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Charles J. Nerko

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### Cover Page Footnote

J.D. Candidate, 2009, Fordham University School of Law; B.A., 2006, Fordham College. I would like to thank Professor Alison Nathan for her guidance during the Note-writing process and my friends for their support. A special thanks to my family, especially my parents Katherine and Charles, for all of their love and encouragement.

# ASSESSING FOURTH AMENDMENT CHALLENGES TO DNA EXTRACTION STATUTES AFTER *SAMSON v. CALIFORNIA*

Charles J. Nerko\*

*DNA plays an indispensable role in modern law enforcement, and courts uniformly find that DNA extraction statutes targeting criminals satisfy the Fourth Amendment. Courts differ on which Fourth Amendment test—totality of the circumstances or special needs—ought to be employed in this context. This Note concludes that courts should apply Samson v. California’s less stringent totality of the circumstances test to analyze DNA extraction statutes in order to maintain the integrity of the special needs test.*

## INTRODUCTION

In November 1990, an intruder stormed into an apartment shared by twenty-one-year-old Ronald Taylor and his girlfriend.<sup>1</sup> The intruder shot the young man multiple times and raped the woman.<sup>2</sup> For seventeen years, the perpetrator of this heinous act evaded investigators.<sup>3</sup> In 2007, DNA samples isolated from the carpet and the woman’s robe produced a match in the Combined DNA Index System (CODIS), a Federal Bureau of Investigation (FBI)-administered computer database that links suspects to DNA profiles extracted from crime scene evidence.<sup>4</sup> Because of this match in CODIS, the Pima County Attorney’s Office indicted a current inmate for the crime.<sup>5</sup> With the aide of CODIS, law enforcement identified a potential perpetrator who had evaded other investigation methods for seventeen years.

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1. See Leasa Conze, *DNA Leads to Break in Cold Case Murder and Rape*, KOLD NEWS 13, Dec. 19, 2007, <http://www.kold.com/global/story.asp?s=7521786&ClientType=Printable>.

2. See Dale Quinn, *DNA Throws New Light on ‘90 Rape, Slaying*, ARIZ. DAILY STAR, Dec. 20, 2007, <http://www.azstarnet.com/metro/217045>.

3. See *id.*

4. See *id.*; see also Federal Bureau of Investigation, CODIS—National DNA Index System, <http://www.fbi.gov/hq/lab/codis/national.htm> (last visited Oct. 12, 2008).

5. See Conze, *supra* note 1.

CODIS has solved thousands of cases and is unquestionably an indispensable tool for modern law enforcement.<sup>6</sup> Recognizing the profound and monumental crime-fighting interests that CODIS furthers, U.S. courts of appeals have uniformly found that statutes authorizing DNA collection comport with the Fourth Amendment's proscription of unreasonable searches and seizures.<sup>7</sup>

Prior to the U.S. Supreme Court's 2006 decision in *Samson v. California*, courts assessed Fourth Amendment challenges to DNA collection statutes using the special needs test.<sup>8</sup> In *Samson*, the Supreme Court established an alternative Fourth Amendment mode of analysis in which a court can assess a search program by examining the totality of the circumstances without establishing the existence of a special need.<sup>9</sup> Courts differ on which Fourth Amendment test ought to be employed to assess DNA extraction statutes and which test more rigorously and stringently protects the Fourth Amendment.<sup>10</sup>

Part I of this Note describes the applicable DNA extraction statutes and Fourth Amendment approaches. Part II of this Note chronicles each Fourth Amendment challenge to a DNA act decided by a U.S. court of appeals after *Samson*, and Part III concludes that courts should follow the majority of circuit courts by assessing Fourth Amendment challenges to DNA extraction statutes under *Samson*'s less stringent and rigorous totality of the circumstances test.

## I. DNA IN LAW ENFORCEMENT

DNA encodes genetic information about living organisms.<sup>11</sup> Each human has unique DNA.<sup>12</sup> By comparing the genetic material obtained from a crime scene to a suspect's DNA, law enforcement can identify a perpetrator by her genetic code.<sup>13</sup> Courts have highly favored this method of identifying defendants.<sup>14</sup>

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6. See *infra* Part I.A.

7. See *infra* Part II.A–B.

8. See *infra* Parts I.B.2.b, II.A.

9. See *infra* Parts I.B.2.b, II.B.

10. See *infra* Part II.A–B.

11. See George Bundy Smith & Janet A. Gordon, *The Admission of DNA Evidence in State and Federal Courts*, 65 FORDHAM L. REV. 2465, 2465–66 (1997).

12. See *id.* However, identical twins have common DNA. See *id.* at 2465.

13. See *id.* at 2465–68 (discussing the scientific process of DNA identification); see also Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 FORDHAM L. REV. 1453, 1469–73 (2007) (providing an overview of the forms of DNA testing and observing that CODIS “has allowed law enforcement agencies to solve thousands of ‘cold cases’ in a manner that is simply unprecedented—some of them decades old and with no leads”).

14. See Aronson & McMurtrie, *supra* note 13, at 1469, 1473–80 (observing that every jurisdiction admits DNA evidence and analyzing the ethics and evidence issues presented by such evidence); Thomas J. Moyer & Stephen P. Anway, *Biotechnology and the Bar: A Response to the Growing Divide Between Science and the Legal Environment*, 22 BERKELEY TECH. L.J. 671 (2007) (providing background information on the broader legal issues

### A. DNA Extraction Statutes

In recognition of the value of solving crimes through DNA-based identification, the U.S. Congress authorized the FBI through the 1994 Violent Crime Control and Law Enforcement Act “to create a national index of DNA samples taken from convicted offenders, crime scenes and victims of crime, and unidentified human remains.”<sup>15</sup> Subsequently, Congress enacted the DNA Analysis Backlog Elimination Act of 2000 (2000 DNA Act), which granted law enforcement the power to extract DNA from any individual in prison or on parole, probation, or supervised release convicted of certain enumerated felonies.<sup>16</sup> Congress later passed the Justice for All Act of 2004 (2004 DNA Act) to require the collection of DNA for those convicted of any felony, crime of violence, or sexual crime.<sup>17</sup> As of June 2008, the CODIS database enables law enforcement to

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presented by DNA evidence); Smith & Gordon, *supra* note 11, at 2477–88 (observing the judicial acceptance of DNA evidence to be nearly “universal,” but noting “[t]he issue still remains of just how many other persons in the population could have the same [DNA] match . . . [so] most states require statistical evidence with the admission of DNA evidence”); Thomas M. Fleming, Annotation, *Admissibility of DNA Identification Evidence*, 84 A.L.R.4th 313 (1991) (collecting cases on the admissibility of DNA identification evidence and finding that courts generally admit such evidence). The uses of DNA other than identifying criminal defendants by their own DNA extend beyond the scope of this Note. See generally, e.g., Avida Landau, *Israeli City Uses DNA to Fight Dog Poop*, THOMSON REUTERS, Sept. 16, 2008, <http://www.reuters.com/articlePrint?articleId=USLG37942520080916> (describing a new initiative in Petah Tikva, Israel, where the government will collect dog DNA to identify dog owners that fail to remove dog feces from city streets).

15. See DNA Analysis Backlog Elimination Act of 2000, H.R. REP. NO. 106-900, pt. 1, at 8 (2000), *reprinted in* 2000 U.S.C.C.A.N. 2323, 2324.

16. See DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, § 3, 114 Stat. 2726, 2728–30 (2000) (codified at 42 U.S.C. § 14135a (2000)). The 2000 DNA Act only applied to offenders convicted of the following crimes: murder, voluntary manslaughter, or other offense relating to homicide; an offense relating to sexual abuse, sexual exploitation or other abuse of children, or to transportation for illegal sexual activity; an offense relating to peonage and slavery; kidnapping; an offense involving robbery or burglary; any violation of 18 U.S.C. § 1153 involving murder, manslaughter, kidnapping, maiming, a felony offense relating to sexual abuse, incest, arson, burglary, or robbery; and any attempt or conspiracy to commit any of the above offenses. See 42 U.S.C. § 14135a. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) expanded the list of qualifying federal offenses to include acts of terrorism (as defined in 18 U.S.C. § 2332b(g)(5)(B)) and additional crimes of violence (as defined in 18 U.S.C. § 16). See 42 U.S.C. § 14135a(d)(3) (Supp. 2005). For a complete list of qualifying federal offenses, see 28 C.F.R. § 28.2 (2005). Many states also have their own analogues of the federal DNA Acts. See Gordon Thomas Honeywell Government Affairs, *DNA Database Legislative Expansion*, <http://www.dnaresource.com/expansion.html> (last visited Oct. 12, 2008) (providing links to annual reports collecting proposed and enacted DNA database expansion legislation).

17. See Pub. L. No. 108-405, § 203(b), 118 Stat. 2260, 2270 (to be codified at 42 U.S.C. § 14135a(d)). While Congress later amended the Act to authorize the DNA collection from arrestees, see Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1004(a), 119 Stat. 2960, 3085 (to be codified at 42 U.S.C. § 14135a(a)(1)(A)), no U.S. court of appeals has assessed the constitutionality of this broad expansion of the Act.

match DNA samples collected from crime scenes to 6,031,000 convicted offenders.<sup>18</sup>

While some commentators have claimed that CODIS permits the government to engage in biological or behavioral research, others have shown that such fears lack foundation.<sup>19</sup> To prevent abuse, federal legislation provides weighty penalties for the unauthorized use of DNA samples.<sup>20</sup> Each act of unauthorized collection, use, or disclosure of a DNA sample constitutes a separate crime, subjecting the offender to a quarter-million-dollar fine and a one-year prison sentence.<sup>21</sup> This statutory safeguard ensures that CODIS's DNA records will be used for fighting crime and not for nefarious purposes.

### B. Fourth Amendment Approaches

This section summarizes the Fourth Amendment jurisprudence germane to DNA extraction. Courts have alternated between two different tests to assess Fourth Amendment challenges to DNA extraction. Part I.B.1 describes the special needs doctrine and Part I.B.2 explores the totality of the circumstances test.

The Fourth Amendment ensures that people will "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and that "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>22</sup>

Since the Fourth Amendment only applies to searches and seizures, courts assess the threshold inquiry of whether an action constitutes a search or seizure by Justice John M. Harlan's formulation in *Katz v. United States*: a search or seizure occurs when the government invades the privacy of an individual who has an actual subjective expectation of privacy that society objectively recognizes as reasonable.<sup>23</sup> Over the years, Justice Harlan's

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18. See Federal Bureau of Investigation—Laboratory Services, <http://www.fbi.gov/hq/lab/codis/clickmap.htm> (last visited Oct. 12, 2008).

19. See Davina Dana Bressler, Note, *Criminal DNA Databank Statutes and Medical Research*, 43 JURIMETRICS J. 51 (2002) (debunking claims that CODIS can be used for invasive research or non-law enforcement purposes).

