

# TAKING THE “BANKS” OUT OF *BANKS* *V. GONZALES*: DNA DATABANKS AND THE FOURTH AMENDMENT PROHIBITION ON UNREASONABLE SEARCHES AND SEIZURES

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#### INTRODUCTION

On February 27, 1998, Richard Myer Banks listened as the court sentenced him to serve thirty-five months in custody and five years on supervised release for pleading guilty to a mere single count of bank fraud.<sup>1</sup> Seven years later, while on supervised release, he received notice from the United States Probation Office for the Northern District of Oklahoma that a planned blood collection would take place on May 17, 2005, to retrieve, analyze, and store his DNA in a national database in accordance with the 2004 amendments to the DNA Analysis Backlog Elimination Act of 2000.<sup>2</sup>

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1. *See* Bank Fraud Act, 18 U.S.C.S. § 1344 (2006) (defining bank fraud as a scheme to defraud or obtain moneys under false or fraudulent pretenses from federally insured financial institutions); *see also* Mehul Madia, *The Bank Fraud Act: A Risk of Loss Requirement?*, 72 U. CHI. L. REV. 1445, 1445 (2005) (describing the circuit split as whether the government needs to prove the defendant possessed the criminal intent to victimize the institution by exposing it to a risk of civil liability or financial loss).

2. *See, e.g.*, *United States v. Kriesel*, 416 F. Supp. 2d 1037, 1041 (W.D. Wash. 2006) (upholding the compulsory DNA profiling of all felons, as required by 42 U.S.C.S. § 14135(a)(2), as reasonable under the Fourth Amendment because the blood sample was minimally intrusive, and finding prisoners on conditional release had diminished expectations of privacy that were outweighed by a legitimate governmental interest in deterrence).

Seeking relief from compulsory blood collection and DNA analysis four years after serving his time in prison and reentering society, Richard Banks filed suit in the Northern District of Oklahoma for an emergency injunction to forbid the collection.<sup>3</sup> Four other individuals convicted of similar offenses joined Banks in the suit, all of whom were serving terms of probation or were on supervised release.<sup>4</sup> The District Court for the Northern District of Oklahoma granted the government's motion to dismiss the plaintiffs' case because, in applying the special needs test set forth by the Supreme Court,<sup>5</sup> it found that a special need separate from general law enforcement existed and that the governmental interests outweighed the plaintiffs' privacy expectations.<sup>6</sup>

This Note argues that the 2004 amendments to the DNA Analysis Backlog Elimination Act, which extended compulsory DNA collection to nonviolent and nonsexual offenders, is a violation of the Fourth Amendment protections against unreasonable searches and seizures.<sup>7</sup> Part II investigates Fourth Amendment jurisprudence and how the courts have dealt with challenges to DNA databanking statutes, including the recent decision by the Northern District of Oklahoma upholding the federal statute in *Banks v. Gonzales*.<sup>8</sup> Part III.A argues that the district court misapplied the special needs test when it upheld the constitutionality of the federal statute in *Banks* because the purpose of the statute does not fall into any categorical exception to the Fourth Amendment warrant and probable cause requirements. Part III.B argues that even if the courts find that a special need does exist for the 2004 amendments, the intrusion on the privacy rights at stake outweighs any asserted governmental interests. Finally, Part III.C challenges the constitutionality of the 2004 amendments in light of the implications they may have on indexed persons' innocent family members through similarities in genetic makeup.

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3. *Banks v. Gonzales*, 415 F. Supp. 2d 1248, 1250 (N.D. Okla. 2006) (en banc).

4. *Id.* at 1251.

5. *See Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (reinforcing that a search unsupported by probable cause can be constitutional when special needs beyond the normal need for law enforcement make the warrant and probable cause requirement impracticable).

6. *Banks*, 415 F. Supp. 2d at 1267 (holding that the DNA Act serves a special need beyond law enforcement objectives, whether it is classified as building a DNA database or creating a DNA identification index to assist in solving crimes because at the time of collection the samples provide no evidence "in and of themselves of criminal wrong doing").

7. *See Weeks v. United States*, 232 U.S. 383, 390 (1914) (discussing the Framers' intention to protect the American people from intrusions into their homes and privacy similar to those protections allowed under general warrants in England for real or imaginary charges against them).

8. *Banks*, 415 F. Supp. 2d at 1248.

## BACKGROUND

I. THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA  
RECENTLY DENIED A FOURTH AMENDMENT CHALLENGE TO THE  
COMPULSORY COLLECTION OF SUPERVISED RELEASEES' AND  
PROBATIONERS' DNA

In the recent case of *Banks v. Gonzales*, the United States District Court for the Northern District of Oklahoma upheld the constitutionality of the DNA Analysis Backlog Elimination Act (“DABEA”) under the Fourth Amendment by rejecting a challenge by a group of persons serving terms of probation or supervised release.<sup>9</sup> The court analyzed the constitutionality of compulsory blood extraction for the federal DNA database from this group of persons under both the special needs test and the totality of the circumstances test announced by the Supreme Court in cases regarding searches lacking individualized suspicion.<sup>10</sup> Although a circuit split exists as to what test to apply to DNA indexing statutes, this Note focuses on the special needs test because it remains the predominant form of analysis after the Court’s decisions in *City of Indianapolis v. Edmond*<sup>11</sup> and *Ferguson v. City of Charleston*.<sup>12</sup>

