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Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?

Tracey Maclin

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I. Introduction

In the past twenty years, advances in forensic DNA technology have revolutionized the American criminal justice system.¹ The use of forensic DNA testing in America began in 1987, and its demonstrated scientific accuracy quickly led jurisdictions to accept expert testimony regarding DNA matches between suspects and crime scene evidence.² Wielding the power to exonerate the innocent and apprehend the guilty, the use of DNA identification technology has become an indispensable resource for prosecutors and law enforcement officials, as well as for defense lawyers representing persons falsely accused or wrongfully convicted of crimes they did not commit. As states began to compile DNA profiles from convicted offenders, the need for a repository for these profiles resulted in the DNA database.

Originally, DNA databases included only “those classes of offenders with a high recidivism rate, such as sex offenders and violent felons.”³ Recognizing the crime-solving potential of this technology, state legislatures soon began to expand the scope of DNA database statutes to include broader classes of offenders. Currently, all fifty states have statutes that mandate the collection of DNA from individuals convicted of certain felonies⁴ and a few states have expanded their statutes even further by authorizing the taking and analysis of DNA from certain categories of arrestees. This article addresses the constitutionality of taking DNA samples from persons subject to arrest. In particular, this article focuses on the statutes of Virginia and Louisiana, which have authorized DNA sampling of persons arrested for specified offenses, and examines whether these laws are consistent with the Fourth Amendment’s “special needs” doctrine as outlined by several Supreme Court rulings.

A. The Origins of DNA Databases

The establishment and expansion of state and federal DNA databases is predicated on the accuracy of DNA profiling and technology. DNA, or deoxyribonucleic acid, is the genetic material found in the chromosomes of most human cells.⁵ Each DNA molecule consists of two strands, known as a double helix, that contain a particular sequence of nucleic acids.⁶ Although most of the human genome consists of genetic information that is shared by a majority of the population, each individual’s chromosomes have minute variations known as polymorphisms that serve as unique identifiers.⁷ While some polymorphic genes code for specific traits such as eye color, forensic DNA analysis uses noncoding

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regions to identify the differences in a person's genetic makeup.⁸ By isolating those areas of the chromosome known to be unique to each individual, forensic DNA testing can compare two samples to determine if the genetic mutations match, indicating that the samples contain DNA from the same individual.⁹ Due to the polymorphic nature of DNA, "individual differences make identification virtually certain."¹⁰

The most widely used technology for DNA identification is the polymerase chain reaction technique ("PCR"). This technique facilitates DNA identification from even a tiny biological sample such as saliva, blood, semen, hair, cheek cells and even epithelial skin cells by making "millions of copies of the small amount of DNA in the sample."¹¹ Within the DNA copy produced by PCR, short tandem repeat ("STR") technology is used to identify genetic loci to distinguish DNA profiles "[b]y examining the gene sequence on a specific location on a chromosome and comparing the length with the gene sequence on the same chromosome from a different person."¹² In both state and federal DNA testing laboratories, STR technology is used to identify the DNA strand at thirteen specific loci, as designated by the Combined DNA Index System ("CODIS") maintained by the Federal Bureau of Investigation.¹³

The CODIS system "enables federal, state, and local crime labs to exchange and compare DNA profiles electronically, thereby linking crimes to each other and to convicted offenders."¹⁴ CODIS began in 1990 as a pilot database for fourteen states,¹⁵ and was formalized by the DNA Identification Act of 1994.¹⁶ The act empowered the FBI to create an index of DNA profiles from convicted criminals, crime scene evidence, unidentified human remains and samples "voluntarily contributed from relatives of missing persons."¹⁷ By 1998, CODIS was connected to all fifty states¹⁸ as a national index linking databases at the local, state and national levels.¹⁹ All profiles originate at the local level in the Local DNA Index System ("LDIS"), which are then fed into the State DNA Index System ("SDIS") and the National DNA Index System ("NDIS").²⁰ In the three tiered levels of CODIS, each state maintains its own SDIS allowing "state and local agencies to operate their databases according to their specific legislative or legal requirements."²¹

The three levels of CODIS are made up of two indexes, the Convicted Offender index that "contains DNA profiles of individuals convicted of felony sex offenses (and other violent crimes)" and the Forensic index containing "DNA profiles developed from crime scene evidence."²² As of April 2004, the FBI maintained a total of 1,762,005 DNA profiles in the NDIS database.²³ These profiles "contain a specimen identifier,

the sponsoring laboratory's identifier, the initials (or name) of DNA personnel associated with the analysis, and the actual DNA characteristics. CODIS does not store criminal history information, case-related information, social security numbers or dates-of-birth."²⁴ Using these two indexes, law enforcement officials at the state and local levels are able to search between crime scene evidence and individual DNA profiles from around the nation.

All fifty states currently have legislation requiring that DNA profiles of certain categories of individuals be included in at least two levels of CODIS.²⁵ But the legislation concerning what classes of offenders are to be incorporated varies widely from state to state.²⁶ The lack of consistency of state legislation is even more problematic due to the huge backlog of samples waiting to be analyzed and catalogued in state and local DNA testing facilities. Congress attempted to combat this problem by passing the DNA Analysis Backlog Elimination Act of 2000.²⁷ This statute authorized the Attorney General to issue grants to the states for the purpose of carrying out "for inclusion in the Combined DNA Index System of the Federal Bureau of Investigation, DNA analyses of samples taken from individuals convicted of a qualifying state offense."²⁸

In 2004, however, the Attorney General submitted a report to Congress regarding the DNA evidence backlog that cited "approximately 542,700 criminal cases with biological evidence" awaiting testing and analysis.²⁹ The reason for this massive backlog is that state and local crime laboratories are "overworked, understaffed and insufficiently funded."³⁰ President Bush has made additional efforts to reduce this backlog through his initiative *Advancing Justice Through DNA Technology* by proposing "\$1 billion in funding over 5 years to reduce the DNA testing backlog, build crime lab capacity, stimulate research and development, support training, protect the innocent, and identify missing persons."³¹ States legislatures have also realized the potential of DNA technology to assist in solving crimes and convicting the guilty. Recognizing the importance of expanding DNA databases to accomplish this goal, many states have increased the number of individuals eligible for inclusion in these databases. As states broaden the category of offenders, they will increase their eligibility for federal funding to reduce their backlogs and solve more crimes.

B. The Statutes of Virginia and Louisiana Authorizing the Taking of DNA from Arrestees

Two of the most aggressive states in DNA database expansion are Virginia and Louisiana. In 2002, Virginia

enacted a provision allowing the taking and analysis of a DNA sample for “[e]very person arrested for the commission or attempted commission of a violent felony” to “determine identification characteristics specific to the person.”³² Those eligible for DNA testing are individuals arrested for the following offenses: first and second degree murder and voluntary manslaughter,³³ mob-related felonies,³⁴ any kidnapping or abduction felony,³⁵ any malicious felonious assault or malicious bodily wounding,³⁶ robbery,³⁷ carjacking,³⁸ criminal sexual assault³⁹ or arson.⁴⁰ After obtaining the sample from the arrestee’s person, the sample is analyzed and the remainder of sample is stored by the Division of Forensic Sciences⁴¹ “in accordance with specific procedures adopted by regulation of the Division to ensure the integrity and confidentiality of the samples.”⁴² The Commonwealth of Virginia makes the results of the analysis of DNA samples “available directly to federal, state and local law-enforcement officers upon request made in furtherance of an official investigation of any criminal offense.”⁴³ The unauthorized use or dissemination of information from stored DNA samples is a punishable misdemeanor.⁴⁴

Virginia’s DNA database, begun in 1989, is the oldest and largest DNA database in the country.⁴⁵ As the first state to take DNA from convicted felons and arrestees, Virginia has led the nation in DNA database expansion. State Attorney General Jerry W. Kilgore, who proposed the legislative package for the database expansion to arrestees has stated, “DNA is the fingerprint of today...it’s a public safety issue.”⁴⁶ Hinting to the legislative intent behind the expansion, General Kilgore has stated that “[i]t’s no secret that an enhanced database increases the chances of solving crimes,”⁴⁷ and that “[database expansion] will help us solve cases much quicker and ensure public safety by making sure somebody’s not released back into the general public who has committed a string of crimes.”⁴⁸ Tim Murtaugh, a spokesman for the Attorney General, has stated that “[w]e see [DNA database expansion] as an important tool for law enforcement that helps the victims of crimes and the families of victims.”⁴⁹ Moreover, a spokeswoman of Virginia Delegate Ryan McDougle, who sponsored HB 829 to expand the state’s DNA database to cover arrestees, confirmed that the legislative intent behind the bill was to match the DNA of violent felony arrestees to DNA evidence from unsolved crimes and not to merely obtain the identity of those arrested by the state.⁵⁰

In 2003, Louisiana enacted legislation expanding its DNA databases to cover certain categories of arrestees. Louisiana authorizes the taking of DNA samples from “[a.] person who is arrested for a felony or other specified offense, including an attempt, conspiracy, criminal solicitation, or accessory after the fact of such

offenses.”⁵¹ These other specified offenses include: battery,⁵² unlawful use of a laser on a police officer,⁵³ simple assault,⁵⁴ assault on a schoolteacher,⁵⁵ stalking,⁵⁶ misdemeanor carnal knowledge of a juvenile,⁵⁷ prostitution,⁵⁸ soliciting for prostitutes,⁵⁹ prostitution by massage,⁶⁰ letting premises for prostitution⁶¹ and peeping tom⁶² offenses. Louisiana also permits DNA testing of juveniles who are arrested for similar felony offenses or attempts.⁶³ Additionally, the legislature provided for recommendation by the state police for the inclusion of other categories of offenders in the state DNA database, stating that “the state police shall consider those offenses for which DNA testing will have a substantial impact on the detection and identification of sex offenders and other violent offenders.”⁶⁴ Louisiana further authorizes the exchange of DNA profiles contained within the state database pursuant to the guidelines and requestor identification verification adopted by the state police.⁶⁵ Like the state of Virginia, Louisiana prohibits unauthorized disclosure of any identifying DNA information.⁶⁶

Although the current Louisiana statute authorizing DNA testing of arrestees was passed in 2003, the history of the legislation dates back to 1997.⁶⁷ Although technically one of the first states to pass such broad DNA legislation, due to a lack of funding the database failed to become a reality by its September 1, 1999 implementation date and was repealed by the legislature that year.⁶⁸ As other states pushed forward with legislation to expand their DNA databases, Louisiana was at a standstill for lack of funding. In 2000, one assistant director at the Louisiana State Police crime lab commented, “[w]e’re required to do something, and we have no funding to do it. Therefore, we have no data bank.”⁶⁹

It took the tragic acts of serial killer Derrick Todd Lee to motivate Louisiana to push for legislation to expand the state’s DNA database to cover certain categories of arrestees. After interviewing and analyzing DNA from over 600 men, police officials in Louisiana had no definitive leads in the investigation of the serial killing of five women in and around Baton Rouge.⁷⁰ When a state official received a tip that Lee was a suspect in a 1992 murder and the 1998 disappearance of two women from Zachary, Louisiana, police began investigating Lee’s extensive criminal history, which included peeping into homes, stalking and attempted murder.⁷¹ Police officials obtained a warrant to take and analyze Lee’s DNA, which was matched with trace evidence from four murder victims attributed to the Baton Rouge serial killer.⁷² Lee was subsequently charged with five counts of murder, five counts of aggravated rape, aggravated burglary, and second-degree kidnapping.⁷³ Speaking of the Lee case, Ray Wickenheiser, the direc-

tor of the Acadiana Crime Lab in Louisiana stated, “[t]here’s no doubt in my mind that with arrestee testing – I can guarantee – four lives would have been saved. If we had proper arrestee information, [Lee] would have been arrested after the first case.”⁷⁴

Other evidence indicating the purpose behind Louisiana’s DNA law can be gleaned from statements made by Louisiana state representative Huntington “Hunt” Downer, who sponsored the 1997 DNA legislation. “I really think [DNA] ought to be [taken from] everybody who’s arrested. Had there been DNA sampling early on in [the Lee] criminal case, maybe we could have caught [Lee] before he killed.”⁷⁵ Downer has additionally commented, “DNA is a fingerprint; it’s not an invasion of privacy. It’s getting guilty people off the streets and innocent people out of jail.”⁷⁶ Interestingly, an amendment by Downer that would have applied the law to anyone arrested for any offense was removed by the legislature before the passage of the bill.⁷⁷

ana has generated a great deal of controversy regarding the Fourth Amendment rights of arrestees.⁸³ Imagine, for example, a scenario where law enforcement officials suspect an individual, John Doe, as the perpetrator of a series of rapes, but lack probable cause or the lesser standard of reasonable suspicion for the individual’s arrest or investigatory seizure. Both Virginia and Louisiana give police the authority to take a DNA sample from Doe if he is arrested for another serious offense. If Doe, let’s say, is arrested in Louisiana for soliciting prostitution, the police can obtain a DNA sample in order to compare it with a sample from the crime scene evidence of the serial rapist.