20. See 42 U.S.C.A. § 14135e(c) (2005).

21. See *id.*

22. U.S. CONST. amend. IV.

23. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). A public display negates a reasonable expectation of privacy. See *id.* at 351–52 (majority opinion) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." (citing *Lewis v. United States*, 385 U.S. 206, 210 (1966); *Rios v. United States*, 364 U.S. 253 (1960); *United States v. Lee*, 274 U.S. 559, 563 (1927); *Ex parte Jackson*, 96 U.S. 727, 733 (1877))); see also *California v. Greenwood*, 486 U.S. 35, 41 (1988) (finding no expectation of privacy in garbage bags awaiting collection from curb); *United States v. Miller*, 425 U.S. 435, 436–40 (1976) (finding no expectation of privacy in depositor's checks, deposit slips, financial statements, and monthly statements viewable by bank employees); *United States v. Dionisio*, 410 U.S. 1, 14 (1973) (finding no expectation of privacy in sound of voice); *United*

two-part test has collapsed into a “reasonable expectation of privacy” standard focusing on objective social expectations.<sup>24</sup> Thus, courts apply Fourth Amendment protections even without a subjective expectation of privacy, since “constitutional rights are generally not defined by the subjective intent of those asserting the rights.”<sup>25</sup> As applied to the federal DNA Acts, the extraction<sup>26</sup> and analysis<sup>27</sup> of DNA constitute two distinct searches, each triggering Fourth Amendment scrutiny.

As the extraction and analysis of DNA constitute two distinct searches to be assessed under the Fourth Amendment, the degree of Fourth Amendment scrutiny depends on how one interprets the relationship of the Fourth Amendment’s two clauses: the Reasonableness Clause and the Warrant Clause.<sup>28</sup> Historically, the Supreme Court interpreted these phrases in a concatenated fashion, so that the Warrant Clause modified the Reasonableness Clause.<sup>29</sup> This unitary reading of the Fourth Amendment 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.<sup>30</sup>

Under a unitary reading of the Fourth Amendment, the warrant requirement determines reasonableness.<sup>31</sup> However, the Fourth Amendment’s text only proscribes unreasonable searches and seizures.<sup>32</sup> Consequently, the Supreme Court has recognized that constitutionally permitted searches do not necessarily require probable cause or a warrant.<sup>33</sup>

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States v. Mara, 410 U.S. 19, 21–22 (1973) (finding no expectation of privacy in handwriting sample).

24. See *Hudson v. Palmer*, 468 U.S. 517, 525 n.7 (1984) (deeming the second criterion of Justice Harlan’s standard articulated in *Katz* to be “controlling”).

25. See *id.*; see also Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974) (“An actual, subjective expectation of privacy . . . can neither add to, nor can its absence detract from, an individual’s claim to fourth amendment protection. If it could, the government could diminish each person’s subjective expectation of privacy merely by announcing . . . that we were all forthwith being placed under comprehensive electronic surveillance.”).

26. See *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 616 (1989) (deeming a forced blood extraction to be a search).

27. See *id.* at 617 (deeming testing of urine a search since, like blood testing, urine testing can “reveal a host of private medical facts,” such as the presence of diseases).

28. See U.S. CONST. amend. IV.

29. See, e.g., *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 315 (1972) (“Though the Fourth Amendment speaks broadly of ‘unreasonable searches and seizures,’ the definition of ‘reasonableness’ turns, at least in part, on the more specific commands of the warrant clause.”).

30. See U.S. CONST. amend. IV; *United States v. Stewart*, 468 F. Supp. 2d 261, 265 (D. Mass. 2007), *rev’d on other grounds*, 532 F.3d 32 (1st Cir. 2008).

31. See *Stewart*, 468 F. Supp. 2d at 266 (“Under [the unitary] interpretation [of the Fourth Amendment], a search would be reasonable only if supported by probable cause and executed pursuant to a warrant specifically describing its scope.” (emphasis omitted)).

32. See U.S. CONST. amend. IV.

33. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (“[A] warrant is not required to establish the reasonableness of *all* government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either.”). For a textual and historical analysis of the interplay of the

Though the Fourth Amendment only mandates reasonableness, courts still prefer searches conducted pursuant to a warrant.<sup>34</sup> The preference for a warrant notwithstanding, the Supreme Court has deemed reasonable a multitude of searches conducted without a warrant or individualized suspicion, such as random drug testing of students participating in extracurricular activities,<sup>35</sup> searches at fixed checkpoints,<sup>36</sup> routine border searches,<sup>37</sup> inventory searches,<sup>38</sup> administrative searches of closely regulated industries,<sup>39</sup> and searches of parolees.<sup>40</sup>

### 1. Special Needs

The special needs doctrine allows courts to invoke an “exception” to the Fourth Amendment’s requirements that searches be conducted with a warrant or individualized suspicion of wrongdoing.<sup>41</sup> Courts justify many

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Warrant Clause to the Fourth Amendment, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994). Historically, warrants were viewed as hostile to citizens’ rights, since warrants immunized government agents that conducted unreasonable searches from trespass liability. See *id.* at 774. Consequently, the Fourth Amendment restricted the availability of warrants to prevent the government from using *ex parte* proceedings to exculpate its agents from tort liability for unreasonable searches. See *id.* Professor Amar thus contends, “the Framers did say what they meant, and what they said makes eminent good sense: all searches and seizures must be reasonable. Precisely because these searches and seizures can occur in all shapes and sizes under a wide variety of circumstances, the Framers chose a suitably general command.” *Id.* at 771; see also Michael Longyear, Note, *To Attach or Not to Attach: The Continued Confusion Regarding Search Warrants and the Incorporation of Supporting Documents*, 76 FORDHAM L. REV. 387, 394–96 (2007) (observing that the focus of the Fourth Amendment has shifted from banning general warrants to reasonableness).

34. See *United States v. Leon*, 468 U.S. 897, 913–14 (1984) (indicating that the Court has a “strong preference” for searches conducted pursuant to a warrant, since warrants require scrutiny from a neutral magistrate instead of the searching officer); *Carroll v. United States*, 267 U.S. 132, 155–56 (1925) (equating probable cause with reasonableness to assess the constitutionality of warrantless searches and seizures).

35. See *Vernonia*, 515 U.S. at 654–65 (upholding suspicionless drug testing of student athletes); see also *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002) (extending *Vernonia*’s holding to permit random drug testing of students participating in any extracurricular activity).

36. See *Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (upholding under the special needs doctrine an information-gathering checkpoint pertaining to a recent hit-and-run accident that occurred at the same location); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 451–55 (1990) (upholding a sobriety checkpoint under the special needs doctrine).

37. See *United States v. Flores-Montano*, 541 U.S. 149, 155 (2004) (approving suspicionless disassembly and search of a vehicle’s fuel tank as part of a routine border search).

38. See *Colorado v. Bertine*, 479 U.S. 367, 371–76 (1987) (permitting search of impounded van after operator’s arrest for driving while under the influence of alcohol).

39. See *New York v. Burger*, 482 U.S. 691, 693, 702–03 (1987) (upholding New York statute allowing warrantless inspections of motor vehicle junkyards).

40. See *infra* Part I.B.2.b.

41. See *United States v. Stewart*, 468 F. Supp. 2d 261, 267 (D. Mass. 2007), *rev’d on other grounds*, 532 F.3d 32 (1st Cir. 2008) (“The ‘special needs’ exception is often invoked as a corollary to the administrative search exception either to validate a general suspicionless and warrantless search or in specific situations where a search is required but obtaining a warrant would be impracticable.”). See generally 3A CHARLES ALAN WRIGHT ET AL.,



searches conducted without a warrant or individualized suspicion under this doctrine.<sup>42</sup> Justice Harry A. Blackmun first coined the phrase “special needs” in the concurring opinion of *New Jersey v. T.L.O.*<sup>43</sup> In upholding the constitutionality of a school administrator’s search of a pupil’s purse after a teacher observed the student smoking, Justice Blackmun clarified that limited exceptions to the probable cause requirement justify searches based upon “a careful balancing of governmental and private interests.”<sup>44</sup> He limited the applicability of this test to “those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”<sup>45</sup> For the special needs doctrine to apply, a search program’s primary purpose must constitute a special need<sup>46</sup> beyond the normal need for law enforcement, and outweigh the privacy interest at stake and the character of the intrusion.<sup>47</sup> After Blackmun’s concurrence in *T.L.O.*, the Court adopted the special needs analysis in subsequent Fourth Amendment cases.<sup>48</sup>

Several recent Supreme Court decisions elucidate how the Court determines if a search qualifies as a special need. In these cases, the Court refused to justify warrantless, suspicionless search programs under the special needs doctrine when the searches served the “specific purpose of incriminat[ion].”<sup>49</sup> Consequently, the Court declared unconstitutional highway checkpoints for drug interdiction<sup>50</sup> and a hospital’s policy of

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FEDERAL PRACTICE AND PROCEDURE § 668.3 (3d ed. 2004) (providing an overview of the special needs doctrine).

42. Originally, the Court invoked the special needs doctrine to supplant the need for a warrant, not individualized suspicion; however, the special needs doctrine has been employed in the suspicionless search context. *See New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985) (“Because the search of [the student’s] purse was based upon an individualized suspicion that she had violated school rules . . . we need not consider the circumstances that might justify school authorities in conducting searches unsupported by individualized suspicion.”); *see also Nicholas v. Goord*, 430 F.3d 652, 661 (2d Cir. 2005) (“[A]lthough the special-needs exception was originally formulated in the context of warrantless searches, the evolution of the Court’s Fourth Amendment jurisprudence suggests that the doctrine has increasingly become the test employed by the Court in suspicionless search cases.” (emphasis omitted)).

43. *See* 469 U.S. at 351 (Blackmun, J., concurring).

44. *See id.* (citing *id.* at 341 (majority opinion)).

45. *See id.*

46. For a discussion of how a governmental interest fails to constitute a “special need,” *see Chandler v. Miller*, 520 U.S. 305 (1997), which refused to characterize a state statute requiring political candidates to submit to drug testing as a “special need.” In *Chandler*, the statute only fulfilled “symbolic” purposes, since it was not enacted in response to any drug use by state officials. *See id.* at 307.

47. *See, e.g., Nicholas*, 430 F.3d at 664 n.22 (engaging in a special needs analysis).

48. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 872–73 (1987) (applying special needs doctrine); *O’Connor v. Ortega*, 480 U.S. 709, 720 (1987) (recognizing special needs doctrine).

49. *See, e.g., Ferguson v. City of Charleston*, 532 U.S. 67, 85 (2001) (emphasis omitted).

50. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

testing pregnant women for drug use when law enforcement was notified of positive results.<sup>51</sup>

a. *City of Indianapolis v. Edmond*

The Court's decision in *City of Indianapolis v. Edmond*, which held highway drug interdiction checkpoints unconstitutional, provides guidance for determining if a search qualifies as a special need by being beyond the needs of normal law enforcement.<sup>52</sup> In *Edmond*, the Court distinguished an unconstitutional drug interdiction checkpoint from permissible sobriety and border checkpoints.<sup>53</sup> At the *Edmond* checkpoint, officers stopped a predetermined number of vehicles, conducted an exterior open-view search of the vehicles, guided a narcotics detection dog around the vehicles, and verified each driver's license and registration.<sup>54</sup>

The Court determined that since "the primary purpose of the . . . narcotics checkpoint program [was] to uncover evidence of ordinary criminal wrongdoing, the program contravene[d] the Fourth Amendment."<sup>55</sup> Thus, the Court refused to "sanction [special needs searches or seizures] justified only by the generalized and ever-present possibility that [the search or seizure] may reveal that any given [person] has committed some crime."<sup>56</sup>

The "severe and intractable nature of the drug problem," which admittedly created "social harms of the first magnitude," was deemed insufficient to justify the drug checkpoint.<sup>57</sup> Observing that the same justification could apply to various other criminal activities, the Court was "particularly reluctant" to approve a special needs search program "where governmental authorities primarily pursue their general crime control ends."<sup>58</sup>

The government unsuccessfully argued that its checkpoint program promoted highway safety by removing unlicensed or impaired drivers.<sup>59</sup> The Court stressed that its special needs inquiry only analyzes a search's primary programmatic purpose.<sup>60</sup> Thus, the government's secondary purposes of reducing impaired motorists and verifying licensure were nondispositive.<sup>61</sup> The Court noted that, if the government's secondary

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51. See *Ferguson*, 532 U.S. at 85–86 ("The stark and unique fact that characterizes this case is that [the hospital's] [p]olicy [of potentially reporting positive drug tests to police] was designed to obtain evidence of criminal conduct by the tested patients . . . that could be admissible in subsequent criminal prosecutions.").

52. See *Edmond*, 531 U.S. at 48.

53. See *id.* at 46–48.

54. See *id.* at 35.

55. *Id.* at 41–42.

56. *Id.* at 44.

57. See *id.* at 42.

58. See *id.* at 43.

59. See *id.* at 46–47.

60. See *id.*

61. See *id.*

purposes approbated a special needs search, “law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check.”<sup>62</sup>

While the Court’s decision in *Edmond* did not alter the balancing component of the special needs test, the decision highlighted the imperative of divorcing special needs searches from ordinary law enforcement searches to uncover evidence of criminal wrongdoing.<sup>63</sup> Though permissible special needs searches—such as sobriety or border checkpoints—may manifest some law enforcement objectives, the Court noted that these permissible special needs checkpoints “serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety.”<sup>64</sup> As *Edmond* clarified, for the special needs doctrine to apply, the primary programmatic purpose of the search must be sufficiently divorced from the normal need of law enforcement officers to obtain evidence of criminal wrongdoing.<sup>65</sup>

#### b. *Ferguson v. City of Charleston*

The Court further clarified the primary purpose requirement in *Ferguson v. City of Charleston*.<sup>66</sup> Due to increasing concerns over patients’ cocaine use during pregnancy, a public hospital devised a plan with city officials to test maternity patients for illegal drug use.<sup>67</sup> Under this program, patients identified as drug users could avoid criminal prosecution by attending counseling and treatment sessions.<sup>68</sup> A detailed protocol outlined a chain of custody to ensure the admissibility of test results in subsequent criminal proceedings.<sup>69</sup> Ten women arrested under the policy sued the City of Charleston, law enforcement officials who developed the policy, and hospital representatives for violating patients’ Fourth Amendment rights.<sup>70</sup>

The Court distinguished the *Ferguson* search regime from permissible special needs search programs by observing that permissible special needs search programs are divorced from the government’s interest in law enforcement.<sup>71</sup> The Court rejected the government’s contention that protecting the health of the mother and child allowed the search program to fulfill the special need requirement.<sup>72</sup> Since “law enforcement involvement

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62. *Id.* at 46.

63. *See id.* at 47 (“The constitutionality of such checkpoint programs still depends on a balancing of the competing interests at stake and the effectiveness of the program.”).

64. *Id.* at 41.

65. *See supra* notes 52–62 and accompanying text.

66. 532 U.S. 67 (2001).

67. *See id.* at 70–72.

68. *See id.* The initial policy, which called for the immediate arrest of substance abusers, was modified to allow patients to successfully complete drug treatment in lieu of arrest. *See id.* at 72.

69. *See id.* at 71–72.

70. *See id.* at 73.

71. *See id.* at 79.

72. *See id.* at 81.

always serves some broader social purpose or objective,” the Court analyzed the “immediate objective” and the “direct and primary purpose” of the search program to assess the existence of a special need.<sup>73</sup> Consequently, the Court found that the “relevant primary purpose” was “to generate evidence for law enforcement purposes.”<sup>74</sup>

Although the *Ferguson* search regime endeavored to secure counseling and medical treatment for drug users and wielded prosecution only as a threat for noncompliance, law enforcement involvement effectuated the program’s therapeutic goal. Therefore, the Court stated that “[t]he stark and unique fact that characterize[d] this case is that [the search policy] was designed to obtain evidence of criminal conduct . . . that could be admissible in subsequent criminal prosecutions.”<sup>75</sup> In light of the hospital’s collection of evidence for future law enforcement use in potential criminal proceedings, the special needs exception could not apply to this program.<sup>76</sup> Taken together, the *Edmond* and *Ferguson* cases show that search programs with the primary purpose of securing evidence for potential criminal proceedings cannot qualify for a special needs assessment.

## 2. Totality of the Circumstances Test

While the special needs doctrine has been invoked to justify searches when no warrant or individualized suspicion of wrongdoing was present, the Court recently broadened its general Fourth Amendment jurisprudence by using the totality of the circumstances test to assess the constitutionality of searches devoid of a warrant or individualized suspicion. This section describes two recent Supreme Court decisions that implemented this mode of analysis.

### a. *United States v. Knights*

The 2001 case *United States v. Knights* assessed the constitutionality of a search conducted pursuant to a probation condition that granted law enforcement officers the right to search the defendant without any cause.<sup>77</sup> In *Knights*, the Court declined to undertake a special needs analysis previously used to assess searches of probationers.<sup>78</sup> Instead, the Court

73. *Id.* at 83–84.

74. *Id.* at 81, 83 (emphasis omitted).

75. *See id.* at 85–86.

76. *See supra* notes 71–75 and accompanying text.

77. *See United States v. Knights*, 534 U.S. 112 (2001). The search condition required the defendant to “[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer.” *Id.* at 114 (alterations in original) (internal quotation marks omitted). Despite Mark James Knights’s consent to the probation search condition, the Court refused to decide *United States v. Knights* on the defendant’s lack of a reasonable expectation of privacy. *See id.* at 118.

78. *See id.* at 117–18; *cf. Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (“The search of [the probationer’s] home satisfied the demands of the Fourth Amendment because it was

deemed the search of the defendant “reasonable under [its] general Fourth Amendment approach of ‘examining the totality of the circumstances,’ with the probation search condition being a salient circumstance” in applying the totality test.<sup>79</sup> The defendant’s status as a probationer “inform[ed] both sides of that balance” when weighing the intrusion upon the individual versus the governmental interest.<sup>80</sup>

The Court found that the probation order significantly diminished Mark James Knights’s expectation of privacy by clearly expressing the search conditions.<sup>81</sup> When assessing the government’s interest, the Court considered both the “significantly higher” recidivism rate of probationers as compared to the general population and probationers’ increased incentives to conceal evidence of criminal activity.<sup>82</sup> Finding that the government’s crime control interest outweighed the defendant’s privacy interest, the Court upheld the search, as the government can “justifiably focus on probationers in a way that it does not on the ordinary citizen.”<sup>83</sup>

The Court in *Knights* premised its holding on the reasonable suspicion present at the time of the search, though the statute authorized suspicionless searches of probationers.<sup>84</sup> Consequently, the Court expressly left open the question of “whether the probation condition so diminished, or completely eliminated, Knights’ reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment.”<sup>85</sup>

#### b. *Samson v. California*

The Court answered the unresolved question in *Knights* in *Samson*, which assessed the constitutionality of a state law requiring parolees to be subject to a search by law enforcement or parole officials without cause.<sup>86</sup> In *Samson*, a law enforcement officer familiar with the defendant’s parole status from a prior encounter stopped the defendant and searched him, uncovering methamphetamine concealed in a cigarette box.<sup>87</sup> In upholding

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carried out pursuant to a regulation that itself satisfies the Fourth Amendment’s reasonableness requirement under well-established [special needs] principles.”)

79. *Knights*, 534 U.S. at 118 (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)).

80. *See id.* at 119.

81. *See id.* at 119–20. The space above Knights’s signature on the probation order conspicuously warned, “I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS OF PROBATION AND AGREE TO ABIDE BY SAME.” *See id.* at 114 (citation omitted) (internal quotation marks omitted).

82. *See id.* at 120.

83. *See id.* at 121.

84. *See id.* at 120 n.6, 122.

85. *See id.* at 120 n.6.

86. *See Samson v. California*, 547 U.S. 843 (2006) (assessing constitutionality of CAL. PENAL CODE § 3067(a) (West 2004)). For an intriguing firsthand account of the effects a similar statute had on a law student parolee and his family, see James M. Binnall, Note, *He’s on Parole . . . But You Still Can’t Come In: A Parolee’s Reaction to Georgia v. Randolph*, 13 GEO. J. ON POVERTY L. & POL’Y 341 (2006).

87. *See Samson*, 547 U.S. at 846.

the constitutionality of a search devoid of cause and any individualized suspicion of wrongdoing, the Court applied a “general Fourth Amendment approach” of examining the “totality of the circumstances to determine whether a search is reasonable within the meaning of the Fourth Amendment.”<sup>88</sup> This totality analysis “assess[es], on one hand, the degree to which [a search] intrudes upon an individual’s privacy and, on the other, the degree to which [the search] is needed for the promotion of legitimate governmental interests.”<sup>89</sup>

As in *Knights*, the Court assessed the defendant’s privacy interests, placing extraordinary emphasis on the criminal status of the defendant to justify the intrusion.<sup>90</sup> The Court observed that “by virtue of their status alone,” probationers and parolees “do not enjoy the absolute liberty to which every citizen is entitled.”<sup>91</sup> This liberty was assessed in relation to a “continuum” of punishments, which afforded probationers more liberty than parolees, since “parole is more akin to imprisonment than probation is to imprisonment.”<sup>92</sup> Moreover, as in *Knights*, the state subjected the parolee to a “clear and unambiguous search condition.”<sup>93</sup> In light of Samson’s status and cognizance of the search condition, the Court concluded that he lacked “an expectation of privacy that society would recognize as legitimate.”<sup>94</sup>

For the next component of the totality test, the Court assessed the state’s interests.<sup>95</sup> In *Samson*, the Court deemed that the state’s “substantial” and “overwhelming” interests in supervising parolees, reducing recidivism, and reintegrating parolees into society justified intrusions that would not otherwise be tolerated under the Fourth Amendment.<sup>96</sup> Since “a requirement that searches be based on individualized suspicion would

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88. *Id.* at 848 (emphasis omitted) (internal quotation marks omitted).

