutes.[234] Although states currently apply both the totality of the circumstances and the special needs tests, *Samson* may encourage states to opt for the former, less

[228] *See Weikert*, 504 F. 3d at 11 (expanding *Samson*'s approval of suspicionless searches of parolees to supervised releasees because "in general the circuits 'have not distinguished between parolees, probationers, and supervised releasees for Fourth Amendment purposes'"). Although supervised releasees' expectations of privacy are diminished compared to those of ordinary citizens, *Samson* never held those expectations were the same as parolees'.

[229] *See id.* at 11 (discussing diminished expectation of privacy); *id.* at 19 (Stahl, J., dissenting) (noting that "the majority's totality of the circumstances analysis represents a further unfortunate step in the continuing erosion of the Fourth Amendment's vital protections," in part "by assigning so little weight to the privacy invasion"); *supra* Parts I.D-E, II (describing special needs test as two-step process and totality of circumstances test as one-step process).

[230] *Weikert*, 504 F.3d at 19 (Stahl, J., dissenting) (explaining lack of weight placed on privacy interests could lead to intrusions upon ordinary citizens); *see* Cacace, *supra* note 75, at 237 (noting "courts are eager to extend *Samson*'s logic along the continuum toward law-abiding citizens"); *see, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 658 n.2 (1995) (noting "public school children . . . have a diminished expectation of privacy").

[231] *Weikert*, 504 F.3d at 19 (Stahl, J., dissenting); *see* Bryan R. Lemons, *Public Privacy: Warrantless Workplace Searches of Public Employees*, 7 U. PA. J. LAB. & EMP. L. 1, 18 (2004) (citing Petersen v. City of Mesa, 83 P.3d 35, 41 (Ariz. 2004)) (explaining firefighters expect diminished privacy rights as result of their job choice); Ralph D. Mawdsley, *School Board Control over Education and a Teacher's Right to Privacy*, 23 ST. LOUIS U. PUB. L. REV. 609, 609 (2004) (stating public school teachers have diminished expectation of privacy).

[232] *See supra* note 231.

[233] *See supra* Part I.D-E (explaining totality of circumstances test is less stringent than special needs test).

[234] Miller, *supra* note 85, § 2[b].

stringent, test. Even more troubling, if *Polston* and *Martin* are any indication, state constitutions are insufficient to protect privacy interests in the face of the totality of the circumstances test (and an improperly applied special needs test).[235]

Under the totality of the circumstances test, it is too easy for courts and states to justify far-reaching infringements on individual rights.[236] *Samson*'s lack of clear standards has given states free rein to intrude upon personal rights by asserting any sort of ordinary crime-solving need.[237] This is not what the Framers intended, and thus, violates the Fourth Amendment.[238]

CONCLUSION

All of the circuits have erred in upholding the DNA Act. The majority of the circuits have erred by using the totality of the circumstances test instead of the special needs test. [239] The minority of the circuits, on the other hand, have erred by misapplying the appropriate test — the special needs test — to uphold suspicionless DNA takings from probationers and supervised releasees.[240] The DNA Act serves ordinary crime solving purposes rather than a special need.[241] Moreover, the Court's use of the totality of the circumstances test has paved the way for federal and state courts and legislatures to encroach on privacy rights.[242] The Court should choose the special needs test and rule the DNA Act unconstitutional before governments further limit Fourth Amendment rights.[243]

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[235] *See supra* Part I.C.
[236] *See supra* Parts I.D-E, III.C.
[237] *See supra* Parts I.D-E, III.C.
[238] *See supra* Part III.A-C.
[239] *See supra* Part III.A.
[240] *See supra* Part III.B.
[241] *See supra* Part III.B.
[242] *See* discussion *supra* Part III.C.
[243] *See* discussion *supra* Part III.C.