Or, imagine a second scenario where a person, Joe Smith, is arrested in Virginia for robbery. A DNA sample is taken from Smith pursuant to his arrest. Months later, state officials determine that Smith’s DNA matches the DNA trace evidence found at the scene of an unsolved murder. In both hypotheticals, the link

To determine whether a particular governmental intrusion constitutes a search, the Court asks whether the target of the intrusion has a subjective expectation of privacy in the information obtained by the government, and whether “society is prepared to accept that expectation as objectively reasonable.”

Louisiana left no doubt as to the purpose behind extending the DNA database to arrestees. In fact, the state enacted a statute explaining that “[t]he Louisiana Legislature finds and declares that DNA data banks are important tools in criminal investigations, in the exclusion of individuals who are the subject of criminal investigations or prosecutions, and in deterring and detecting recidivist acts.”⁷⁸ Like most states, Louisiana suffers a massive backlog of DNA samples waiting to be analyzed.⁷⁹ By expanding its database, the state can expect to increase its federal funding to help reduce that backlog. State senator Jay Dardenne, who sponsored the 2003 bill, stated that even if the money needed to pay for the expansion is not available in the state budget, the bill was needed to “attract a federal grant that would pay for the testing of 27,000 inmates in state prisons and people on probation or parole.”⁸⁰ Dardenne further stated in a Louisiana senate floor debate that the real benefit of expanding the database to include arrestees was to identify the culprits of crime and help convict the guilty, especially after the Derrick Todd Lee case.⁸¹

The Fourth Amendment to the United States Constitution guarantees all persons the right to be free from unreasonable searches and seizures.⁸² The expansion of DNA databases in states such as Virginia and Louisi-

connecting the suspects to the unsolved crimes is the taking and analysis of a DNA sample from the suspect upon being arrested.⁸⁴ This paper addresses whether this procedure is consistent with Fourth Amendment principles.

II. Does DNA Sampling Constitute a Search?

The Fourth Amendment protects against unreasonable searches and seizures. Thus, if DNA sampling is to trigger Fourth Amendment protections, it must be either a search or seizure. To determine whether a particular governmental intrusion constitutes a search, the Court asks whether the target of the intrusion has a subjective expectation of privacy in the information obtained by the government, and whether “society is prepared to accept that expectation as objectively reasonable.”⁸⁵ In deciding whether an arrestee has a reasonable expectation of privacy in his or her DNA profile, the Court will most likely consider three factors: the extent to which DNA is exposed to the public, the extent of any bodily intrusion in obtaining the DNA sample, and the nature of the information extracted from a DNA profile.⁸⁶

A. Exposure to the Public

Information or property that is exposed to the public is generally not protected by the Fourth Amendment.

Thus, even forcible police intrusions to obtain information revealed to the public will not be considered a search. Compelling an individual to provide a voice exemplar, for instance, is not a search because the physical characteristics of a person's voice are constantly exposed to the public.⁸⁷ If one construes this rationale broadly, DNA could be considered a physical characteristic that is constantly exposed to the public. We all leave traces of DNA everywhere we go – by losing hair, leaving saliva on a drinking glass at a restaurant, or shedding skin cells. This suggests that acquisition of an arrestee's DNA would not be considered a search.⁸⁸

The Court, however, is likely to find the taking of an arrestee's DNA is a search. First, the lower court cases that have broadly applied the "public exposure" rationale have involved only the discovery of limited information, such as one's identification⁸⁹ or the presence of chemicals transferred from stolen money.⁹⁰ By contrast, DNA can potentially reveal a broad array of personal information.⁹¹ Second, in *Kyllo v. United States*,⁹² the Supreme Court ruled that a thermal imaging device directed at a home constituted a search within the meaning of the Fourth Amendment. The Court explained that a search occurs when government agents use sense-enhancing technology to collect any information regarding the interior of a home that could not otherwise be obtained without a physical invasion, "at least where (as here) the technology in question is not in general public use."⁹³ Assuming that *Kyllo's* holding is not limited to the home – where Fourth Amendment concerns have typically been the highest – one can certainly argue that DNA sampling and analysis is sense-enhancing technology that is not in general public use.⁹⁴ Therefore, DNA testing of arrestees would constitute a search, even if DNA, like heat emanations, is technically exposed to the public.

B. Extent of Bodily Intrusion

Any physical intrusion into the body, such as using a needle to withdraw blood, constitutes a search for Fourth Amendment purposes. In *Schmerber v. California*,⁹⁵ a case in which blood was forcibly taken from an arrestee suspected of drunk driving so that it could be tested for its alcohol content, the Court held that "such testing procedures plainly constitute searches of persons."⁹⁶ *Skinner v. Railway Labor Executives' Ass'n*⁹⁷ extended this principle to include the taking of breath samples. *Skinner* involved federal regulations mandating drug testing of railway workers who violate safety rules or were involved in train accidents without individualized suspicion of alcohol or drug use.⁹⁸ The Court held that "[s]ubjecting a person to a breathalyzer test...implicates similar concerns about bodily integrity

and, like the blood-alcohol test [the Court] considered in *Schmerber*, should also be deemed a search."⁹⁹

Skinner further held that mandatory urinalysis constitutes a search even though "collecting and testing urine samples do not entail a surgical intrusion into the body."¹⁰⁰ Urinalysis was a search because "chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether she is epileptic, pregnant, or diabetic."¹⁰¹ The Court further explained that "the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests."¹⁰²

In determining whether the Court will find DNA sampling to be a search, one might distinguish *Skinner* on the grounds that there was a further privacy interest at stake in that case, to wit, the visual or aural monitoring of the urine sample, that would not be present in a case of DNA sampling.¹⁰³ Further, the privacy concerns implicated by DNA testing and analysis may be diminished by limiting access to the information that can be obtained from the DNA profile. Despite these differences, the Court will likely follow the reasoning of *Schmerber*, *Skinner* and its progeny when determining whether DNA sampling and analysis is subject to constitutional scrutiny.¹⁰⁴ Therefore, although DNA sampling can be accomplished in a minimally invasive manner by testing epithelial cells, the odds are very good that the Court will conclude that the taking and analysis of the sample is a search under the Fourth Amendment.

C. Nature of the Information Extracted

Finally, the nature of the information obtained by the government may be significant in determining whether DNA sampling will be deemed a search. An individual's DNA contains a wealth of information.¹⁰⁵ Likewise, the noncoding regions used in DNA profiling "can indicate or predict disease states, and all loci, coding and non-coding alike, can be used for parentage testing."¹⁰⁶ Concededly, the DNA profiles maintained in the CODIS database contain purely biometric identifiers that are "represented in the data base...as a series of digits comparable to social security numbers or passport numbers."¹⁰⁷ Privacy concerns, however, are implicated by the maintenance of DNA samples in a databank, much like a blood bank. Even scholars like Professor David Kaye recognize the privacy interests implicated in the storage of DNA in databanks for an infinite period of time. "Although health insurers are not particularly interested in [DNA] information and although a small explosion of state laws ban or restrict [DNA information] use in insurance and the workplace, the possibility that the government will allow the samples to fall

into the wrong hands or will misuse them for its own purposes must not be ignored.¹⁰⁸ Because DNA has the potential to reveal a host of private facts about an arrestee, the Court will probably find that forcibly taking and testing DNA is a search.

In sum, should the Court address the constitutionality of Louisiana or Virginia's statutes authorizing the DNA sampling of arrestees, it will most likely find that

In sum, should the Court address the constitutionality of Louisiana or Virginia's statutes authorizing the DNA sampling of arrestees, it will most likely find that the taking and analyzing of DNA samples is a search.

the taking and analyzing of DNA samples is a search. If DNA sampling is measured by the three factors discussed above, the Court's precedents plainly suggest that this process is a search under the Fourth Amendment.¹⁰⁹

III. Special Needs Analysis and DNA Searches

If DNA sampling and analysis is deemed a search, it must be reasonable in order to comply with the Fourth Amendment. In most criminal contexts, a search is reasonable if conducted pursuant to a judicial warrant or based on individualized probable cause.¹¹⁰ Because neither Louisiana nor Virginia's statutes authorizing the taking of an arrestee's DNA requires a judicial warrant or individualized suspicion, these searches must satisfy a recognized exception to the warrant or probable cause requirement in order to survive constitutional scrutiny. Because the so-called "special needs" exception permits suspicionless searches in a variety of contexts, it would seem to be the most appropriate category for analyzing the constitutionality of taking an arrestee's DNA.

Before deciding whether obtaining an arrestee's DNA sample without probable cause or judicial authorization constitutes a "special need" search, it is necessary to understand the scope and limitations of the Court's special needs cases. Under the special needs cases, government officials are permitted to conduct searches and seizures without any individualized suspicion of criminality, negligence or malfeasance. Although individualized suspicion and judicial warrants are generally required when the government intrudes into the privacy of citizens, the Court has recognized exceptions to this norm "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.'"¹¹¹ The Court has applied the special needs formula to allow

suspicionless searches or seizures that are justified by governmental interests *unrelated* to law enforcement concerns.

While the Court has issued several rulings under its "special needs" analysis, these cases do not form a coherent doctrine. Twelve years ago, Professor William Stuntz observed that "little or no effort has been made to explain what these 'special needs' are; the term turns

out to be no more than a label that indicates when a lax standard will apply."¹¹² Since that time, the Court's special needs jurisprudence has not become more comprehensible. Even when a majority of the Court can agree on a particular result, members of the majority

will disagree over a critical component of the special needs analysis.¹¹³ In other cases, the *ad hoc* nature of the Court's reasoning has produced rulings that are not logically consistent, which, in turn, has prompted lower court decisions that are contradictory.¹¹⁴ More importantly, and pertinent to the issue of the constitutionality of taking an arrestee's DNA sample, the Court's rulings have not done a very good job of identifying the line between law enforcement and special needs.¹¹⁵

The remainder of this article, which contains two parts, will canvas the Court's special needs cases with an eye toward identifying the factors that the Court will likely emphasize should it address the constitutionality of taking a DNA sample from an arrestee. In the first part, I describe the origins of the special needs analysis. This part also analyzes the rulings the Court has specifically labeled special needs cases. At the end of the second part, I will consider two cases, *New York v. Burger*¹¹⁶ and *Indianapolis v. Edmond*,¹¹⁷ which have, at times, been lumped together with the special needs cases.¹¹⁸ Although these two cases share significant characteristics with the special needs cases, I believe that, as a doctrinal matter, these cases do not fall into the special needs category. Nevertheless, both cases draw attention to the issue of searches that serve primary and secondary purposes. And both cases highlight the conflict between the special needs cases, which forbid searches that promote criminal law interests, and the administrative search cases, which permit searches that simultaneously advance civil and criminal law interests. The final part of the article discusses the constitutionality of the Louisiana and Virginia laws that authorize the taking of DNA samples from selected arrestees.