89. *Id.* (internal quotation marks omitted).

90. *See id.* at 848–49.

91. *Id.* (internal quotation marks omitted).

92. *Id.* at 850.

93. *See id.* at 852.

94. *See id.* Though a lack of an expectation of privacy that society would recognize as legitimate would normally bring a purported intrusion outside the ambit of the Fourth Amendment, the Court in *Samson v. California* assessed the defendant’s Fourth Amendment protections notwithstanding his lack of an expectation of privacy. *See id.* at 852 n.3. Thus, a criminal’s status—and resultant diminished privacy—influences the application of the Fourth Amendment totality test, rather than influencing the threshold determination of whether the Fourth Amendment applies to the search. *See Banks v. United States*, 490 F.3d 1178, 1187 (10th Cir. 2007) (“[T]he Supreme Court in *Knights* informed both sides of its reasonableness determination with the defendant’s status as a convicted felon serving on probation.” (citing *United States v. Knights*, 534 U.S. 112, 119 (2001))); *United States v. Stewart*, 468 F. Supp. 2d 261, 265 (D. Mass. 2007), *rev’d on other grounds*, 532 F.3d 32 (1st Cir. 2008) (“[A] diminished expectation of privacy in [DNA] information for one convicted of a crime . . . [is a] factor . . . in the context of a Fourth Amendment balancing test, specifically on the degree of intrusion suffered. The status of a convicted criminal does not affect the threshold question whether the Fourth Amendment initially attaches.” (citing *Johnson v. Quander*, 440 F.3d 489, 495 (D.C. Cir. 2006))).

95. *See Samson*, 547 U.S. at 853.

96. *Id.* at 853–54.

undermine the State's ability to effectively supervise parolees and protect the public from criminal acts by reoffenders," the Court found "eminent sense" in requiring mere reasonableness—rather than a special need or a quantum of individualized suspicion—to approbate the search.<sup>97</sup>

Justice John Paul Stevens, joined by Justices David Souter and Stephen Breyer, vigorously dissented, contending that the Court should have engaged in a special needs analysis.<sup>98</sup> The dissent contended that previous Court decisions did not "support[] a regime of suspicionless searches, conducted pursuant to a blanket grant of discretion untethered by any procedural safeguards."<sup>99</sup> Depicting the majority opinion as "an unprecedented curtailment of liberty," the dissent doubted the Court's conclusion that "a search supported by neither individualized suspicion nor 'special needs' [would be] nonetheless 'reasonable.'"<sup>100</sup>

Rejecting the dissent's argument that the Fourth Amendment requires either individualized suspicion or a special need, the majority opinion clarified that "[t]he touchstone of the Fourth Amendment is reasonableness, not individualized suspicion."<sup>101</sup> Accordingly, "the 'Fourth Amendment imposes no irreducible requirement of such suspicion,' . . . although this Court has only sanctioned suspicionless searches in limited circumstances, namely programmatic and special needs searches, we have never held that these are the only limited circumstances in which searches absent individualized suspicion could be 'reasonable.'"<sup>102</sup>

The dissent further argued that no procedural safeguards sufficiently check an officer's discretion to obviate the necessity of individualized suspicion, since "arbitrary exercise of discretion . . . is the height of unreasonableness."<sup>103</sup> Moreover, the dissent deemed the majority's expectation of privacy analysis "sophistry," since parolees have no meaningful choice in accepting the search condition.<sup>104</sup>

Finally, the dissent distinguished between searches performed by parole and general law enforcement officers, since parole officers endeavor to transition offenders back into society, while law enforcement officers serve a crime control function.<sup>105</sup> Thus, searches conducted by parole officers—even if not based on reasonable suspicion—may be justified under the special needs doctrine.<sup>106</sup> In light of the foregoing analysis, the dissent admonished the majority for abandoning the Fourth Amendment's

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97. *Id.* at 854.

98. *See id.* at 857 (Stevens, J., dissenting).

99. *See id.*

100. *See id.* at 857–58.

101. *Id.* at 855 n.4 (majority opinion).

102. *Id.* at 856 n.4 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)).

103. *See id.* at 861 (Stevens, J., dissenting).

104. *See id.* at 863 n.4 ("[A prisoner] may either remain in prison, where he will be subjected to suspicionless searches, or he may exit prison and still be subject to suspicionless searches.").

105. *See id.* at 864–65.

106. *See id.*

individualized suspicion requirement: “The requirement of individualized suspicion, in all its iterations, is the shield the Framers selected to guard against the evils of arbitrary action, caprice, and harassment. To say that those evils may be averted without that shield is . . . to pay lipservice to the end while withdrawing the means.”<sup>107</sup>

Although the majority opinion characterized its decision as “far from remarkable,”<sup>108</sup> never before had the Court approbated a search devoid of a warrant or individualized suspicion by invoking the totality of the circumstances test.<sup>109</sup> Despite the majority’s reluctance in *Samson* to acknowledge the remarkable effect of its decision, the Court has provided a new method to judge the Fourth Amendment constitutionality of government searches.

## II. DIFFERENT APPROACHES TO ASSESSING DNA EXTRACTION STATUTES

While *Samson* affirms that the Supreme Court favors a totality of the circumstances approach over the special needs approach to assess the constitutionality of government search programs targeting parolees,<sup>110</sup> U.S. courts of appeals have struggled to agree on how *Samson*’s holding applies to DNA extraction statutes.<sup>111</sup> Circuit courts disagree over which Fourth Amendment approach should be employed and which approach more stringently and rigorously protects the Fourth Amendment.<sup>112</sup> Presently, a minority of circuit courts employ the special needs approach, while most circuit courts adopt *Knights* and *Samson*’s totality of the circumstances approach.<sup>113</sup> Part II chronicles each Fourth Amendment challenge to a federal DNA act decided by U.S. courts of appeals after *Samson*. Part II.A analyzes circuit decisions that apply a special needs approach and Part II.B discusses circuits that have adopted the totality of the circumstances approach.

### A. Circuit Court Cases Applying the Special Needs Doctrine

This section analyzes recent decisions in the U.S. Courts of Appeals for the Seventh and Second Circuits and discusses how these cases reflect those courts’ decisions to characterize compelling DNA extraction for CODIS as a special need. These cases argue that the special needs doctrine remains the proper analytical framework for assessing warrantless and suspicionless

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107. *See id.* at 866.

108. *Id.* at 856 n.4 (majority opinion).

109. *Id.* at 858–59 (Stevens, J., dissenting) (“Although the Court has in the past relied on special needs to uphold warrantless searches of probationers, it has never gone so far as to hold that a probationer or parolee may be subjected to full search at the whim of any law enforcement officer he happens to encounter, whether or not the officer has reason to suspect him of wrongdoing.” (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873, 880 (1987))).

110. *See supra* Part I.B.2.b.

111. *See infra* Part II.A–B.

112. *See infra* Part II.A–B.

113. *See infra* Part II.A–B.



DNA search programs, even after the Supreme Court's holding in *Samson*.<sup>114</sup> In qualifying compelled DNA extraction for CODIS as a special need, these circuit courts deem that CODIS has several features distinguishing it from typical law enforcement search programs that gather evidence of criminal activity.<sup>115</sup>

Part II.A.1 describes the Seventh Circuit's decision in *United States v. Hook*, in which the court deferred to circuit precedent predating *Samson* and characterized CODIS as managing supervised releasees to justify applying the special needs doctrine. Part II.A.2 looks at the Second Circuit's recent decision in *United States v. Amerson*, which attempts to distinguish the applicability of *Knights* and *Samson* from two probationers' Fourth Amendment challenges to the 2004 DNA Act.

### 1. *United States v. Hook*

In a post-*Samson* decision, the Seventh Circuit in *United States v. Hook* applied a special needs framework to a supervised releasee's challenge to the DNA collection provisions of the 2000 DNA Act and 2004 DNA Act.<sup>116</sup> A jury convicted George C. Hook of wire fraud, money laundering, and theft involving an employee benefit plan, and he was sentenced to eighty-four months' imprisonment and three years of supervised release.<sup>117</sup> Hook's probation officer ordered Hook to provide a DNA sample after being on supervised release for one year.<sup>118</sup> In response, Hook contended that the DNA collection requirements violated the Fourth, Fifth, Eighth, Ninth, Tenth, and Thirteenth Amendments.<sup>119</sup> Hook further challenged these DNA Acts under the Ex Post Facto and Bill of Attainder Clause; the Equal Protection Clause; Article I, Section 9 and Article IV, Section 2 of the U.S. Constitution; and the separation of powers doctrine.<sup>120</sup> The district court found each of these challenges to the DNA Acts unavailing.<sup>121</sup>

In upholding the determination of the district court, the Seventh Circuit invoked the special needs doctrine to defeat Hook's Fourth Amendment challenge to the DNA Acts.<sup>122</sup> Deferring to its precedent in a challenge to a Wisconsin DNA collection statute that predated the Supreme Court's holding in *Samson*,<sup>123</sup> the Seventh Circuit observed,

As we found in [a prior Seventh Circuit case], taking a DNA sample is a Fourth Amendment search, but such a search may be reasonable if it falls into an exception to the warrant requirement. While some circuits have

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114. See *infra* Part II.A.1-2.

115. See *infra* Part II.A.1-2.

116. See *United States v. Hook*, 471 F.3d 766, 772-73 (7th Cir. 2006).

117. See *id.* at 769.

118. *Id.*

119. See *id.*

120. See *id.*

121. See *id.*

122. See *id.* at 773.

123. *Green v. Berge*, 354 F.3d 675 (7th Cir. 2004).

employed a reasonableness standard, we employed the “special needs” approach in [a prior case] and will do the same here.<sup>124</sup>

Additionally, the court found the special needs doctrine to apply to DNA testing, since it serves the purpose of managing supervised releasees.<sup>125</sup>

In conducting its special needs analysis, the Seventh Circuit rejected the proposition that the DNA Acts primarily serve an ordinary law enforcement need.<sup>126</sup> The court determined that the DNA Acts endeavor to accurately identify felons and deter recidivism, instead of seeking evidence for a specific crime or detecting ordinary criminal wrongdoing.<sup>127</sup> The court further observed that the special needs test ought to be employed since the DNA Acts remove discretion from probation officers, as all individuals within the DNA Acts’ scope must furnish DNA samples.<sup>128</sup>

The court contended that even though “a DNA sample contained in CODIS may be used at a later date in relation to law enforcement,” this law enforcement use can be distinguished from the investigation of crimes since “such information may also be used to exonerate an individual” and the “special need is primary.”<sup>129</sup> In light of the court’s proffered objectives of the DNA Acts, the DNA collection “qualifie[d] as a special need justifying a departure from the usual warrant and probable cause requirements of the Fourth Amendment” since the DNA collection was not undertaken for the investigation of a specific crime, like drug testing and probation searches are.<sup>130</sup> Thus, after finding that the government’s interest outweighed the defendant’s, the court upheld the DNA Acts as a special need.<sup>131</sup>

## 2. *United States v. Amerson*

The Second Circuit assessed the constitutionality of applying the 2004 DNA Act to defendants convicted of nonviolent crimes and sentenced only to probation in *United States v. Amerson*.<sup>132</sup> In this appeal, the court consolidated two Fourth Amendment challenges to the 2004 DNA Act.<sup>133</sup>

The first challenge involved appellant Karen Amerson, who pled guilty to one count of bank larceny for redirecting \$13,500 from her employer, a federally insured bank.<sup>134</sup> The district court sentenced her to three years of probation and ordered her to provide a DNA sample.<sup>135</sup> Appellant Julius Graves brought the second challenge, after pleading guilty to one count of

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124. *Hook*, 471 F.3d at 773 (citations omitted).

125. *See id.* at 772.

126. *Id.* at 774.

127. *Id.* at 773.

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.* at 774–75.

132. 483 F.3d 73 (2d Cir. 2007).

133. *See id.* at 77.

134. *See id.* (observing that Amerson violated 18 U.S.C. § 2113(b) (2000)).

135. *See id.*

aiding and abetting wire fraud for allowing a neighbor to receive merchandise procured from a stolen credit card account.<sup>136</sup> The district court sentenced Graves to two years of probation and likewise ordered him to furnish his DNA sample.<sup>137</sup>

The Second Circuit began its discussion with the observation that “[t]he Fourth Amendment prohibits unreasonable searches and seizures.”<sup>138</sup> Although commencing its discussion with the rhetoric of reasonableness, the court rejected a totality of the circumstances analysis of the DNA Acts due to the lack of individualized suspicion: “[S]uspicionless searches—such as those permitted by the 2004 DNA Act—are highly disfavored since they dispense with the traditional rule that a search, if it is to be deemed reasonable, must be either supported by a warrant . . . or justified by evidence establishing individualized suspicion of criminal misconduct.”<sup>139</sup> To support this proposition, *Amerson* relied on a 2000 Supreme Court case—predating both *Knights* and *Samson*—that noted “[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.”<sup>140</sup>

The court rejected the government’s contention that *Knights* and *Samson* legitimize the use of a general balancing test for probationers in the absence of individualized suspicion, since *Samson*’s holding relied on the “severely diminished expectations of privacy” of parolees, as “parolees are more akin to prisoners than probationers.”<sup>141</sup>

Without ruling on the issue, the court conceded that *Samson* might undermine a prior Second Circuit ruling that applied special needs analysis to DNA indexing of prisoners.<sup>142</sup> However, since no Supreme Court authority supported that the privacy expectations of probationers are sufficiently diminished to invoke a general balancing test, the court rejected the contention that *Samson* requires the totality test’s application to probationers.<sup>143</sup> Observing that since the court in *Samson* “expressly acknowledged that probationers have a greater expectation of privacy than . . . parolees,” the court deemed that “nothing in *Samson* suggests that a general balancing test should replace special needs as the primary mode of analysis of suspicionless searches outside the context of the highly diminished expectation of privacy presented in *Samson*.”<sup>144</sup>

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136. *See id.* (observing that Graves violated 18 U.S.C. §§ 2, 1343).

137. *See id.*

138. *Id.*

139. *Id.* at 77–78.

140. *See id.* at 78 (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (finding drug checkpoint unconstitutional under special needs analysis)).

141. *See id.* at 79 (quoting *Samson v. California*, 547 U.S. 843, 850–51 & n.2 (2006)).

142. *Id.* at 79 n.5 (“[S]ince the Supreme Court stated in *Samson* that prisoners have at least as diminished expectations of privacy as parolees, *Nicholas[ v. Goord]*’s holding as applied to prisoners may well have been undermined by *Samson*.” (citing *Samson*, 547 U.S. at 850)).

143. *See id.* at 79.

144. *See id.*

When applying its special needs analysis, the court first assessed if CODIS qualified as a special need. Starting with the belief that the 2004 DNA Act's primary purpose was to reliably ascertain an offender's identity to help solve crimes,<sup>145</sup> the court offered multiple justifications to show that compelling DNA extraction for CODIS does not achieve "normal" law enforcement goals.<sup>146</sup>

First, the court deemed the DNA collection incompatible with the normal warrant and probable cause requirements of the Fourth Amendment, since the Act mandates collecting DNA from all felons without exception.<sup>147</sup> Since officers have no discretion as to which felons to obtain DNA samples from, requiring a warrant would not curtail the arbitrary exercise of police power.<sup>148</sup> Accordingly, the blanket nature of the DNA collection regime divorced it from "(a) investigating a particular crime committed by the[] defendants, or (b) . . . the likelihood of these defendants' committing a future crime."<sup>149</sup>

Moreover, the 2004 DNA Act does not endeavor to obtain a normal law enforcement end since "it does not involve the 'normal' law enforcement objective of uncovering evidence that is itself proof of the commission of a specific crime."<sup>150</sup> Consequently, "the 'special' law enforcement activity of creating and maintaining a DNA index fulfills important purposes that could not be achieved by reliance on 'normal' law enforcement methodology."<sup>151</sup> While "normal" law enforcement methods dictate that DNA samples be collected after the commission of a specific crime, the court identified three characteristics of CODIS that removed it from the ambit of "normal" law enforcement.<sup>152</sup> First, CODIS allows perpetrators whom would otherwise remain unidentified to be caught.<sup>153</sup> Second, the database offers "unparalleled speed" and "accuracy" in solving crimes.<sup>154</sup> Finally, CODIS rapidly excludes the innocent from investigations—a "[c]ritical[]" factor that distinguished the database from normal law enforcement.<sup>155</sup>

After establishing that CODIS qualified as a special need, the court then analyzed the context-specific reasonableness of the special need as applied to the appellants.<sup>156</sup> The court assessed three factors when applying this test: (1) the nature of the privacy interest, (2) the character and degree of

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145. *See id.* at 81.

146. *See id.* at 82–83.

147. *See id.* at 82.

148. *See id.*

149. *Id.* at 82 n.8.

150. *Id.* at 82.

151. *Id.* at 82–83.

152. *See id.* at 83.

153. *See id.*

154. *See id.*

155. *See id.*

156. *See id.* at 83–84.

the intrusion, and (3) the nature and immediacy of the government's needs in light of the search policy's efficacy in addressing them.<sup>157</sup>

When assessing the first prong, the court determined—under *Samsco*'s holding—that probationers have a reduced expectation of privacy that permits greater intrusion upon their Fourth Amendment rights.<sup>158</sup> The court characterized the intrusion of collecting blood as “minimal,” “not significant,” and “commonplace,”<sup>159</sup> though blood collection is the “most intrusive of the usual collection techniques” and accordingly implicates a greater privacy interest than the use of a cheek swab for DNA collection.<sup>160</sup>

Subsequently, the court assessed the intrusion of analyzing and maintaining the appellants' DNA. CODIS presented a “significant intrusion” into “very strong privacy interests.”<sup>161</sup> However, the court found that the 2004 DNA Act provided adequate safeguards, such as only analyzing junk DNA and permitting weighty penalties for misuse of the DNA samples or profiles.<sup>162</sup> Moreover, the 2004 DNA Act applied only to felons, who have a “severely diminished” expectation of privacy in their identities.<sup>163</sup> Consequently, the court analogized the intrusion as “similar to the intrusion wrought by the maintenance of fingerprint records.”<sup>164</sup> Although the court analogized DNA samples to fingerprint records, the court distinguished these identification methods by their accuracy.<sup>165</sup> Thus, since DNA identification produced “more accurate . . . identification,” the court deemed it “less intrusive . . . because of the associated reduced risk that the sample will result in misidentification.”<sup>166</sup> Moreover, since the state already maintained a “plethora” of felons' identifying information, the incremental privacy intrusion mandated by the 2004 DNA Act was “small.”<sup>167</sup>

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157. *See id.*

158. *See id.* at 84. (“It is in this context of a reduced expectation of privacy that the government's intrusion on the defendant's interests must be considered.”).

159. *See id.* (citations omitted) (internal quotation marks omitted).

160. *See id.* at 84 n.11. No facts in the record indicated that the appellants would be subjected to a blood extraction for their DNA. *See id.* Nevertheless, the court assumed—as did the parties—that a blood extraction would be employed. *See id.*; *cf.* *United States v. Kincade*, 379 F.3d 813, 817 (9th Cir. 2004) (noting that FBI guidelines require blood extraction method for DNA samples). The FBI's requirement that DNA samples be derived from blood extractions ought to be examined, as a buccal swab can achieve equivalent effectiveness for law enforcement use without the bodily invasion of a needle-based extraction. *See generally* *United States v. Holmes*, No. 2:02-CR-0349-DFL, 2007 WL 529830, at \*3 (E.D. Cal. Feb. 20, 2007) (observing that “the DNA profile uploaded into CODIS does not differ depending upon whether it was drawn from a blood cell or a cheek cell”).

161. *See Amerson*, 483 F.3d at 85; *see also supra* notes 19–21 and accompanying text.

162. *See Amerson*, 483 F.3d at 85.

163. *See id.* at 86.

164. *See id.* (quoting *Nicholas v. Goord*, 430 F.3d 652, 671 (2d Cir. 2005)).

165. *See id.*

166. *Id.*

167. *See id.*

Surprisingly, the court observed that furnishing DNA samples to CODIS has “the potential to provide a net gain in privacy . . . [since CODIS] exculpate[s] . . . individuals by avoiding misidentification and, thus, prevent[s] much more serious invasions of their privacy in the future.”<sup>168</sup> Even though CODIS retains offenders’ information long after their status as probationers, this would not change the court’s privacy analysis because of the “strong enough public interest in retaining” the information and the “well established” practice of permanently maintaining identification records—such as fingerprints and photographs—of convicted felons.<sup>169</sup> Accordingly, in light of the “appellants’ status as probationers,” the court described CODIS’s privacy risk as “quite small.”<sup>170</sup>

Finally, the court analyzed the government’s needs and the efficacy of the 2004 DNA Act in addressing those needs. The court deemed that “the government ha[d] a compelling interest in rapidly and accurately solving crimes and that having DNA-based records of the identity of as many people as possible, especially past offenders, effectuate[d] this interest.”<sup>171</sup>

Furthermore, the 2004 DNA Act served the government’s interest of accurate prosecution by rapidly excluding innocent individuals from further investigation.<sup>172</sup> Although the appellants argued that the government lacked an interest in maintaining DNA records of nonviolent white-collar criminals, the court determined that the appellant’s nonviolent crimes did not negate the government’s interest in maintaining CODIS, which extends beyond the deterrence of a particular offender.<sup>173</sup>

If all that was at issue in the DNA testing was preventing the particular individual tested from committing crimes and solving any future crime he committed, it is unclear whether there would be a meaningful distinction between the DNA testing and the normal law enforcement purpose of investigating and preventing specific crimes through searches to uncover evidence of wrongdoing, which, the Supreme Court has made clear, cannot be a special need.<sup>174</sup>

Thus, the court concluded that the DNA collection constituted a special need because of a “whole panoply of societal benefits that stem from the capacity to identify or to exclude individuals, quickly, accurately, and at reasonable expense.”<sup>175</sup>

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168. *Id.* at 86–87.