A. Origins of the Special Needs Analysis

Justice Blackmun's concurring opinion in *New Jersey v. T.L.O.*¹¹⁹ marked the formal start of the special needs analysis. *T.L.O.* concerned the constitutionality of an assistant vice-principal's search of a high school student's purse upon suspecting the student had violated a rule against smoking. The search revealed marijuana and evidence of marijuana dealing. The results of the search were turned over to the police and the state subsequently brought juvenile delinquency charges against the student. The *T.L.O.* majority ruled that the search was constitutional. Speaking generally, Justice White's majority opinion explained that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the

worthy for several reasons. First, as Professor Stephen Schulhofer has explained, Justice Blackmun's opinion was an effort to "rein in" Justice White's analysis, which had proceeded directly to a balancing test, while "bypass[ing] the presumption in favor of probable cause" that is normally required for searches that substantially intrude upon a person's privacy.¹²⁶ Second, when Justice Blackmun spoke of "special needs," he did not restrict that category to interests unrelated to law enforcement concerns. Before he wrote the lines that would become the "standard of review" employed in subsequent rulings by the Court, Justice Blackmun explained that a balancing test was proper only when the Court was confronting "a special *law enforcement* need for greater flexibility."¹²⁷ And he used other law

enforcement examples, such as frisking suspects for weapons and roving border patrol stops, to illustrate when a balancing test, rather than strictly applying the probable cause and warrant requirements, was appropriate for judging the legality of a search or seizure.

To date, the Court has decided eight special needs cases. All but two of the cases involved suspicionless drug testing plans. And the Court has found that all but two of the searches were constitutional.

search."¹²⁰ Under Justice White's balancing formula, probable cause and judicial warrants are not required when school officials conduct searches of students believed to be violating the criminal law or school rules.

Although Justice Blackmun agreed with the result reached by the majority and "with much that is said in its opinion,"¹²¹ he cautioned that the majority's reasoning had "omit[ted] a critical step in its analysis" when determining the legality of a school search. According to Justice Blackmun, Justice White's majority opinion was too quick to apply a balancing test. Blackmun believed that a balancing test was appropriate only *after* the Court had identified special or compelling law enforcement needs that justify dispensing with the normal requirements of probable cause and a judicial warrant.¹²² "Only in those exception circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."¹²³ Justice Blackmun believed that a balancing test was proper because "[t]he elementary and secondary school setting presents a special need for flexibility justifying a departure from the balance struck by the Framers."¹²⁴ According to Blackmun, maintaining discipline and safety in schools would not be possible if school officials had to show probable cause or await judicial authorization before searching a student.¹²⁵

Justice Blackmun's approach to resolving the Fourth Amendment question presented in *T.L.O.* was note-

Finally, Justice Blackmun's special needs formula was *not* an updated version of the administrative search doctrine. Almost twenty years prior to *T.L.O.*, the Court had re-examined and reformulated its views on administrative searches. In *Camara v. Municipal Court*,¹²⁸ the Court overruled *Frank v. Maryland*,¹²⁹ which had effectively eliminated Fourth Amendment scrutiny for fire, health and housing inspections. In holding that health inspections did implicate significant Fourth Amendment interests, *Camara* explained that administrative searches would satisfy constitutional concerns if officials relied upon "reasonable legislative or administrative standards for conducting an area inspection" and obtained administrative warrants that authorized the searches.¹³⁰

In his *T.L.O.* concurrence, Justice Blackmun did not utilize the framework established in *Camara* and its administrative search progeny. Indeed, Blackmun's "plea for showing some 'special needs' is a far cry from the four elements that justified departure from the Fourth Amendment framework in *Camara* – a neutral plan, a compelling need to search, an absence of workable alternatives to the dilution of probable cause, and a substantially diminished intrusion on privacy."¹³¹ Like Justice White's majority opinion, Blackmun's special needs model diminished Fourth Amendment safeguards. As Professor Schulhofer has observed, Justice Blackmun "was willing to embark on *de novo* balancing (and ultimately to uphold the search [in *T.L.O.*]) on the more slender basis of 'special needs' that render the probable cause requirement merely 'impracticable.'"¹³²

Finally, as the proceedings in *T.L.O.* illustrated, Justice Blackmun did not propose limiting access to the results of a special needs search to those officials responsible for initiating the search. Perhaps because Blackmun did not contemplate that a special needs search would be restricted to contexts unrelated to law enforcement concerns, he raised no objection when the fruits of the search in *T.L.O.* were turned over to the police and subsequently used in a juvenile proceeding brought by state officials.

B. Development of the Special Needs Doctrine

Although Justice Blackmun spoke only for himself in *T.L.O.*, a majority of the Court soon adopted his special needs formula as the controlling standard for measuring the constitutionality of suspicionless searches outside of traditional law enforcement contexts. To date, the Court has decided eight special needs cases. All but two of the cases involved suspicionless drug testing plans. And the Court has found that all but two of the searches were constitutional. When considered as a whole, however, the Court's special needs cases do not provide an overarching theory that clearly identifies which searches will satisfy the Court's constitutional scrutiny.

1) Searches by governmental employers

*O'Connor v. Ortega*¹³³ was the first case where a majority of the Court adopted Justice Blackmun's special needs formula to uphold a warrantless, suspicionless search. *Ortega* involved a governmental employer's search of an employee's private office for work-related reasons. Following the search, the employee sued the official in charge of the search and others, alleging that the search violated his Fourth Amendment rights.

Writing for a plurality of the Court, Justice O'Connor ruled that a public employer need not have probable cause or judicial authorization before conducting a work-related search of an employee's office. She explained that the "efficient and proper operation of the workplace" justified proceeding without traditional Fourth Amendment safeguards.¹³⁴ Thus, Justice O'Connor concluded that "'special needs, beyond the normal need for law enforcement make the...probable cause requirement impracticable' for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct."¹³⁵

Justice O'Connor's finding that a special need existed in *Ortega* turned mostly on the motivations behind the search. She explained that when governmental supervisors conduct searches for work-related employee misconduct, "they have an interest substantially different from 'the normal need for law enforcement.'"¹³⁶ Public employers are concerned with the efficient operation

of their agencies; they are not concerned with enforcing the criminal law.¹³⁷ She also stated that a probable cause requirement for searches directed at government employees would cause "tangible and often irreparable damage to [an] agency's work, and ultimately to the public interest,"¹³⁸ and that it was unrealistic to expect government supervisors to familiarize themselves with the niceties of probable cause, "at least when the search is not used to gather evidence of a criminal offense."¹³⁹ After determining that a special need justified bypassing the probable cause and warrant requirements, O'Connor announced that this category of searches of employees "should be judged by the standard of reasonableness under all the circumstances."¹⁴⁰

Interestingly, Justice Blackmun dissented in *Ortega* and argued, *inter alia*, that "there was no 'special need' to dispense with the warrant and probable cause requirements of the Fourth Amendment."¹⁴¹ Recalling his earlier opinions which were the progenitors of his special needs formula, Blackmun characterized the special needs formula as approximating the exigent circumstances exception for traditional police searches. He explained that "only when the *practical realities* of a particular situation suggest that a government official cannot obtain a warrant based upon probable cause without sacrificing the ultimate goals to which a search would contribute, does the Court turn to a 'balancing' test to formulate a standard of reasonableness for this context."¹⁴²

Keeping in mind this concern, Justice Blackmun argued that the facts in *Ortega* revealed no special need because there was no urgency to conduct a warrantless search of Dr. Ortega's office.

[T]his was an investigatory search undertaken to obtain evidence of charges of mismanagement at a time when Dr. Ortega was on administrative leave and not permitted to enter the Hospital's grounds. There was no special practical need that might have justified dispensing with the warrant and probable-cause requirements. Without sacrificing their ultimate goal of maintaining an effective institution devoted to training and healing, to which the disciplining of Hospital employees contributed, petitioners could have taken any evidence of Dr. Ortega's alleged improprieties to a magistrate in order to obtain a warrant.¹⁴³

None of the opinions in *Ortega* elaborated on the scope or limitations of the special needs exception. Perhaps none of the Justices felt compelled to announce criteria for distinguishing between searches that are "beyond the normal need for law enforcement" and traditional police searches because the facts in *Ortega* undoubt-

edly involved the former category. Moreover, unlike in *T.L.O.*, the fruits of the search in *Ortega* were not given to the police or used to prosecute the target of the search. But a second type of special needs intrusion, searching the homes of probationers, would force the Court to address the applicability of the special needs exception to a search that was more characteristic of a traditional police intrusion.

2) Searches of the homes of probationers

*Griffin v. Wisconsin*¹⁴⁴ was decided in the same Term as *Ortega*. But unlike *Ortega*, *Griffin* involved a search that resembled a traditional police search for evidence of criminal conduct. A probation officer received a tip from a police detective that there might be guns in the home of Griffin, who was on probation. Two probation officers, accompanied by three police officers, conducted a warrantless search of Griffin's home and discovered a handgun. After Griffin was convicted of the felony of possession of a firearm by a convicted felon, the Court ruled that the search of his home was constitutionally reasonable despite the absence of a warrant or probable cause for the search. The Court ruled the search was permissible because it was carried out pursuant to an administrative regulation that required "reasonable grounds" to believe that contraband was present in a probationer's home.

Speaking for the majority, Justice Scalia initially observed that a "probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'¹⁴⁵ Yet, Scalia also noted that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled, but only...conditional liberty properly dependent on observance of special [probation] restrictions.'¹⁴⁶ Justice Scalia explained that a state's operation of a probation system "presents a 'special need' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."¹⁴⁷ The limitations placed on a probationer's liberty helps to assure that probation serves "as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large."¹⁴⁸ Achieving these goals requires close supervision of probationers. Thus, supervision of probationers, including warrantless searches of their homes, is a special need "permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large."¹⁴⁹

In determining where to draw the line between criminal law enforcement and special needs, the reasoning and result in *Griffin* are important for at least three reasons. First, unlike Justice O'Connor's plurality opinion in *Ortega*, Justice Scalia did not discuss or explore the motives for the specific search in *Griffin*. Justice

Scalia's special needs analysis appeared to assume that the purpose for the search was to ensure rehabilitation and community safety. Second, unlike the search in *Ortega*, there was significant police involvement in the search of Griffin's home. This fact, however, had no impact on the Court's conclusion that the search was unrelated to traditional law enforcement interests. Finally, after finding that a special need justified the search, *Griffin* placed no limitation on who would have access to the fruits of the search. The handgun discovered by the search was used to prosecute Griffin for an independent criminal offense, and not used merely to revoke his probation. Thus, the result and reasoning of *Griffin* suggested that the boundaries of a permissible special needs search would not be narrowly drawn by the Court.¹⁵⁰

3) Drug testing

The third category of special need searches considered by the Court is urinalysis drug testing. Since 1989, the Court has decided six urinalysis drug testing cases, and has upheld four of the drug testing policies. Two of the cases involved federal policies; both of these plans were upheld by the Court. Two other policies targeting public school students were also validated by the Court. The remaining two policies involved drug testing of candidates for state-wide political offices, and a public hospital's plan, devised in close cooperation with law enforcement officials, to test pregnant women suspected of drug use. The Court found both of these policies unconstitutional. The results in these cases do not establish any general legal norm, other than the conclusion that the special needs exception "has precisely the effect of leaving the law-abiding citizen more vulnerable to invasions of privacy than the criminal suspect is."¹⁵¹ The following discussion will concentrate on aspects of these cases that are likely to affect the Court's thinking on whether taking an arrestee's DNA sample constitutes a special need unrelated to law enforcement.

a) *Skinner and Von Raab*

The Court's first encounter with urinalysis drug testing came in two companion cases, *Skinner v. Railway Labor Executives' Assoc.*,¹⁵² and *National Treasury Employees Union v. Von Raab*,¹⁵³ both written by Justice Kennedy. *Skinner* held that federal regulations requiring the administration of blood, breath and urine tests to railroad employees who violate safety rules, or were involved in railroad accidents, did not violate the Fourth Amendment. The challenged searches did not require judicial authorization, nor individualized suspicion that a worker had used narcotics or alcohol. Likewise, *Von Raab* upheld Custom Service regulations

mandating a urinalysis test from employees who seek transfer or promotion to positions directly involving drug interdiction or requiring the employee to carry a firearm. As in *Skinner*, the Custom Service's drug testing policy did not require any individualized suspicion that an employee had used drugs.