169. *See id.* at 86.

170. *See id.* at 87. The court noted that its analysis and conclusion is “highly context dependent.” *See id.* The court considered that its conclusion might change if scientific advances allow mining of nonidentifying information from CODIS’s DNA records. *See id.*

171. *Id.*

172. *See id.* at 88.

173. *See id.* at 89.

174. *See id.* at 89 n.16.

175. *See id.* at 89 (emphasis omitted). Considering that DNA collection serves a broader social purpose, the court noted that “the government’s interest in getting appellants’ DNA samples is not much attenuated by the fact that appellants are non-violent felons.” *See id.* However, this justification would probably not apply to law-abiding citizens since “felons—

### B. Circuit Courts Applying the Totality of the Circumstances Test

This section analyzes recent U.S. court of appeals cases assessing compulsory DNA extraction statutes under *Samson's* totality of the circumstances test. Generally, courts use this method on the basis that *Samson* affirmed that the Fourth Amendment only prohibits unreasonable searches. Though nascent Supreme Court authority supports adopting this approach, one scholar has advocated for a totality assessment even prior to *Samson*. David H. Kaye contends that since *Edmond* and *Ferguson* confine special needs searches to search programs not designed to catch or deter offenders, courts should create a "biometric identification exception" to the Fourth Amendment.<sup>176</sup> This biometric identification exception would harmonize prior Fourth Amendment cases permitting the retention of criminals' fingerprints and photographs with cases allowing mandatory DNA extraction.<sup>177</sup> In proposing this new exception, Professor Kaye relies on the Reasonableness Clause of the Fourth Amendment,<sup>178</sup> which was the basis for the Supreme Court's decision in *Samson*. Presently, six U.S. courts of appeals apply *Samson's* approach in the compelled DNA extraction context.

#### 1. *United States v. Conley* and *Wilson v. Collins*

Avoiding the contention amongst the circuit courts on which Fourth Amendment approach applies to compelled DNA extraction, the U.S. Court of Appeals for the Sixth Circuit in *United States v. Conley* declined to adopt a specific Fourth Amendment approach.<sup>179</sup> In this decision, the court found that the special needs and the totality of the circumstances tests both justify extracting DNA from a white-collar felon.<sup>180</sup> The decision did not indicate which approach the court preferred.

For its special needs analysis, the court found that DNA extraction endeavors to obtain reliable proof of a felon's identity to solve past and future crimes.<sup>181</sup> The court contended that *Edmond* and *Ferguson* do not negate a special needs finding.<sup>182</sup> To distinguish *Edmond*, the court found that rather than seeking evidence of criminal wrongdoing, CODIS simply maintained proof of identity.<sup>183</sup> To distinguish *Ferguson*, the court relied on the patients' expectations of privacy in voluntary medical tests.<sup>184</sup>

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whose DNA is being mandatorily collected pursuant to the statute before us—are often, in practice, at particular risk of being accused of subsequent crimes." *See id.* at 88.

176. *See* David H. Kaye, *Two Fallacies About DNA Data Banks for Law Enforcement*, 67 *BROOK. L. REV.* 179, 204 (2001).

177. *See id.*

178. *See id.* at 205.

179. *See* *United States v. Conley*, 453 F.3d 674 (6th Cir. 2006).

180. *See id.*

181. *See id.* at 678–79.

182. *See id.* at 679.

183. *See id.* at 678–79.

184. *See id.* at 679.

Unlike the voluntary medical tests the patients had in *Ferguson*, a defendant subject to a DNA extraction statute understands the extraction's law enforcement purposes.<sup>185</sup>

In conducting a totality assessment, the Sixth Circuit first noted that the defense offered no reason for its claim that a totality approach is "more stringent."<sup>186</sup> Nevertheless, the court deemed that the government's interest in properly identifying criminals and deterring further crimes outweighed a felon's limited expectation of privacy in a blood draw used solely for identification purposes.<sup>187</sup>

Subsequently, the Sixth Circuit in *Wilson v. Collins* applied the totality of the circumstances test.<sup>188</sup> In *Wilson*, a prisoner convicted of felonious assault brought numerous constitutional challenges to Ohio's DNA Act, which the court characterized as "materially indistinguishable" from the federal DNA Acts.<sup>189</sup>

The district court applied the special needs test to Antoine D. Wilson's Fourth Amendment challenge.<sup>190</sup> The court deemed this test more stringent, as it requires a court to identify a special need as a threshold before balancing the parties' interests.<sup>191</sup> Diverging from the district court's analysis, the Sixth Circuit found that "courts have viewed *Samson* as affirmatively signaling that the totality-of-the-circumstances test is the appropriate test for assessing the reasonableness of suspicionless DNA collection requirements as applied to parolees and supervised releasees."<sup>192</sup> As the Supreme Court invoked *Samson*'s totality assessment for a parolee, the Sixth Circuit found it fit to apply the totality test to a prisoner—whose privacy interest is even more diminished than a parolee's.<sup>193</sup>

Borrowing from its previous decision in *Conley*, the court identified several compelling needs justifying the DNA collection program: "obtaining reliable proof of convicted felons' identities; promoting increased accuracy in the investigation and prosecution of crimes; deterring convicted felons from committing additional crimes, thereby protecting communities in which they are eventually released; and aiding in the solving of crimes by serving to exculpate the innocent and inculpate the guilty."<sup>194</sup> Because these interests outweighed Wilson's diminished privacy as a convict, the court upheld the extraction of his DNA.<sup>195</sup>

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185. *See id.*

186. *See id.* ("Conley argues that . . . *Knights* required a more stringent [totality of the circumstances] test . . . [She] makes no attempt to explain how that test is more stringent, however." (internal quotation marks omitted)).

187. *See id.* at 679–81.

188. *See Wilson v. Collins*, 517 F.3d 421 (6th Cir. 2008).

189. *See id.* at 423, 428. Unlike the federal DNA collection procedure, Ohio collects DNA specimens through the less intrusive buccal swab. *See id.* at 423.

190. *See id.* at 426.

191. *See id.*

192. *See id.*

193. *See id.* at 427.

194. *Id.*

195. *See id.*



## 2. *United States v. Weikert*

In *United States v. Weikert*, the U.S. Court of Appeals for the First Circuit applied a totality of the circumstances analysis to the 2000 DNA Act.<sup>196</sup> The defendant, Leo Weikert, pled guilty to one count of conspiracy to possess cocaine with the intent to distribute.<sup>197</sup> While serving his ten-year sentence, he escaped from prison and was sentenced to eight months in prison and twenty-four months of supervised release to follow his incarceration.<sup>198</sup> After being released from prison, Weikert challenged the probation office's request to take his DNA.<sup>199</sup> The district court engaged in a special needs analysis due to the lack of individualized suspicion and found that no special need existed, because the government's objectives in collecting DNA samples were not beyond the normal need for law enforcement.<sup>200</sup> Continuing with its analysis, the district court also reasoned that Weikert's privacy interests outweighed the government's interest in obtaining his DNA sample.<sup>201</sup>

The circuit court observed that much of the authority on the constitutionality of the 2000 DNA Act predated *Samson*.<sup>202</sup> *Samson* provided guidance on resolving the circuit split regarding the correct test to assess the constitutionality of the mandatory DNA extraction since, "[p]rior to *Samson*, the Court had never held that the totality of the circumstances was the appropriate test to apply in a suspicionless search of a conditional release."<sup>203</sup> The First Circuit hypothesized that the Supreme Court undertook a totality analysis in *Samson* because the search may not have qualified as a special need.<sup>204</sup> Similarly, the court questioned if CODIS qualified as a special need, since extensive legislative history reveals that "law enforcement objectives predominate."<sup>205</sup>

The court then criticized the Second Circuit's interpretation of *Samson* in *Amerson* that restricted *Samson*'s holding only to parolees,<sup>206</sup> since no rationale exists to allow courts to distinguish between the Fourth Amendment tests applicable to supervised releasees and other conditional releasees.<sup>207</sup> Consequently, the court argued that the analysis used for parolees in *Samson* can be applied to supervised releasees, because circuit

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196. See *United States v. Weikert*, 504 F.3d 1 (1st Cir. 2007). In a subsequent Fourth Amendment challenge to the 2000 DNA Act, the First Circuit applied *United States v. Weikert* to reverse a trial court's decision that misapplied the totality of the circumstances test. See *United States v. Stewart*, 532 F.3d 32, 33–34 (1st Cir. 2008).

197. See *Weikert*, 504 F.3d at 4.

198. See *id.* at 4–5.

199. See *id.* at 5.

200. See *id.*

201. See *id.* *Samson* was decided after the district court's decision. See *id.* at 10 n.8.

202. See *id.* at 9.

203. See *id.* (emphasis omitted).

204. See *id.* at 9–10.

205. See *id.* at 10.

206. See *supra* Part II.A.2.

207. See *Weikert*, 504 F.3d at 10–11.

courts “have not distinguished between parolees, probationers, and supervised releasees for Fourth Amendment purposes.”<sup>208</sup>

In applying the totality of the circumstances test, the court balanced Weikert’s expectations of privacy with the government’s interest in conducting the search. Weikert had a “substantially diminished expectation of privacy” due to his status as a conditional releasee.<sup>209</sup> Although a blood draw intrudes more than an external search such as fingerprinting, the court did not find that the blood draw would intrude significantly or unusually upon Weikert.<sup>210</sup> Additionally, the defendant’s claim that data may be misused in the future did not factor into the court’s analysis, as the balancing test employed “focus[d] on present circumstances.”<sup>211</sup>

The court identified several governmental interests in collecting Weikert’s DNA. First, the government had an interest in identifying, monitoring, and rehabilitating supervised releasees.<sup>212</sup> Second, the government endeavored to accurately and efficiently solve crimes and exonerate those wrongfully suspected of criminal activity.<sup>213</sup> Finally, since the 2000 DNA Act requires all felons to submit DNA samples, no potential abuses of discretion undermined the government’s interests.<sup>214</sup>

The government’s interests outweighed Weikert’s privacy interests in light of his status as a supervised releasee, the minimal intrusion of the blood draw, and the statutory restrictions on the use of the DNA sample.<sup>215</sup> Though the court approved the search, it noted some hesitancy in establishing a precedent, observing that “[e]very doctrine can be applied to future cases in ways that may or may not be desirable,” so “a concern for potential future applications cannot justify a result at odds with the circumstances of the case before us.”<sup>216</sup>

### 3. *Johnson v. Quander*

While the First Circuit relied on *Samson* to apply a totality of the circumstances test to compelled DNA extraction of probationers, the U.S. Court of Appeals for the District of Columbia Circuit adopted *Knights* to legitimize the use of a totality assessment. In *Johnson v. Quander*, the court assessed the constitutionality of applying the 2000 DNA Act to Lamar Johnson, a convicted robber who received a suspended sentence and two

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208. *See id.* at 11 (quoting *United States v. Kincade*, 379 F.3d 813, 817 n.2 (9th Cir. 2004)).

209. *See id.* at 12.

210. *See id.*

211. *See id.* at 13. The court acknowledged that it would reconsider the reasonableness of DNA collection if scientific advances allow the deduction of private, nonidentifying information from junk DNA samples. *See id.*

212. *See id.*

213. *See id.* at 14.

214. *See id.*

215. *See id.* at 14–15.

216. *See id.* at 15 n.12.

years of probation.<sup>217</sup> Relying on *Knights*, the court applied a balancing test to find that the defendant's reduced privacy interests could not outweigh the government's interest in monitoring probationers, deterring recidivism, and protecting the public.<sup>218</sup> Finding that CODIS operates like an efficient fingerprint database, the court determined that the Fourth Amendment does not apply to each search of the CODIS database.<sup>219</sup> Moreover, the court rejected Johnson's claim that the government has no right to retain his blood sample to perform tests in the future.<sup>220</sup> Finding that a search is completed upon drawing the blood, further testing of the sample was deemed nonintrusive, since it would not discern any human activity.<sup>221</sup>

#### 4. *United States v. Kraklio*

Similarly, in *United States v. Kraklio*, the U.S. Court of Appeals for the Eighth Circuit assessed the constitutionality of applying the 2000 DNA Act to a probationer under the totality of the circumstances test.<sup>222</sup> The court observed that most circuits employ the "more rigorous" totality of the circumstances test instead of a special needs analysis, since the purposes of DNA collection extend beyond the supervisory purposes of probation.<sup>223</sup> After adopting the totality of the circumstances approach, the court summarily rejected the defendant's Fourth Amendment challenge to the 2000 DNA Act, finding that the government's interest in using DNA to investigate crimes outweighed the defendant's diminished expectation of privacy as a probationer.<sup>224</sup>

#### 5. *Banks v. United States*

Prior to its latest decision, the U.S. Court of Appeals for the Tenth Circuit has been inconsistent in its Fourth Amendment analysis of compelled DNA extraction statutes.<sup>225</sup> In its most recent case on compelled DNA extraction, the Tenth Circuit entertained a Fourth Amendment challenge to the 2004 DNA Act by nonviolent felons serving supervised

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217. See *Johnson v. Quander*, 440 F.3d 489, 491–92 (D.C. Cir. 2006).

218. See *id.* at 493–97.

219. See *id.* at 499.

220. See *id.* at 499–500.

221. See *id.*

222. See *United States v. Kraklio*, 451 F.3d 922 (8th Cir. 2006).

223. See *id.* at 924.

224. See *id.* ("The circuits favoring the reasonableness [totality] standard have concluded 'the purpose for the collection of DNA goes well beyond the supervision by the Probation Office of an individual on supervised release' . . ." (citing *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005))).

225. Compare *United States v. Kimler*, 335 F.3d 1132 (10th Cir. 2003) (applying special needs doctrine), with *Shaffer v. Saffle*, 148 F.3d 1180 (10th Cir. 1998) (assessing totality of the circumstances), *Schlicher v. Peters*, 103 F.3d 940 (10th Cir. 1996) (same), and *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996) (same).

release and probation in *Banks v. United States*.<sup>226</sup> In its decision, the court admitted its inconsistent analytical approaches to DNA extraction, but noted that its prior decision employing a special needs framework failed to articulate how CODIS qualified as a special need.<sup>227</sup>

In *Banks*, the court found no sufficient distinction to warrant treating parolees, supervised releasees, probationers, or prisoners different for purposes of choosing a Fourth Amendment analytical framework.<sup>228</sup> Accordingly, the court relied on *Knights* and *Samson* as support that a balancing test can be used to assess Fourth Amendment challenges to DNA collection statutes.<sup>229</sup>

When assessing the privacy interests afforded to different classes of offenders, the court observed that prisoners comprise their own category, as their custody extinguishes their privacy.<sup>230</sup> The court found that persons on conditional release, parole, probation, and supervised release have substantial curtailments on their liberty that categorically justify DNA extraction.<sup>231</sup> Similarly, the court noted that collecting a former felon's DNA is justified by its potential to solve future crimes, as maintaining criminal justice records rationally relates to a conviction.<sup>232</sup> Contrapuntally, the court observed that those never convicted of a felony receive greater Fourth Amendment protection.<sup>233</sup> Applying the totality of the circumstances approach, the court analogized DNA extraction to fingerprinting.<sup>234</sup> In so doing, the Tenth Circuit concluded that the "significant" government interests in identifying offenders, solving crimes, and combating recidivism outweighed the felons' privacy interests.<sup>235</sup>

## 6. *United States v. Kriesel*

The U.S. Court of Appeals for the Ninth Circuit in *United States v. Kriesel* considered a challenge to the 2004 DNA Act by a convicted felon on supervised release.<sup>236</sup> The court found that no case prior to *Samson*

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226. 490 F.3d 1178, 1181–83 (10th Cir. 2007).

227. *See id.* at 1183–84 (collecting cases demonstrating inconsistent Fourth Amendment analytical approaches).

228. *See id.* at 1184.

229. *See id.* at 1185.

230. *See id.* at 1186 (citing *Green v. Berge*, 354 F.3d 675, 679–81 (7th Cir. 2004) (Easterbrook, J., concurring)).

231. *See id.* (citing *Green*, 354 F.3d at 679–81).

232. *See id.* at 1187 (citing *Green*, 354 F.3d at 679–81). Though not explicitly articulated by the court, it intimated that nonfelons—such as those convicted of a misdemeanor or citizens just arrested on suspicion of a crime—enjoy a Fourth Amendment privacy interest in their DNA that outweighs the government's criminal justice interests. *See id.*

233. *See id.* (citing *Green*, 354 F.3d at 679–81).

234. *See id.* at 1185, 1188, 1190, 1192–93.

235. *See id.* at 1193.

236. *See United States v. Kriesel*, 508 F.3d 941 (9th Cir. 2007). The U.S. Court of Appeals for the Ninth Circuit subsequently determined that *United States v. Kriesel* foreclosed a subsequent Fourth Amendment challenge to the 2004 DNA Act. *See United States v. Zimmerman*, 514 F.3d 851, 855 (9th Cir. 2007).

addressed the issue of which Fourth Amendment approach to apply in this context.<sup>237</sup> “Taking [its] cue from *Samson*,” the court applied the totality of the circumstances test.<sup>238</sup>

In applying this test, the court invoked *Samson*’s proposition that a parolee’s reduced expectation of privacy permits greater governmental intrusions.<sup>239</sup> Though acknowledging the defendant’s “cherished” interest in his bodily integrity, the court determined that the government’s interests in identifying crimes committed while the defendant was at large, reducing recidivism, and solving past crimes outweighed the intrusion.<sup>240</sup>

Judge Betty B. Fletcher dissented on the basis that the government’s interests did not sufficiently outweigh the defendant’s privacy interest in the totality test.<sup>241</sup> While agreeing that *Samson* establishes the proper framework for assessing a Fourth Amendment challenge to compelled DNA extraction, she noted that the search of the parolee in *Samson* correlated with the government’s supervisory purpose.<sup>242</sup> Accordingly, the dissent argued that *Samson* does not approbate searches “untethered from an immediate supervisory need.”<sup>243</sup> Despite claiming no immediate supervisory need in compelling DNA extraction for CODIS, the dissent concluded that the government lacked a sufficient interest to overcome the defendant’s privacy.<sup>244</sup> Thus, the Ninth Circuit has joined the majority of circuits in holding that the totality of the circumstances test is the proper analytical framework for assessing Fourth Amendment challenges to compelled DNA extraction.

### III. ANALYZING THE FOURTH AMENDMENT APPROACHES

This Note has chronicled various rationales espoused by U.S. courts of appeals for adopting either the special needs or the totality of the circumstances approach to assess Fourth Amendment challenges to DNA extraction statutes. Part III.A of this Note resolves the minor disagreement amongst several circuit courts regarding which Fourth Amendment approach is more stringent and rigorous. Part III.B of this Note argues that while the special needs approach more rigorously and stringently protects the Fourth Amendment in the context of a specific controversy, courts will more rigorously protect the Fourth Amendment by foregoing a special needs assessment in the DNA extraction context. By doing so, courts will maintain the integrity of the special needs exception against precedents that erode the threshold requirement for a government search program to qualify as a special need. Part III.C of this Note concludes that the majority of

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237. See *Kriesel*, 508 F.3d at 946.

238. See *id.* at 947.

239. See *id.*

240. See *id.* at 948 (quoting *Schmerber v. California*, 384 U.S. 757, 772 (1966))

241. See *id.* at 958 (Fletcher, J., dissenting).

242. See *id.* at 952–53.

243. See *id.* at 953.

244. See *id.* at 955–58.

circuit courts correctly applied the totality of the circumstances approach to assess laws compelling DNA extraction.

A. *The Special Needs Doctrine's More Stringent and Rigorous Fourth Amendment Protections*

Though the major disagreement among the U.S. courts of appeals concerns which Fourth Amendment approach to apply, courts have also disagreed on which Fourth Amendment approach more stringently and rigorously protects the Fourth Amendment.<sup>245</sup> While both Fourth Amendment tests require balancing a defendant's interests against the government's, the special needs test adds the special need requirement to a general balancing test, thereby rendering it the more rigorous Fourth Amendment approach for assessing compulsory DNA extraction. The Second Circuit aptly found "puzzling" the proposition that the totality approach is more rigorous:

The special needs exception requires the court to ask two questions. First, is the search justified by a special need beyond the ordinary need for normal law enforcement? Second, . . . is the search reasonable when the government's special need is weighed against the intrusion on the individual's privacy interest? A general balancing test, on the other hand, only requires the court to balance the government's interest . . . against the individual's . . . .<sup>246</sup>

Since the balancing component of the special needs test is akin to a totality of the circumstances determination, DNA extractions approbated under the special needs doctrine would also be approved under a totality of the circumstances assessment.<sup>247</sup> Thus, when applied to a specific case, the special needs doctrine more stringently and rigorously protects Fourth Amendment freedoms.