Skinner explained that the government's interest in regulating the conduct of railroad employees to ensure safety presents a special need beyond law enforcement that justified a departure from the traditional safeguards of judicial warrants and probable cause. The regulations targeted employees engaged in "safety-sensitive tasks."¹⁵⁴ Justice Kennedy noted that the government's interest to ensure the safety of the traveling public as well as the employees themselves justified restricting employees' use of controlled substances. Requiring probable cause before conducting a search of a covered employee is inconsistent with the government's need to supervise employees. "Railroad supervisors, like school officials, and hospital administrators, are not in the business of investigating violations of the criminal laws or enforcing administrative codes, and otherwise have little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence."¹⁵⁵ Finally, Justice Kennedy noted that the testing procedures mandated by the federal government were not designed "to assist in the prosecution of employees but rather 'to prevent accidents and casualties in railroad operations that result from impairment by alcohol or drugs.'"¹⁵⁶

Unlike *Ortega* and *Griffin*, *Skinner* did address, albeit obliquely, the crucial question of who would have access to any evidence revealed by a special needs search. In a footnote, Justice Kennedy observed that although the challenged regulation "might be read broadly to authorize the release of biological samples to law enforcement authorities, the record does not disclose that it was intended to be, or actually has been, so used."¹⁵⁷ He dismissed the challengers' concern that the testing process was a pretext to enable the gathering of evidence for prosecutorial purposes. "Absent a persuasive showing that the [federal] testing program is pretextual, we assess the [federal] scheme in light of its obvious administrative purpose."¹⁵⁸ Finally, Kennedy left open whether "routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the [federal] program."¹⁵⁹

Skinner's discussion of the "access" issue seems almost purposefully vague. After directly stating that testing for controlled substances was "not to assist in the prosecution of employees but rather 'to prevent accidents and casualties in railroad operations,'" Justice

Kennedy seemed to retreat from this statement because the challenged regulations did provide for third-party litigants to have access to test results.¹⁶⁰ Thus, as Justice Marshall's dissent pointed out, the "regulations not only do not forbid, but, in fact, appear to invite criminal prosecutors to obtain the blood and urine samples drawn by the [federal officials] and use them as basis of criminal investigations and trials."¹⁶¹ Moreover, Justice Kennedy's refusal to withhold approval of the policy unless law enforcement officials were denied access to test results "casts considerable doubt on the conceptual basis of [*Skinner*] – that the 'special need' of railway safety is one 'beyond the normal need for law enforcement.'"¹⁶²

Of course, one could argue that once the Court approved mandatory testing, the intrusion upon an employee's privacy is the same regardless of whether test results are made available to third-party litigants. Therefore, as Professor Schulhofer has noted, "[i]t would be perverse to hold that innocent employees can be subjected to these indignities while drug abusers caught by the test are shielded from prosecution."¹⁶³ But the fact that an employee's privacy interest is invaded by testing *ab initio* does not address the separate, and critical, question of whether a search that serves criminal *and* civil law purposes is consistent with the special needs formula.¹⁶⁴ The most that can be said about *Skinner* is that the Court was unwilling to address whether "routine use in criminal prosecutions" of test results would prevent application of the special needs exception. Although the Court could have sent a clear message on the scope of the special needs exception by approving the challenged regulations on the condition that test results be unavailable to law enforcement officials, apparently, a majority of the Court was not ready to take that step.

Justice Kennedy's special needs analysis in *Skinner* seemed to raise more questions than provide answers about where the Court was willing to draw the line between special needs and law enforcement. By contrast, his opinion in *Von Raab* was more straightforward on where the line between special needs and law enforcement was drawn. A mandatory urinalysis test for Custom Service employees who seek transfer or promotion to certain sensitive positions was a special need unrelated to law enforcement interests for two reasons: First, "[t]est results may not be used in a criminal prosecution of the employee without the employee's consent."¹⁶⁵ Second, the purpose of the policy was to deter illegal drug use among employees who might occupy sensitive positions in the Customs Service.

When the fruits of a search are unavailable to law enforcement officials, the civil function of the search is evident.¹⁶⁶ In contrast to the search in *Griffin*, the

searches in *Von Raab* would not be initiated by law enforcement officials,¹⁶⁷ did not involve significant police participation, nor would the results be given to prosecutorial officials. When the procedures leading up to and the fruits of a search are separated from the tentacles of law enforcement, a stronger case for the special needs exception is demonstrated.

At the same time, the second reason cited in *Von Raab* – the Custom Service’s interest in deterring drug use among its employees – also sends an important (and different) message about the scope of the special needs exception. Detering drug use among a select group of governmental employees, particularly where there has been no demonstrated history of drug use among such employees,¹⁶⁸ is a broad goal. Like the governmental interest in “fighting crime,” the aim of deterring drug use has an almost limitless reach and scope. If such a boundless governmental interest constitutes a special need that justifies intrusive searches without probable cause, then the special needs formula will validate many types of governmental intrusions so long as the government can identify rational, legitimate reasons for the search.

b) Urinalysis of public school students

The second set of urinalysis drug testing cases involved public school students. In *Vernonia Sch. Dist. 47J v. Acton*¹⁶⁹ and *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*,¹⁷⁰ the Court upheld policies that permitted mandatory and random urinalysis drug tests of students who participate in athletic and competitive extracurricular activities, respectively. In each case, the Court quickly and easily found that school officials had a special need to conduct drug testing. Repeating the reasoning outlined in *T.L.O., Acton* explained that the warrant and probable cause requirements would undermine school officials’ ability to maintain discipline and order in the schools.¹⁷¹ More recently, *Earls* observed that Fourth Amendment protection differs in the school context because officials have “custodial and tutelary responsibility for children.”¹⁷²

More importantly, the Court also emphasized that test results were not released to any law enforcement officials. Although this point was not included in the part of the opinions explaining why special needs exist in the school context, as in other special needs cases, this factor helps to define whether a challenged search serves civil or criminal law purposes. For example, while considering the character of the intrusion caused by the urinalysis, *Acton* noted that “the results of tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function.”¹⁷³ Similarly, *Earls* commented

that test results are not given to law enforcement officials, and the results do not “lead to the imposition of discipline or have any academic consequences.”¹⁷⁴

c) Chandler and Ferguson: Restricting the special needs exception?

The final two urinalysis cases do not fall into any of the categories described above. More importantly, in contrast to the cases already discussed, the Court invalidated the challenged drug testing policies because the searches did not satisfy the special needs formula. In *Chandler v. Miller*,¹⁷⁵ the Court struck down a Georgia law that required candidates for certain state offices to certify that they had taken a urinalysis drug test and that the test result was negative. Speaking for eight members of the Court, Justice Ginsburg held that this law “does not fit within the closely guarded category of constitutionally permissible suspicionless searches.”¹⁷⁶ In the second case, *Ferguson v. City of Charleston*,¹⁷⁷ the Court invalidated a public hospital’s policy that conducted urine tests of pregnant patients suspected of using drugs and turned the results over to law enforcement officials. Because the primary purpose of the hospital’s policy “was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy,”¹⁷⁸ *Ferguson* concluded that “this case simply does not fit within the closely guarded category of ‘special needs.’”¹⁷⁹ The reasoning in both *Chandler* and *Ferguson* is very likely to affect the Court’s thinking on whether taking and analyzing an arrestee’s DNA sample is a valid special needs search.

In *Chandler*, Justice Ginsburg’s framing of the issue was noteworthy. The question before the Court was not simply whether Georgia’s law served an interest unrelated to law enforcement – which it surely did. Rather, the “core” issue before the Court was whether “the certification requirement warranted a special need.”¹⁸⁰ In determining that issue, Justice Ginsburg explained that “the proffered special need for drug testing must be substantial – important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.”¹⁸¹

Georgia defended its law and the searches that it required as necessary to promote the integrity of public officials and to deter drug users from attaining state-wide political offices. Without questioning the validity of these goals, Justice Ginsburg explained that the state had failed to identify a “concrete danger demanding departure from the Fourth Amendment’s main rule.”¹⁸² In other words, there was no evidence that high-ranking state officials were abusing illegal

drugs. Proof of drug abuse among those targeted for searches “may help to clarify – and to substantiate – the precise hazards posed by such use.”¹⁸³ Justice Ginsburg also observed that the statute was not “well designed to identify candidates who violate antidrug laws.”¹⁸⁴ Ultimately, Justice Ginsburg concluded that the state interest (or need) “is symbolic, not ‘special,’ as that term draws meaning from our case law.”¹⁸⁵

In *Ferguson*, the design and operation of the drug testing policy was unlike any other policy addressed by the Court. Justice Stevens explained that the intrusion posed by the searches was considerably more substantial than in previous cases. In the earlier drug testing cases “there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties.”¹⁸⁶ In contrast, the searches in *Ferguson* were intentionally designed to obtain incriminating evidence that would be turned over to police and prosecutorial officials.

More importantly, the interest served by the searches in *Ferguson* was directly related to law enforcement. In previous cases, “the ‘special need’ that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State’s interest in law enforcement.”¹⁸⁷ In *Ferguson*, however, “the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment.”¹⁸⁸ Justice Stevens noted that “[w]hile the ultimate goal of the policy may well have been to get [patients] into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal.”¹⁸⁹

A few aspects of *Chandler* and *Ferguson* should be highlighted. First, *Chandler* appears to have “raised the bar” on the threshold requirement for a special needs search. It is clear from Justice Ginsburg’s opinion that a proper state interest unrelated to law enforcement is not enough to trigger the special needs formula. Although reasonable minds might differ over the weightiness of Georgia’s interest in “set[ting] a good example” that its politicians did not use drugs,¹⁹⁰ there is no dispute that this interest is a legitimate goal, and one that is unrelated to law enforcement.¹⁹¹ In future cases, the state may have to show that its “special need” is particularly important and outweighs the privacy interests of individuals who are targeted for searches in order to trigger the balancing test that follows a finding that a special need exists.

Next, whatever one thinks about the doctrinal foundation of *Ferguson*’s distinction between a search’s “ultimate goal” and its “immediate objective,”¹⁹² it is very clear why the searches in *Ferguson* were unconstitutional. The purpose served by the searches “is ultimately indistinguishable from the general interest in crime control.”¹⁹³ Putting aside the search in *Griffin*, none of the prior special needs searches involved the “collection of evidence for criminal law purposes” with an “extensive entanglement of law enforcement” personnel.¹⁹⁴ When confronted with the argument that *Griffin* demonstrated that the special needs exception “was developed, and is ordinarily employed, precisely to enable searches by law enforcement officials who, of course, ordinarily have a law enforcement objective,” the *Ferguson* Court replied that the impact of *Griffin*’s logic was confined to cases involving search targets possessing a diminished expectation of privacy.¹⁹⁵

It is very clear why the searches in *Ferguson* were unconstitutional. The purpose served by the searches “is ultimately indistinguishable from the general interest in crime control.”

Finally, *Ferguson* sent a somewhat mixed-message on how the Court would react to a “multi-purpose” special needs search. On the one hand, *Ferguson* reveals that government officials will not be able to use the special needs exception as a loophole to implement suspicionless searches for law enforcement purposes. And it will not matter in future cases if state officials can articulate a broad, civil law objective that is simultaneously advanced by the search. “Because law enforcement involvement always serves some broader social purpose or objective,” *Ferguson* explained, “virtually any non-consensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose.”¹⁹⁶ That approach will not work.

On the other hand, because the result in *Ferguson* turned on the Court’s conclusion that the primary and immediate goal of the searches was to generate evidence for law enforcement purposes, the Court left open the possibility that a search that is primarily motivated for civil or administrative purposes, but also serves criminal law purposes, might slip through the special needs loophole. That possibility was made more probable by *Ferguson*’s distinguishing of *New York v. Burger*.¹⁹⁷ Ironically, the search upheld in *Burger* was more characteristic of a police search than the searches invalidated in *Ferguson*.

Burger involved a warrantless, suspicionless search of an automobile junkyard by police officers pursuant to an administrative statute. “Although the statute helped assure that [vehicle] dismantlers are legitimate business persons and helped trace stolen vehicle parts, [searches] were carried out solely by police and their main focus was on catching the receiver of stolen property.”¹⁹⁸ The fruits of the search were used to prosecute *Burger* for felony and misdemeanor offenses.

The *Burger* Court ruled that the search was constitutional under its administrative search precedents. In reaching this result, the *Burger* Court also concluded that an otherwise proper administrative search is not illegal “because the ultimate purpose of the regulatory statute pursuant to which the search is done – the deterrence of criminal behavior – is the same as that of penal laws, with the result that the [search] may disclose violations not only of the regulatory statute but also of the penal statutes.”¹⁹⁹ On this latter point, *Burger* concluded that the “discovery of evidence of crimes in the course of an otherwise proper administrative [search] does not render that search illegal or the administrative scheme suspect.”²⁰⁰

Ferguson distinguished *Burger* on two grounds. First, Justice Stevens explained that *Burger* involved “an industry in which the expectation of privacy in commercial premises was ‘particularly attenuated’ given the extent to which the industry in question was closely regulated industry.”²⁰¹ Second, and “[m]ore important” for special needs analysis, *Burger* relied on the “plain administrative purposes” of the statutory framework to reject the claim that the challenged search was a pretext to obtain evidence for law enforcement purposes.²⁰² Thus, according to Justice Stevens, the fruits of the search in *Burger* were “merely incidental to the purposes of the administrative search.”²⁰³ By contrast, the searches in *Ferguson* were “specifically designed to gather evidence of violations of penal laws.”²⁰⁴

The tension between *Ferguson* and *Burger* is obvious: As Professors Stephen Saltzburg and Dan Capra have noted, “*Burger* seems to hold that criminal law objectives can be pursued through civil-based means under the ‘special needs’ doctrine,” whereas “*Ferguson* seems to hold that civil law objectives cannot be pursued through criminal-based means under the ‘special needs’ doctrine.”²⁰⁵ Perhaps the tension is diminished because the *Ferguson* Court did not view *Burger* as a special needs case.²⁰⁶ But even if *Burger* is not formally

labeled a special needs case, the result and reasoning of *Burger* provide a precedent for state officials who may claim that obtaining DNA samples of arrestees serves both “administrative,” as well criminal law, functions. Thus, the conflict between the holdings in *Burger* and *Ferguson* is likely to trouble the Court should it decide whether obtaining the DNA samples of arrestees is constitutional.

Burger’s ruling that an administrative search can serve the same ultimate purpose of the criminal law, and that the fruits of that search can be used to prosecute the target of the administrative search, takes on greater significance due to a footnote contained in *Indianapolis v. Edmond*.²⁰⁷ In *Edmond*, the Court considered the validity of highway roadblocks “whose primary purpose is the discovery and interdiction of illegal narcotics.”²⁰⁸ The Court held that roadblocks violate the Fourth Amendment when their primary purpose is to discover evidence of ordinary criminal conduct. Writing for the majority, Justice O’Connor ex-

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plained that previously approved checkpoints were designed to serve governmental purposes closely related to the problems of policing the international border or the necessity of ensuring roadway safety. By contrast, the primary purpose of the Indianapolis checkpoint, as conceded by the City, was to uncover evidence of ordinary criminal behavior.²⁰⁹

When confronted with the argument that her reasoning made the constitutional validity of the roadblock turn on police motivations, which are ordinarily irrelevant to Fourth Amendment cases, Justice O’Connor did not deny the charge. She stated that “programmatic purposes may be relevant to the validity of [police] intrusions undertaken pursuant to a general scheme without individualized suspicion.”²¹⁰ Justice O’Connor explained, however, that an unconstitutional roadblock could not be transformed into a permissible roadblock by the convenient claim that the checkpoint served the secondary purpose of keeping drunk drivers off the roads or verifying licenses and registrations

of motorists. If that argument were valid, police could “establish checkpoints for virtually any purpose so long as they also included a license or sobriety check.”²¹¹ Justice O’Connor then dropped an intriguing footnote where she explained that the Court was not addressing whether police may establish a roadblock with the “primary purpose of checking licenses or driver sobriety and a secondary purpose of interdicting drugs.”²¹²

The hypothetical roadblock envisioned in *Edmond’s* footnote mirrors the search upheld in *Burger*. Both intrusions have the primary purpose of promoting administrative or “Fourth Amendment-legitimate” governmental interests, and a secondary purpose or incidental benefit of detecting criminal evidence. The fact that the multi-purpose roadblock may reveal or uncover criminal evidence does not undermine its constitutional validity. An “administrative [or “Fourth Amendment-legitimate”] scheme is [not] unconstitutional simply because, in the course of enforcing it, [a police] officer may discover evidence of crimes, besides violations of the scheme itself.”²¹³ Under the rule of *Burger*, “[t]he discovery of evidence of crimes in the course of an otherwise proper administrative [search or seizure] does not render that search illegal or the administrative scheme suspect.”²¹⁴

In his analysis of *Edmond*, Professor Wayne LaFave has cautioned that “an illegal multi-purpose checkpoint cannot be made legal by the simple device of assigning ‘the primary purpose’ to one objective instead of the other, especially since that change is unlikely to be reflected in any significant change in the magnitude of the intrusion suffered by the checkpoint detainee.”²¹⁵ But the reasoning and result in *Burger* and the *Edmond* footnote may encourage state officials to do just that, i.e., characterizing suspicionless searches as having an administrative primary purpose, with the discovery of criminal evidence as being “merely incidental to the purposes of the administrative search.”²¹⁶ In any event, the Court’s special needs precedents provide little guidance on how the Court will react to a suspicionless search that state officials claim serve multiple purposes, or has a permissible primary purpose, but a secondary purpose related to criminal law enforcement.²¹⁷

IV. Is Taking DNA From Arrestees a Valid Special Needs Search?

Considered as a whole, the Court’s special needs cases do not neatly fit together as a coherent doctrine. As already noted, there are inconsistencies within the category of special needs cases, and conflicts exist between the special needs cases and other Fourth Amendment precedents decided by the Court. Nevertheless, some fundamental criteria can be derived from the special

needs cases to determine whether taking DNA samples from arrestees is constitutional. The criteria include: the purpose of the search; whether law enforcement officials will have access to the results of the search; the extent of police involvement in conducting the search; and finally, whether the search can be characterized as serving civil and criminal law interests. Keeping these criteria in mind, this section discusses the constitutionality of the Louisiana and Virginia laws that authorize the taking of DNA samples from certain arrestees.

A. Purpose for the Search

From the inception of the special needs exception, the purpose for a search has been the most important factor in deciding whether the search serves a legitimate special need unrelated to law enforcement, or instead “is ultimately indistinguishable from the general interest in crime control.”²¹⁸ The Louisiana and Virginia statutes are plainly designed to serve law enforcement interests. In the case of Louisiana, the state legislature has made its purpose crystal clear: “The Louisiana Legislature finds and declares that DNA data banks are important tools in *criminal investigations*, in the exclusion of individuals who are the subject of criminal investigations or prosecutions, and in deterring and detecting recidivist acts.”²¹⁹ The Louisiana legislature has also stated that “it is the policy of [Louisiana] to assist federal, state, and local criminal justice and law enforcement agencies in the identification and detection of individuals in criminal investigations.”²²⁰ Therefore, to implement this declared policy, the Louisiana legislature has decided that the “best interest” of the state is served by establishing “a DNA data base and a DNA data bank containing DNA samples submitted by individuals arrested, convicted, or presently incarcerated for felony sex offenses and other specified offenses.”²²¹

If this statement of the purpose behind Louisiana’s law is not sufficient, other evidence that the state intends to use DNA samples from arrestees for criminal law purposes can be gleaned from the statements of state legislators who sponsored the law. State Senator Dardenne, the sponsor of the 2003 bill that renewed police authority to obtain samples, explained that the benefit of expanding the state’s database to include arrestees was to identify perpetrators of criminal acts and to assist prosecutors in obtaining convictions of guilty persons.²²²

Similarly, Virginia’s statute equally serves the Commonwealth’s interest in assisting and solving criminal investigations. Virginia Attorney General Jerry W. Kilgore, the main proponent behind expanding the state’s database to include the DNA of arrestees, compared DNA samples to fingerprints and said that ob-

taining samples is a “public safety issue.”²²³ Further, General Kilgore remarked that “an enhanced database increases the chances of solving crimes,”²²⁴ and that including arrestees’ samples into the database “will help [the state] solve cases much quicker and ensure public safety by making sure somebody’s not released back into the general public who has committed a string of crimes.”²²⁵ More importantly, a spokeswoman for Virginia Delegate Ryan McDougle, who sponsored the bill, confirmed that the legislators’ primary intent was to help law enforcement through the testing, analysis and comparison of arrestee’s DNA to that of evidence from unsolved crimes.²²⁶

Because the purpose behind the Louisiana and Virginia laws is to use DNA samples from arrestees to assist law enforcement officials “in criminal investigations”²²⁷ and to enhance the states’ “chances of solving crimes,”²²⁸ such searches would not fit within the special needs exception. As far back as *Ortega*, the Court has approved suspicionless searches provided that the “search[es] [were] not used to gather evidence of a criminal offense.”²²⁹ Since then, the Court has been adamant that the special needs exception is not to be used to implement searches for law enforcement purposes. Most recently, in *Ferguson*, the Court invalidated a drug testing plan because “the purpose actually served by the [hospital’s] searches ‘is ultimately indistinguishable from the general interest in crime control.’”²³⁰

To be sure, at this point in the development of the Court’s special needs doctrine, no one factor has been controlling or outcome determinative in the Court’s analysis. But the result in *Ferguson* strongly suggests that the “purpose” factor is a “first among equals” in the calculus. If this interpretation is correct, the searches authorized by the Louisiana and Virginia law are unlikely to be upheld under the special needs analysis.²³¹

B. Law Enforcement Access to DNA Searches

Another important factor for determining whether a suspicionless search will be upheld under the special needs rule is whether the results of the search are available to law enforcement officials. In the Court’s early special needs cases, this was not a relevant concern. In his *T.L.O.* concurrence, Justice Blackmun raised no objection to the fact that the results of the school search in that case were turned over to police officials and later used to bring juvenile delinquency hearings against the student. Likewise, no member of the *Griffin* Court objected when the results of the probation search were used to prosecute the probationer for an independent offense. Finally, in *Skinner*, Justice Kennedy’s majority opinion was equivocal on this issue. On the one hand, *Skinner* noted that the plaintiffs had not seriously contended that the drug testing plan for rail-

road workers “was designed as ‘a pretext to enable law enforcement authorities to gather evidence of penal law violations.’”²³² On the other hand, there was no denying the fact that the administrative regulations in *Skinner* authorized prosecutors to obtain the results of the searches. Notwithstanding this “invitation” to prosecutors,²³³ *Skinner* upheld the searches and offered the mild caution that it was reserving “for another day” whether routine use, in criminal prosecutions, of search results would raise an inference that state officials were employing their special needs authority as a pretext to obtain evidence of criminal offenses.²³⁴

Since *Skinner*, the Court has been more adamant on the “access” issue, albeit most of the Court’s comments have come in dicta. In approving the drug testing plans in *Von Raab*, *Acton*, and *Earls*, the Court emphasized that test results would not be turned over to law enforcement officials. The statements in *Von Raab*, *Acton*, and *Earls* on the “access” issue were dicta, and were not especially important to the outcome in the latter two cases. In *Ferguson*, however, the “access” issue was directly addressed. The searches in *Ferguson* were substantively different from other special needs searches because the results were disclosed to law enforcement officials without the knowledge or consent of the patients.²³⁵ This fact was extremely important. “The fact that positive test results were turned over to the police does not merely provide a basis for distinguishing” prior cases,²³⁶ Justice Stevens emphasized that it “also provides an affirmative reason for enforcing the strictures of the Fourth Amendment.”²³⁷

When one considers this legal backdrop and the fact that both Louisiana and Virginia make the test results of DNA samples “available directly to federal, state and local law-enforcement officers upon request made in furtherance of an official investigation of any criminal offense,”²³⁸ the Court will have to perform some creative legal analysis to conclude that taking DNA samples from arrestees constitutes a valid special needs search. Indeed, common sense suggests that the primary reason for expanding state databases to include the DNA of arrestees is to help investigate and solve crimes. It would make no sense to obtain the DNA of arrestees if the analysis of samples were unavailable to police officials and prosecutors.²³⁹ “The legislative interest in DNA data bases has not been primarily to supplement or supplant fingerprints as markers of true identity; it has always been to generate investigative leads.”²⁴⁰

C. Involvement of Police in Conducting a Search

Another factor the Court is likely to weigh in its special needs calculus is the involvement of the police in conducting the search. In *Griffin*, an early special

needs precedent, there was substantial police involvement in the initiation and execution of the search, but that fact had no impact on the result.²⁴¹ By contrast, in *Ferguson*, law enforcement and prosecutorial officials were involved in designing, implementing and achieving successful results in the search policy.²⁴² As Justice Stevens' majority opinion put it, when there is "extensive entanglement of law enforcement" with a search policy, that policy "cannot be justified by reference to legitimate needs."²⁴³

It is obvious that there has been significant law enforcement involvement in the design of Louisiana and Virginia's statutes, and there will be substantial law enforcement participation in the implementation of the searches that these statutes authorize. In both states, law enforcement needs and the large number of unsolved crimes were essential factors in the push to formulate laws permitting DNA sampling and analysis of certain categories of arrestees. Louisiana's law includes a provision where the state police "may recommend to the legislature that it enact legislation for the inclusion of additional offenses for which DNA samples shall be taken."²⁴⁴

More importantly, police officers will be intimately involved in executing the searches. Because an arrest, which is the consummate police act, triggers the state's authority to obtain DNA, police involvement is inherent in the acquisition of the DNA samples. Justice Kennedy's concerns about law enforcement involvement with the searches that were invalidated in *Ferguson* are just as relevant to the police involvement that will surround the taking of DNA from arrestees. "None of our special needs precedents has sanctioned the routine inclusion of law enforcement, both in the design of the policy and in using arrests, either threatened or real, to implement the system designed for the special needs objectives."²⁴⁵ Thus, if *Ferguson's*, rather than *Griffin's*, analysis is controlling, the fact that police officials are intimately involved in the implementation of DNA searches strongly suggests that such searches do not satisfy the special needs exception.