B. *Applying the Special Needs Doctrine to Compelled DNA Extraction Search Programs*

Although Part III.A of this Note demonstrated that the special needs test is more stringent and rigorous, applying this test in the DNA extraction context actually undermines Fourth Amendment protections. Prior to *Samson*, no Supreme Court authority would permit compulsory DNA extractions without a warrant, individualized suspicion, or a special need.<sup>248</sup>

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245. Compare *United States v. Kraklio*, 451 F.3d 922, 924 (8th Cir. 2006) (characterizing totality test as more rigorous), with *United States v. Weikert*, 504 F.3d 1, 9–10 (1st Cir. 2007) (doubting that a DNA extraction statute satisfying the totality of the circumstances test would satisfy the special needs test).

246. *Nicholas v. Goord*, 430 F.3d 652, 664 n.22 (2d Cir. 2005) (citations omitted).

247. See *United States v. Amerson*, 483 F.3d 73, 80 n.6 (2d Cir. 2007) ("[H]ad we concluded that it was appropriate to apply a general balancing test to the suspicionless searches of probationers—which we did not—we would have reached the same result that we do under the special needs test.").

248. See *supra* notes 102, 106–09 and accompanying text.

Concerned with the monumental governmental interests CODIS furthered, courts were initially forced to fit CODIS into the special needs rubric to link criminals to their crimes. Since *Samson* provides courts with a new Fourth Amendment approach to justify the monumental governmental interests CODIS furthers,<sup>249</sup> courts should preserve the integrity of the special needs exception by not broadening the special need threshold requirement to accommodate CODIS. Placing CODIS in the special needs rubric threatens to undermine the Fourth Amendment protections the Supreme Court established in *Edmond* and *Ferguson*.<sup>250</sup> By applying a less rigorous test in the DNA extraction context, courts will more rigorously protect the Fourth Amendment by preventing the perpetuation of precedent that impoverishes the requirements for a search program to qualify as a special need.

In light of *Edmond* and *Ferguson*, the DNA Acts fail to constitute a special need sufficiently divorced from the government's general interest in solving crime. The minority of circuits cannot sustain the contention that a special need exists because the blanket nature of the DNA extractions show that such searches do not endeavor to investigate particular crimes.<sup>251</sup> This argument fails in light of *Edmond* and *Ferguson*, in which the Supreme Court found that blanket search programs primarily serve law enforcement purposes.<sup>252</sup> *Edmond* is particularly analogous, since law enforcement officers stopped a predetermined number of motorists based on vehicle sequence rather than officers' discretion.<sup>253</sup> Though the officers in *Edmond* were not investigating a particular crime at the time of the checkpoint, the search regime failed the special needs test.<sup>254</sup> Contrary to the contention of courts presently applying the special needs analysis to Fourth Amendment challenges to compulsory DNA extraction statutes, the Supreme Court iterated in *Edmond* that generally seeking evidence of criminal wrongdoing places a search outside the special needs exception; it was not necessary for the officers to conduct the search with the objective of solving any particular crime for the search program to be unconstitutional.<sup>255</sup> Thus, the minority of circuits should abandon their classification of CODIS as sufficiently divorced from obtaining evidence of criminal activity.

Moreover, the Supreme Court's refusal to approbate *Ferguson*'s search program that garnered evidence for possible "subsequent criminal prosecutions"<sup>256</sup> does not permit courts to invoke temporal distinctions between the collection and prosecutorial use of evidence to legitimize the application of the special needs test. Since CODIS can be used to solve future crimes in possible subsequent criminal prosecutions, the government presently employs it to garner evidence—just like the unconstitutional

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249. See *supra* Part I.B.2.b; *infra* Part III.C.

250. See *supra* Part I.B.1.

251. See *supra* Part II.A–B.

252. See *supra* Part II.B.1.

253. See *supra* note 54 and accompanying text.

254. See *supra* Part I.B.1.a.

255. See *supra* Part I.B.1.a.

256. See *supra* note 75 and accompanying text.

hospital search program in *Ferguson*. Thus, even if CODIS solves or deters only nonexistant crimes, CODIS still does not amount to a special need.

The minority of circuits has strained to characterize CODIS as a special need by also reciting CODIS's panoply of benefits.<sup>257</sup> However, the Supreme Court made evident in *Edmond* and *Ferguson* that only the primary purpose of a search program determines the existence of a special need.<sup>258</sup> Though these cases do not enumerate a precise method to ascertain a search program's primary purpose, one scholar has suggested a mixed subjective-objective approach, considering factors such as a search program's resource allocation and duration.<sup>259</sup> Extensive legislative history and resource allocation suggests that the DNA Acts serve crime-solving functions, and the indefinite duration of CODIS's records guarantees the availability of DNA samples for prosecutorial use in subsequent criminal proceedings.<sup>260</sup> Even the Second Circuit's conclusion that the Act's "primary purpose . . . is to obtain a reliable record of an offender's identity that can then be used to help solve crimes"<sup>261</sup> affirms CODIS's connection to ordinary law enforcement search programs that do not qualify for a special needs assessment.

Moreover, the Second Circuit characterized CODIS as a special need because it "fulfills purposes that could not be achieved by reliance on 'normal' law enforcement methodology."<sup>262</sup> To the extent *Edmond* and *Ferguson* limit a special needs assessment to a search's primary programmatic purpose, this justification should be abandoned. The assertion that CODIS qualifies as a special need since it is not a "normal" law enforcement method equivocates the meaning of "special need." Certainly, any law enforcement innovation—such as the unprecedented drug testing program in *Ferguson*—could be deemed a "special need" if innovativeness determined specialness. The Second Circuit's recitation of "qualitative and quantitative advantages over the alternatives" is not only irrelevant to determining the existence of a special need, but also demonstrates CODIS's incriminatory nexus to the alternative "normal" methods of solving crime—which do not qualify for special needs treatment.<sup>263</sup>

CODIS's potential to exonerate the innocent presents the least persuasive justification for the special need. An innocent suspect should not be compelled to provide exculpatory evidence. Moreover, exoneration of the

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257. See *supra* Part II.A–B.

258. See *supra* Part I.B.1.

259. See generally Brooks Holland, *The Road 'Round Edmond: Steering Through Primary Purposes and Crime Control Agendas*, 111 PENN ST. L. REV. 293 (2006).

260. See DNA Analysis Backlog Elimination Act of 2000, H.R. REP. NO. 106-900, pt. 1, at 26–27 (2000), reprinted in 2000 U.S.C.C.A.N. 2323, 2324 (observing CODIS will solve crimes "by matching DNA from crime scenes to convicted offenders" for "law enforcement identification purposes").

261. See *United States v. Amerson*, 483 F.3d 73, 81 (2d Cir. 2007).

262. See *supra* notes 146–55 and accompanying text.

263. See *supra* Parts I.B.1, II.A.2.



innocent is equivalent to the ordinary law enforcement goal of incriminating the guilty.<sup>264</sup> Additionally, extensive empirical evidence suggests that the government vigorously resists prisoners' efforts to use DNA evidence for exculpation.<sup>265</sup> Even to the extent that CODIS frees the innocent, as a nonprimary purpose, it is irrelevant to qualifying CODIS as a special need.

In light of the foregoing analysis, courts should not continue to apply the special needs framework when assessing Fourth Amendment challenges to compelled DNA extraction. CODIS simply exists to provide evidence of criminal activity.<sup>266</sup> By broadening the special needs doctrine to accommodate CODIS, courts invite other law enforcement search regimes to find justification under the closely guarded special needs exception to the Fourth Amendment. By lowering the threshold of what constitutes a special need, courts will create precedent for law enforcement search regimes of greater breadth and magnitude to encroach upon Fourth Amendment protections.

### C. Applying Samson's Totality of the Circumstances Assessment to Compelled DNA Extraction

When assessing Fourth Amendment challenges to mandatory DNA extraction, courts should follow the majority of circuit courts by applying a general totality of the circumstances test per *Knights* and *Samson*.<sup>267</sup> As *Samson* iterated, a totality of the circumstances analysis is not a novel "exception," but rather the "general Fourth Amendment approach" courts should adopt when adjudicating Fourth Amendment claims.<sup>268</sup> After all, the Fourth Amendment only proscribes unreasonable searches.<sup>269</sup>

Though courts may now adopt a less stringent test for assessing Fourth Amendment challenges to compelled DNA extraction, applying *Samson's* totality test in the criminal DNA extraction context still protects the Fourth Amendment. As described above, using a less rigorous approach in the compelled DNA extraction context will more rigorously protect the Fourth Amendment by preserving the integrity of the special needs exception. Moreover, *Samson* stressed that a totality test would only sanction suspicionless searches in "limited circumstances."<sup>270</sup> These limited circumstances appear circumscribed by an offender's criminal status, as

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264. See Sandra J. Carnahan, *The Supreme Court's Primary Purpose Test: A Roadblock to the National Law Enforcement DNA Database*, 83 NEB. L. REV. 1, 24 (2004) ("The first step in the accurate prosecution of crime is for law enforcement officials to arrest the proper suspect . . . so . . . the innocent may go free. For every guilty person going to prison, all other innocent persons who might have been wrongly convicted for the same crime are, by default, exonerated.").

265. See *id.* at 24 & n.135.

266. See *supra* Part I.A.

267. See *supra* Part I.B.2.

268. See *supra* Part I.B.2.

269. See *supra* Part I.B.2.

270. See *supra* note 102 and accompanying text.

*Samson* approbated increased intrusions for criminal offenders “by virtue of their status alone.”<sup>271</sup> Since the parolee’s criminal status constituted the Court’s sole basis for finding a suspicionless search reasonable under the totality of the circumstances assessment, nothing in *Samson* suggests that the less rigorous Fourth Amendment approach can be invoked to erode the Fourth Amendment protections of the law-abiding public.

Indeed, when the Tenth Circuit in *Banks* chose to invoke *Samson*’s totality assessment, the court carefully distinguished among the Fourth Amendment rights various offenders have, finding that those never convicted of a felony enjoy the greatest Fourth Amendment protections.<sup>272</sup> This suggests that while courts may impose harsher restrictions on convicts, law enforcement investigations targeting members of the general public fall outside the “limited circumstances” under which a court may invoke *Samson*’s less vigorous totality test to justify suspicionless search programs. As more recent state and federal DNA extraction programs permit DNA extraction from arrestees, it will be interesting to witness how *Samson*’s analysis will apply in future search and seizure contexts.

#### CONCLUSION

The willingness of every U.S. court of appeals to uphold DNA extraction statutes indicates the judiciary’s firm support of CODIS’s profound crime-fighting capabilities. Previously, when faced with a Fourth Amendment challenge to a DNA extraction statute, courts were left with the dilemma of declaring the statute’s search program unconstitutional or straining to assess the search program as a special need. Since the Supreme Court in *Samson* has provided a method for courts to avert this dilemma, courts can now maintain the integrity of the special needs exception while concurrently permitting DNA evidence retained in the CODIS database to continue solving heinous crimes.

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271. See *supra* note 91 and accompanying text.

272. See *supra* notes 230–33 and accompanying text.