D. DNA Sampling as a "Multi-Purpose" Search

The searches in *Ferguson* did not satisfy the special needs formula because the Court determined that the primary and immediate purpose of the search was to obtain evidence for criminal law enforcement purposes. *Ferguson*, however, did not address whether the special needs exception would permit a search that is primarily motivated for civil or administrative purposes, but also has a secondary (or simultaneous) function or purpose of discovering evidence of criminal conduct. As noted above, *Burger* ruled that a valid administrative

search will not be declared unconstitutional simply because the search may disclose violations of both civil and criminal statutes.²⁴⁶ Although there is significant tension between *Ferguson* and *Burger*, for now at least, the Court has reconciled these cases by explaining that where the discovery of criminal evidence is "merely incidental to the purposes of the administrative search,"²⁴⁷ the administrative search will not be unconstitutional on its face.

Because the searches authorized by the Louisiana and Virginia statutes undoubtedly advance criminal investigative purposes, there should be no reason for the Court to consider the constitutionality of a "multi-purpose" special needs search. *Ferguson* is controlling and the searches authorized by the statutes should be declared unreasonable. That said, a majority the Court might be willing to broadly construe these statutes in a manner that permits the Court to assign other purposes to the laws. This type of "interpretative surgery" was performed in *Burger*. In *Burger*, the New York Court of Appeals concluded that a portion of the state's vehicle code, which authorized warrantless, suspicionless administrative searches of junkyard dealers, was *facially* unconstitutional.²⁴⁸ Although the searches were part of an administrative scheme directed at "closely regulated" entities, the state court ruled that the statute was unconstitutional because it "authorize[d] searches undertaken solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme."²⁴⁹ In support of this conclusion, the Court of Appeals noted that the State had "concede[d] in [its] brief that '[t]he immediate purpose of inspecting a vehicle dismantler's junkyard is to determine whether the dismantler's inventory includes stolen property."²⁵⁰

As discussed above, the Supreme Court reversed, and held that New York's law was a valid administrative search. In overturning the lower court's ruling, the *Burger* Court explained that the New York Court of Appeals had "failed to recognize that a State can address a major social problem both by way of an administrative scheme and through penal sanctions."²⁵¹ It also noted that an administrative search can serve the "immediate goals" of an administrative scheme, while also contributing to achieve "the same ultimate purposes that the penal laws were intended to achieve."²⁵² In sum, an administrative framework that authorizes warrantless searches "may have the same ultimate purpose as penal laws, even if its regulatory goals are narrower."²⁵³

Although *Burger* was an administrative search case, a majority of the current Court may be persuaded to borrow the interpretative blueprint employed in *Burger* to uphold Louisiana and Virginia's laws as permissible special needs searches. For example, the states might argue that obtaining and testing DNA samples of ar-

restees serves the civil or administrative function of providing a genuine or “true” identity of arrestees. In the convicted offender DNA cases, a few lower courts have ruled that the state’s interest in identifying the persons it arrests, prosecutes and convicts overrides the diminished privacy interests of individuals in state custody.²⁵⁴ The argument would continue that just as police officials are permitted to automatically take “mug shots” and fingerprints from arrestees for identification purposes, they should be free to take DNA samples from arrestees without any requirement of individualized suspicion.

Some writers and scholars have recognized that the expansion of DNA testing to arrestees will serve the vital administrative purpose of discerning the true identities of individuals subject to arrest. Thus, Virginia or Louisiana might contend that taking DNA samples from arrestees is, as Professor Kaye has observed, “a kind of inventory search, providing an unequivocal record of just who has been arrested, that is considered appropriate when the state takes an individual into custody.”²⁵⁵ But in another, subsequent article, Professor Kaye states that, in light of *Edmond* and *Ferguson*, it is “extremely implausible”²⁵⁶ that DNA sampling of arrestees could be justified under the theory that the primary purpose of the search is to ascertain an arrestee’s true identity. In that second article, Professor Kaye rightly notes that “[t]he legislative interest in DNA data bases has not been primarily to supplement or supplant fingerprints as markers of true identity; it has always been to generate investigative leads.”²⁵⁷ It is duplicitous to insist that the forcible collection of a blood or saliva sample from an arrestee is for “identification” purposes. As Judge Reinhardt has noted with respect to the mandatory collection of blood samples from federal offenders, “[t]he collection of a DNA sample...does not ‘identify’ a conditional releasee any more than a search of his home does – it merely collects more and more information about that releasee that can be used to investigate unsolved past or future crimes.”²⁵⁸

In sum, even if the Court is willing to perform “interpretative surgery” on the Virginia or Louisiana statutes when determining the purpose of these laws, it will be difficult to conclude that the laws advance a primary purpose that is unrelated to ordinary law enforcement interests. Both of these laws promote interests that are “ultimately indistinguishable from the general interest in crime control.”²⁵⁹ While the searches authorized by these statutes certainly may advance the states’ secondary or ultimate interest in determining the identification of persons held in custody or charged with a crime, the above discussion demonstrates that “the immediate objective of the searches [is] to generate evidence

for law enforcement purposes in order to reach that goal.”²⁶⁰

Therefore, under the Court’s current precedents, forcibly obtaining and testing DNA samples of arrestees, absent judicial authorization or probable cause for the search, cannot be justified under the special needs exception.

V. Conclusion

This article has discussed the constitutionality of Virginia and Louisiana’s laws, which authorize DNA sampling of certain categories of arrestees. Under the existing Fourth Amendment doctrine of the Supreme Court, there is little doubt that the intrusions permitted by these statutes constitute searches. And under the Court’s special needs cases, a very strong argument can be made, based on the well-known purposes of these searches, that these procedures cannot be upheld as special needs searches unrelated to law enforcement interests. Thus, if the Court were to address the constitutional validity of either or both of these statutes, an objective analysis of the statute themselves, when combined with an objective reading of the Court’s precedents, indicates that the statutes should be declared unconstitutional.²⁶¹

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98. *Id.* at 606.

99. *Id.* at 616-17. *Skinner* also concluded that the blood tests mandated by the regulations constituted searches. Furthermore, *Skinner* plainly stated that the “ensuing chemical analysis of [a blood] sample to obtain physiological data is a *further* invasion of the tested employee’s privacy interests.” *Id.* at 616. See also Krent, *supra* note 83, at 69 (explaining why “subsequent governmental use of information may intrude upon privacy far more than the initial seizure itself, just as the chemical analysis of blood and urine samples may constitute a greater intrusion into privacy than the collection of the sample”) (footnote omitted); Scherer, *supra* note 83, at 2026 (“[I]t is not the taking of [a DNA sample] that is the most objectionable search. Rather, it is the analysis that poses a grave threat to the privacy interests of millions of Americans.”) Despite *Skinner*’s plain language, Professor Kaye insists that *Skinner* did not decide whether “laboratory analysis of a legitimately acquired sample is a ‘second search’ and lower courts have concluded that it is not.” Kaye, “Two Fallacies,” *supra* note 83, at 202, n.96 (citations omitted).
100. *Skinner*, 489 U.S. at 617. See also *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 678-79 (1989) (holding that “[w]here the Government requires its employees to produce urine samples to be analyzed for evidence of illegal drug use, the collection and subsequent chemical analysis of such samples are searches that must meet the reasonableness requirement of the Fourth Amendment.”) See also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) (affirming that “state-compelled collection and testing of urine, such as that required by [school officials] constitutes a ‘search’ subject to the demands of the Fourth Amendment.”) See also *Bd. of Educ. of Indep. Sch. Dist. of Pottawatomie County v. Earls*, 536 U.S. 822, 828 (2002) (holding that “[s]earches by public school officials, such as the collection of urine samples for drug testing, implicate Fourth Amendment interests.”)
101. *Skinner*, 489 U.S. at 617.
102. *Id.*
103. See Kaye, “DNA Sampling on Arrest,” *supra* note 83, at 482 (“Arguably, *Skinner* is distinguishable in that urinalysis involves both the possible revelation of private information *and* interference with what might be called, for want of a better phrase, ‘excretory privacy.’”); cf. Imwinkelried and Kaye, *supra* note 83, at 439 (collecting DNA is distinguishable from urinalysis because the latter “involves a much more extensive intrusion into privacy: the possible revelation of private information, compelled excretion of bodily fluid, and monitoring the normally private act of excretion”) (footnote omitted).
104. See *Kincade*, 379 F.3d at 821, n.15 (relying on *Schmerber* and *Skinner* in concluding that the “compulsory extraction of blood for DNA profiling unquestionably implicates the right to personal security embodied in the Fourth Amendment, and thus constitutes a ‘search’ within the meaning of the Constitution.”) See also Carnahan, *supra* note 83, at 7-8 (explaining that the involuntary taking of blood and the use of buccal swabs to collect skin cells from the lining of the cheek are searches).
105. See e.g., Scherer, *supra* note 83, at 2021. The author notes that the information obtained from DNA is much more extensive than the information obtained from the drug and alcohol tests in *Skinner* and its progeny. First, unlike drug or alcohol tests which measure the concentration of a substance at a particular point in time, “DNA analysis maps immutable, lifelong characteristics of an individual. Indeed, immutability is what makes DNA such an ideal identifier.” *Id.* Moreover, while the tests done in *Skinner* “garnered information solely about the government employee, the information revealed in a DNA analysis is not unique only to that donor. Information from a donor’s genome also reveals the private concerns of the donor’s parents, children, and siblings.” *Id.* (footnote omitted).
106. Kaye, “Two Fallacies,” *supra* note 83, at 187.
107. *Id.* at 192.
108. Kaye, “DNA Sampling on Arrest,” *supra* note 83, at 505.
109. Cf. *id.* at 482 (“As currently practiced, ... DNA sampling should be considered a search within the meaning of the Fourth Amendment.”)
110. See e.g., *Skinner*, 489 U.S. at 619 (“Except in certain well-defined circumstances, a search or seizure is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause.”)
111. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) [Blackmun, J., concurring in judgment]).
112. See e.g., W. J. Stuntz, “Implicit Bargains, Government Power, and the Fourth Amendment,” *Stanford Law Review* 44 (1992): 553- 591, at 554; cf. G. M. Dery, III, “Are Politicians More Deserving of Privacy than Schoolchildren? How *Chandler v. Miller* Exposed the Absurdities of Fourth Amendment ‘Special Needs’ Balancing,” *Arizona Law Review* 40 (1998): 73-103, at 74 (commenting that under the special needs cases, the “Court assigns values to the parties’ various needs without any standard weights or measurements. The resulting subjectivity has created absurd inconsistencies [between the cases].”) See also, Gerald S. Reamey, “When ‘Special Needs’ Meet Probable Cause: Denying the Devil Benefit of Law,” *Hastings Constitutional Law Quarterly* 19 (1992): 295-341, at 299-300 (asserting that the Court’s special needs cases “are individually flawed for failing to adhere to their conceptual antecedents, and are collectively flawed by requiring that the Supreme Court interpret the [fourth] amendment in an ad-hoc and unprincipled fashion”). Cf. Kaye, “DNA Sampling on Arrest,” *supra* note 83, at 489 (describing the special needs cases as a “relatively recent and somewhat amorphous category of searches”).
113. See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67, 86-87 (Kennedy, J., concurring in judgment) (noting that the “majority views its distinction between the ultimate goal and immediate purpose of the [governmental search] as critical to its analysis. The distinction the Court makes, however, lacks foundation in our special needs cases.”)
114. See, e.g., S. A. Saltzburg and D. J. Capra, (7th ed.) *American Criminal Procedure: Cases and Commentary* (2004): at 412. Professors Saltzburg and Capra explain that in *Chandler v. Miller*, 520 U.S. 305 (1997), the Court second-guessed the effectiveness of a drug-testing policy aimed at candidates for political office, but note that “such second-guessing was missing in the Court’s previous cases, and in the subsequent case of [*Board of Ed. of Independent School Dist. No. 92 of Pottawatomie County, v. Earls*, 536 U.S. 822 (2002)]. Saltzburg and Capra also observe that it is “no surprise that drug-testing cases are all over the map after *Chandler*.” *Id.* (listing lower court rulings with differing results on the constitutionality of drug-testing of certain employees who perform work for governmental entities).
115. *Id.* at 431 (after discussing the many special needs cases, asking “[w]here is the line, then, between crime enforcement and special needs.”) Professor Kaye also notes that lower court judges “have disagreed as to the applicability of the ‘special needs’ exception to convicted-offender DNA databanking.” Kaye, “DNA Sampling on Arrest,” *supra* note 83, at 491 (listing cases) (footnote omitted); see also *Kincade*, 379 F.3d at 832 (plurality opinion) (upholding suspicionless searches of certain conditionally-released federal offenders mandated by the DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, 114 Stat. 2726 (2000), under a “totality of the circumstances” test, “[w]hile not precluding the possibility that the [searches] could satisfy a special needs analysis”); *id.* at 840 (Gould, J., concurring) (upholding DNA testing of federal offenders under special needs exception); *id.* at 856 (Reinhardt, J., dissenting) (arguing that “primary purpose in conducting searches pursuant to the DNA Act is to generate evidence capable of assisting ordinary law enforcement investigations,” which is “the paradigmatic search condemned by the special needs doctrine”).
116. 482 U.S. 691 (1987).
117. 531 U.S. 32 (2000).
118. See, e.g., Carnahan, *supra* note 83, at 15 (describing *Edmond* as a special needs case which “casts doubt on much, if not all, of the reasoning of the prior [lower court] DNA cases, placing some squarely in conflict”); Kaye, “DNA Sampling on Arrest,” *supra* note 83, at 490, n.152 & 154. See also, *Kincade*, 379 F.3d at 825

- (plurality opinion) (describing *Edmond* as a special needs case); *id.* at 853, n.9 (Reinhardt, J. dissenting) (describing *Edmond* and *Burger* as special needs cases).
119. 469 U.S. 325 (1985).
 120. *Id.* at 341.
 121. *Id.* at 351 (Blackmun, J., concurring in judgment).
 122. See *id.* at 351 (noting that the Court has “used such a balancing test, rather than strictly applying the Fourth Amendment’s Warrant and Probable-Cause Clause, only when we were confronted with ‘a special law enforcement need for greater flexibility.’”) (citation omitted).
 123. *Id.*
 124. *Id.* at 352.
 125. *Id.* at 353 (“The special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirement, and in applying a standard determined by balancing the relevant interests.”)
 126. S. J. Schulhofer, “On the Fourth Amendment Rights of the Law-Abiding Public,” *Supreme Court Review* (1989): 87- 163, at 100.
 127. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment) (emphasis added).
 128. 387 U.S. 523 (1967).
 129. 359 U.S. 360 (1959).
 130. *Id.* at 538. See also *See v. City of Seattle*, 387 U.S. 541 (1967) (applying principles announced in *Camara* to fire inspection of a commercial warehouse). For the classic explanation of *Camara*, see W. R. LaFave, “Administrative Searches and the Fourth Amendment,” *Supreme Court Review* (1967): 1-38.
 131. Schulhofer, *supra* note 126, at 100.
 132. *Id.* at 101.
 133. 480 U.S. 709 (1987).
 134. *Id.* at 723 (plurality opinion).
 135. *Id.* at 725 (quoting *T.L.O.*, 469 U.S. at 351 [Blackmun, J., concurring in judgment]).
 136. *Id.* at 724 (quoting *T.L.O.*, 469 U.S. at 351 [Blackmun, J., concurring in judgment]).
 137. *Id.* (“In contrast to law enforcement officials, therefore, public employers are not enforcers of the criminal law; instead, public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner.”)
 138. *Id.*
 139. *Id.*
 140. *Id.* at 725-26. Although Justice Scalia objected to certain aspects of Justice O’Connor’s plurality, he did agree with her decision to apply Justice Blackmun’s special needs formula. See *id.* at 732 (Scalia, J., concurring in the judgment) (“Such ‘special needs’ are present in the context of government employment....I would hold that government searches to retrieve work-related materials or to investigate violations of workplace rules – searches of the sort that are regarded as reasonable and normal in the private-employer context – do not violate the Fourth Amendment.”)
 141. *Id.* at 732 (Blackmun, J., dissenting).
 142. *Id.* at 741 (emphasis added).
 143. *Id.* at 742. While Justice Blackmun concluded that the facts presented no special need for dispensing with the warrant requirement, his comments implied that he might be willing to find that certain public employer searches of employees are consistent with the special needs exception. See also, Schulhofer, *supra* note 126, at 101-102 (noting that Justice Blackmun “agreed that some employer searches could be valid under a diluted standard, but found no ‘special need’ in *Ortega* itself.”)
 144. 483 U.S. 868 (1987).
 145. *Id.* at 873.
 146. *Id.* at 874.
 147. *Id.* at 873-74.
 148. *Id.* at 875.
 149. *Id.* Four Justices dissented in *Griffin*. Writing for the dissenters, Justice Blackmun argued that the “need for supervision in probation” presents a special need beyond the normal need for law enforcement. *Id.* at 881 (Blackmun, J., dissenting). Accordingly, Justice Blackmun argued that a special need justified a search of probationer’s home on a lesser level of suspicion than probable cause, namely, reasonable suspicion. But he would require that such a search be authorized by a judicial warrant as a means of “protecting a probationer’s privacy.” *Id.* at 882.
 150. Two aspects of *Griffin* indicated that a majority of the Court in 1987 would apply the special needs exception with consider leeway in favor of the state. First, although the Court ruled that the search of Griffin’s home was reasonable because, *inter alia*, it was done pursuant to an administrative regulation that required “reasonable grounds” for a search, the facts in *Griffin* provided, at best, a “feeble justification” for a search. *Griffin*, 483 U.S. at 887-90 (Blackmun, J., dissenting) (explaining that the facts did not justify a search even under a reasonable suspicion standard). Second, the clear presence of a law enforcement motive for the challenged search did not negate the applicability of the special needs exception. As Justice Scalia would subsequently acknowledge years later, “the special-needs doctrine was developed, and is ordinarily employed, precisely to enable searches *by law enforcement officials* who, of course, ordinarily have a law enforcement objective” for their searches. *Ferguson* 532 U.S. at 100 (Scalia, J., dissenting). A majority of the current Court, however, has not embraced Justice Scalia’s position. See *infra* notes 186-204 and accompanying text.
 151. Schulhofer, *supra* note 126, at 115.
 152. 489 U.S. 602 (1989).
 153. 489 U.S. 656 (1989).
 154. *Skinner*, 489 U.S. at 620.
 155. *Id.* at 623 (citations omitted).
 156. *Id.* at 620-21 (quoting 49 CFR § 219.1(a) (1987) [footnote omitted]).
 157. *Id.* at 621, n.5.
 158. *Id.*
 159. *Id.* (citations omitted).
 160. *Id.* at 621, n.5. (“each sample provided under [the regulations]... may be available to...a party in litigation upon service of appropriate compulsory process on the custodian”), quoting 49 C.F.R. § 219.211(d) (1987). The revised version of 49 C.F.R. § 219.211(d) omits any reference to making test results available to third parties in litigation.
 161. *Id.* at 650 (Marshall, J., dissenting).
 162. *Id.* at 651-52.
 163. Schulhofer, *supra* note 126, at 138.
 164. Professor Schulhofer does recognize that “[r]outine law enforcement involvement [and access to test results], together with slender or half-hearted regulatory and remedial goals, would indicate that the administrative features of the program were merely pretextual. If so, the program would not involve ‘special needs, beyond the normal need for law enforcement,’ and the probable cause requirement would have to apply.” *Id.*
 165. *Von Raab*, 489 U.S. at 666.
 166. See Schulhofer, *supra* note 126, at 140 (“In one sense, *Von Raab* presents a stronger case for administrative treatment [than *Skinner*] because law enforcement use of test results was prohibited. *Von Raab* appears to involve a purely employment-related program.”)
 167. See *Von Raab*, 489 U.S. at 667 (under the policy, “every employee who seeks a transfer to a covered position knows that he must take a drug test, and is likewise aware of the procedures the Service must follow in administering the test. A covered employee is simply not subject ‘to the discretion of the official in the field.’ The process becomes automatic when the employee elects to apply for, and thereafter pursue, a covered position.”)
 168. See *id.* at 674.
 169. 515 U.S. 646 (1995).
 170. 536 U.S. 822 (2002).
 171. See *Acton*, 515 U.S. at 653.
 172. 536 U.S. at 830 (quoting *Acton*, 515 U.S. at 656).

173. 515 U.S. at 658 (footnote omitted).
174. 536 U.S. at 833.
175. 520 U.S. 305 (1997).
176. *Id.* at 309. Only Chief Justice Rehnquist dissented from the majority opinion.
177. 532 U.S. 67 (2001).
178. *Id.* at 84.
179. *Id.* (footnote omitted).
180. *Chandler*, 520 U.S. at 318 (emphasis added).
181. *Id.*
182. *Id.* at 319.
183. *Id.*
184. *Id.*
185. *Id.* at 322. Interestingly, in dicta, Justice Ginsburg noted that “where the risk to *public safety* is substantial and real, blanket suspicionless searches calibrated to the risk may rank as ‘reasonable’ – for example, searches now routine at airports and at entrances to courts and other official buildings.” *Id.* at 323 (citations omitted) (emphasis added).
186. *Ferguson*, 532 U.S. at 78. The previous cases Justice Stevens had in mind were *Chandler*, *Acton*, *Skinner*, and *Von Raab*. See *id.*, at 78, n.12 (citing cases).
187. *Id.* at 79.
188. *Id.* at 80.
189. *Id.* at 82-83 (footnotes omitted).
190. *Chandler*, 520 U.S. at 322.
191. Justice Ginsburg’s opinion on this point marks a change in the law. As Chief Justice Rehnquist noted in his dissent, prior special needs cases had not required the state to establish that its interest was especially important. “Under [previous] precedents, if there was a proper governmental purpose other than law enforcement, there was a ‘special need,’ and the Fourth Amendment then required the familiar balancing between that interest and the individual’s privacy interest.” *Id.* at 325 (Rehnquist, C.J., dissenting). Cf. *Ferguson*, 532 U.S. at 81 (“In *Chandler*,...we did not simply accept the State’s invocation of a ‘special need.’ Instead, we carried out a ‘close review’ of the scheme at issue before concluding that the need in question was not ‘special,’ as that term has been defined in our cases.”)
192. Justice Kennedy voted to invalidate the policy in *Ferguson*, but claimed that the majority’s distinction between “the ultimate goal and immediate purpose” of the government interests pursued, “lacks foundation” in the Court’s special needs cases. *Ferguson*, 532 U.S. at 86-87. According to Kennedy, all of the special needs cases “have turned upon what the majority terms the policy’s ultimate goal.” *Id.* at 87. Put simply, in deciding whether special needs exist in a particular setting, the Court has always focused on the ultimate goal in carrying out the search, “rather than its proximate purpose.” *Id.* As Kennedy noted, “although procuring evidence is the immediate result of a successful search, until [*Ferguson*] that procurement has not been identified as the special need which justifies the search.” *Id.* at 88.
193. *Id.* at 81 (quoting *Edmond*, 531 U.S. at 44).
194. *Id.* at 84, n.20. See also *id.* at 88 (Kennedy, J., concurring in judgment) (noting that earlier cases did not sanction “the routine inclusion of law enforcement, both in the design of the policy and in using arrests, either threatened or real, to implement the system designed for the special needs objectives.”)
195. See *id.* at 81, n.15 (stating that *Griffin* “is properly read as limited by the fact that probationers have a lesser expectation of privacy than the public at large.”)
196. *Id.* at 84.
197. 482 U.S. 691 (1987).
198. Schulhofer, *supra* note 126, at 103.
199. *Burger*, 482 U.S. at 693.
200. *Id.* at 716.
201. *Ferguson*, 532 U.S. at 84, n.21 (citation omitted).
202. *Id.* (citation omitted).
203. *Id.*
204. *Id.*
205. Saltzburg and Capra, *supra* note 114, at 419-20.
206. A good argument can be made that *Burger* was never intended to be a special needs case. While *Burger* makes a single reference to the special needs exception, see 482 U.S. at 702, (after describing the lesser privacy interests of vehicle dismantlers, “conclud[ing] that, as in other situations of ‘special need,’ a warrantless search may well be reasonable), the bulk and substance of the Court’s analysis is focused on administrative search precedents. Further, *Burger* never identifies a particular “special need” that justifies the suspicionless search authorized by the statute. Thus, although in a previous article I wrote that the *Burger* Court “invoked the special needs doctrine to uphold a New York law authorizing warrantless, suspicionless searches of automobile junkyards,” T. Maclin, “Constructing Fourth Amendment Principles From The Government Perspective: Whose Amendment Is It, Anyway?” *American Criminal Law Review* 25 (1988): 669-742, at 735, in retrospect, that description was probably mistaken. Although *Burger* certainly shares many similarities to the modern special needs cases, I now believe that *Burger* is properly categorized with the administrative search cases.
207. 531 U.S. 32 (2000).
208. *Id.* at 34.
209. *Id.* at 40. In another passage, Justice O’Connor noted the Court’s reluctance to “recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.” *Id.* at 43. Standing alone, *Edmond* appeared to establish a broad rule against roadblocks designed to serve the state’s “general interest in crime control.” Four years later, however, the Court demonstrated that the phrase “general crime control” would not be broadly construed. In *Illinois v. Lidster*, 124 S. Ct. 885 (2004), the Court upheld a roadblock where police stopped cars to ask motorists for information about a crime that occurred at the same location one week earlier. *Lidster* was seized at the roadblock, arrested for driving under the influence of alcohol, and subsequently prosecuted. The *Lidster* Court distinguished this roadblock from the illegal roadblock in *Edmond* because the primary purpose “was *not* to determine whether a vehicle’s occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend, not the vehicle’s occupants, but other individuals.” 124 S. Ct. at 889. *Lidster* demonstrates that *Edmond*’s use of the phrase “general interest in crime control” does not cover “every ‘law enforcement’ objective.” *Id.* (quoting *Edmond*, 531 U.S. at 44, n.1).
210. *Edmond*, 531 U.S. at 45-46.
211. *Id.* at 46.
212. *Id.* at 47, n.2; see also *id.* (“Specifically, we express no view on the question whether police may expand the scope of a license or sobriety checkpoint seizure in order to detect the presence of drugs in a stopped car.”)
213. *Burger*, 482 U.S. at 716.
214. *Id.* (citation and footnote omitted).
215. 4 W. R. LaFave, *Search and Seizure* § 9.7(b) at 709 (4th ed. 2004).
216. *Ferguson*, 532 U.S. at 84, n.21.
217. Kaye, “DNA Sampling on Arrest,” *supra* note 83, at 496 (noting that “neither *Edmond* nor *Ferguson* reaches the more vexing question of what evidence can be used to infer purpose when the government contends that its immediate purpose in instituting an investigative practice is something other than (or in addition to) pure crime control”) (footnote omitted). It is important to note that *Edmond*’s analysis will *not* be controlling in a special needs context. Although the Court’s roadblock cases are sometimes lumped together with the special needs cases, *Ferguson* clarified that the Court’s roadblock cases and special needs cases are separate doctrinal categories. *Ferguson*, 532 U.S. at 84, n.21.
218. *Ferguson*, 532 U.S. at 81 (quoting *Edmond*, 531 U.S. at 44).
219. La. R.S. 15 § 602 (2003) (emphasis added).

220. *Id.*
221. *Id.*
222. See *supra* note 81.
223. Timberg, *supra* note 46.
224. Sorokin, *supra* note 47.
225. Clines, *supra* note 48.
226. See *supra* note 50.
227. La. R.S. § 15:602 (2003).
228. Sorokin, *supra* note 47.
229. *Ortega*, 480 U.S. at 724 (plurality opinion). See also *Von Raab*, 489 U.S. at 679 (“Because the testing program adopted by the Customs Service is not designed to serve the ordinary needs of law enforcement...[w]e hold that the suspicionless testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm, is reasonable.”) See also, *Skinner*, 489 U.S. at 621 (in upholding urinalysis testing of covered railroad employees, the Court stated “[a]bsent a persuasive showing that the FRA’s testing program is [designed to gather criminal evidence], we assess the FRA’s scheme in light of its obvious administrative purpose.”)
230. *Ferguson*, 532 U.S. at 81 (quoting *Edmond*, 531 U.S. at 44).
231. Cf. Rothstein & Carnahan, *supra* note 83, at 154 (stating that “*Edmond* and *Ferguson* raise serious Fourth Amendment concerns with respect to the constitutionality of the data bank laws, and even greater concerns as to the constitutionality of state statutes that require DNA from certain classes of offenders upon arrest”) (footnote omitted). Finally, it should be noted that characterizing DNA searches of arrestees as a “public safety” goal should not justify application of the special needs exception. In many instances, the line between “public safety” and law enforcement is imperceptible. For example, in *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004), organizers of an annual protest at a military base challenged a police policy requiring all protesters to undergo metal detector searches. The city argued the searches were valid under the special needs exception because they keep protesters and others safe by detecting weapons and other contraband. The court rejected the city’s argument. Speaking for the court, Judge Tjoflat explained that “it is difficult to see how public safety could be seen as a governmental interest independent of law enforcement; the two are inextricably intertwined.” *Id.* at 1312-1313.
232. *Skinner*, 489 U.S. at 621, n.5 (quoting *Burger*, 482 U.S. at 716-17, n.27 (internal quotation marks omitted)).
233. See *id.* at 650 (Marshall, J., dissenting) (“Most strikingly, the agency’s regulations not only do not forbid, but, in fact, appear to invite criminal prosecutors to obtain the blood and urine samples drawn by the [agency] and use them as the basis of criminal investigations and trials.”) (citation omitted).
234. *Id.* at 621.
235. *Ferguson*, 532 U.S. at 71-72.
236. *Id.* at 84.
237. *Id.*
238. Va. Code Ann. § 19.2-310.5 (2002).
239. Cf. Kaye, “Two Fallacies,” *supra* note 83, at 191 (“there is plenty of empirical evidence that bigger data bases solve more crimes”) (footnote omitted).
240. *Id.* at 203.
241. Cf. 5 LaFave, *supra* note 215, § 10.3(b) at 115 (noting that the police involvement in *Griffin* was at the request of the probation officer to “provid[e] protection,” and thus was “unobjectionable,” and also observing that the Court “did not have occasion to speak to the limits of police involvement in probationer searches in *Griffin*, but surely there are limits, as is reflected by the existing body of law [from the lower courts] on that subject”) (footnotes omitted); *Burger*, 482 U.S. at 717 (explaining that there is no “constitutional significance in the fact that police officers, rather than ‘administrative’ agents, are permitted to conduct the [administrative search]”).
242. *Ferguson*, 532 U.S. at 88 (Kennedy, J., concurring in judgment) (explaining that “there was substantial law enforcement involvement in the [search] policy from its inception”).
243. *Id.* at 84, n.20.
244. La. R.S. § 15:607 (2003).
245. *Ferguson*, 532 U.S. at 88 (Kennedy, J., concurring in judgment).
246. In a similar vein, *Edmond* left open whether police can establish a roadblock with the “primary purpose of checking licenses or driver sobriety [a permissible purpose under the roadblock cases] and a secondary purpose of interdicting drugs [an impermissible purpose under the roadblock cases].” *Edmond*, 532 U.S. at 47, n.2.
247. *Ferguson*, 532 U.S. at 84, n.21.
248. *People v. Burger*, 493 N.E. 2d 926, 930 (N.Y. 1986), *rev’d*, *New York v. Burger*, 482 U.S. 691 (1987).
249. *Id.* at 929.
250. *Id.* at 930 (citation omitted).
251. *Burger*, 482 U.S. at 712.
252. *Id.*
253. *Id.*
254. *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992) (holding the Virginia DNA collection statute reasonable and rejecting convicted felons’ Fourth Amendment challenge); *Roe v. Marcotte*, 193 F.3d 72 (2d Cir., 1999) (upholding the constitutionality of a Connecticut statute authorizing the DNA testing of convicted sex offenders because the testing was minimally intrusive and advanced the important state interest of promoting safety by identifying convicted sex offenders).
255. Kaye, “DNA Sampling on Arrest,” *supra* note 83, at 487 (footnote omitted).
256. Kaye, “Two Fallacies,” *supra* note 83, at 203.
257. *Id.*
258. *Kincade*, 379 F.3d at 857, n.16 (Reinhardt, J., dissenting). The analogy to fingerprinting is flawed in another sense. “[U]nlike fingerprints, DNA stores and reveals massive amounts of personal, private data about that individual, and the advance of science promises to make stored DNA only more revealing in time. Like DNA, a fingerprint identifies a person, but unlike DNA, a fingerprint says nothing about the person’s health, their propensity for particular disease, their race and gender characteristics, and perhaps even their propensity for certain conduct.” *Id.* at 842 (Gould, J., concurring). See also Rothstein & Carnahan, *supra* note 83, at 156-57 (distinguishing DNA samples from fingerprinting).
259. *Ferguson*, 532 U.S. at 81 (quoting *Edmond*, 531 U.S. at 44).
260. *Id.* at 83 (footnote omitted).
261. Throughout this article, I have endeavored to provide an objective analysis of the Court’s Fourth Amendment doctrine. In light of that goal, the article reaches the conclusion that neither Virginia’s nor Louisiana’s DNA arrestee law satisfies the special needs formula. If, however, the Court were to actually hear a challenge to the taking and testing of an arrestee’s DNA, I doubt the Court will strike down the law on Fourth Amendment or any other constitutional grounds. Notwithstanding the result and reasoning of *Ferguson*, I predict a majority of the Court will be unwilling to invalidate such a statute. A majority of the Court will construct a “Good for This Day and Train Only” theory in order to uphold the search. *United States v. Knights*, 534 U.S. 112 (2001), is a recent example of this occasionally-used phenomenon on the Court. *Knights* upheld a warrantless search by police officers of a probationer’s home based upon a reasonable suspicion that criminal evidence would be discovered. *Knights* did not rely on *Griffin* or the special needs cases, because the search was clearly related to law enforcement purposes and conducted without the involvement or knowledge of probation officials. *Knights*’ holding rests upon what the Court cites as “our general Fourth Amendment approach of ‘examining the totality of the circumstances.’” *Id.* at 118 (citation omitted). Such a “totality” or “general reasonableness” model is a standardless formula that permits a majority of the Court to do what it pleases without having to justify its result or reasoning under traditional Fourth Amendment doctrine.