II. THE DNA ANALYSIS BACKLOG ELIMINATION ACT, THE COMBINED  
DNA INDEX SYSTEM, AND THE 2004 AMENDMENTS TO THE ACT

On December 19, 2000, Congress passed the DABEA.<sup>13</sup> The fact that the majority of states, including New York, already maintained DNA databanks influenced Congress’s decision to pass the DABEA because the federal legislature saw the need for connecting all states together in a national database.<sup>14</sup> The DABEA originally required persons convicted of “qualifying federal offenses,” including the most serious crimes such as sexual assault and murder, to provide a DNA sample to be included in the Combined DNA Index System (“CODIS”), a national DNA database maintained by the Federal Bureau of Investigation.<sup>15</sup> In passing the U.S.A. Patriot Act, Congress amended the DABEA in 2001 extending the reach of compulsory DNA collection to additional crimes, such as any offense of

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9. *Id.* at 1248, 1268.

10. *Id.* at 1257-59.

11. 531 U.S. 32 (2000).

12. 532 U.S. 67 (2001).

13. H.R. REP. 106-900(I), at 1 (2000).

14. *See, e.g.*, N.Y. EXEC. LAW § 995 (McKinney 1999) (providing for mandated DNA extraction from sixty-five percent of all convicted felons, requiring that the DNA information be maintained in a database, and that information be released only in limited circumstances for law enforcement identification purposes).

15. 114 Stat. 2726 (2000).

federal terrorism, any crime of violence as defined in 18 U.S.C. § 16, or conspiracy to commit any of those crimes.<sup>16</sup> Congress amended the DABEA for a second time in 2004 to eliminate the two existing lists of qualifying offenses and provide a new list that extended the reach of DABEA to nonviolent and nonsexual offenders.<sup>17</sup>

### III. THE FOURTH AMENDMENT GENERALLY AND THE PRIVACY RIGHTS AT STAKE WHEN ANALYZING THE CONSTITUTIONALITY OF THE 2004 AMENDMENTS TO DABEA

The Fourth Amendment of the United States Constitution provides, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . .”<sup>18</sup> When evaluating whether or not a government official violated an individual’s Fourth Amendment rights, courts look to whether: (1) there was a legitimate expectation of privacy involved; (2) a search/seizure occurred; (3) there was probable cause for the search/seizure to take place; and (4) the situation fell under an exception to the Fourth Amendment warrant and probable cause requirements if there was no probable cause present.<sup>19</sup>

#### *A. The Supreme Court Announced What May Be Considered a Legitimate Expectation of Privacy Within the Fourth Amendment Context*

No right is more sacred, or more carefully guarded, than the right of every individual to maintain possession and control of his own person, free from restraint by others.<sup>20</sup> The Supreme Court holds steadfastly to the rule that the Fourth Amendment protects people, not places, and that what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.<sup>21</sup> The Court also

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16. H.R. REP. 107-609(I), at 1352-53 (2000).

17. See H.R. REP. 107-609(I) (extending the DABEA to include any felony, any aggravated sexual abuse offense covered under chapter 109A of Title 18, any crime of violence defined in section 16 of Title 18 as a crime involving substantial risk that the person will use physical force against another, and any attempt or conspiracy to commit any of the offenses therein); see also *Flowers v. Indiana*, 654 N.E.2d 1124, 1124 (Ind. 1995) (advancing the notion that nonindexed family members could become suspects to crimes by analyzing their convicted family member’s DNA in the database).

18. U.S. CONST. amend. IV.

19. See generally 1-2 CRIMINAL CONSTITUTIONAL LAW (MB) § 2.01 (2005) (discussing the requirements set forth in the Fourth Amendment by the Framers, who intended them to serve as a restraint upon the activities of government under general warrants).

20. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (citing *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)) (stating that the right of personal security “belongs as much to the citizen on the streets . . . as to the homeowner closeted in his study to dispose of his secret affairs”).

21. See, e.g., *Katz v. United States*, 389 U.S. 347, 351 (1967) (concluding that when a person enters a public phone booth and closes the door behind him his conversation is

established that wherever an individual may harbor a reasonable expectation of privacy, he is entitled to be free from unreasonable governmental intrusion.<sup>22</sup>

The Fourth Amendment reflects the Framers' recognition that certain enclaves should be free from arbitrary government interference.<sup>23</sup> The Supreme Court has recognized many categorical privacy expectations,<sup>24</sup> but the Court must decide others on a case-by-case basis by weighing different factors to assess the degree to which a search infringes upon individual privacy.<sup>25</sup> In some circumstances, the Court finds a lower expectation of privacy for certain groups of individuals, such as public schoolchildren in schools and prisoners in state prison facilities.<sup>26</sup>

*B. A Seizure Occurs Within the Meaning of the Fourth Amendment When There is Some Meaningful Interference by the Government in an Individual's Possessory Interest*

A seizure occurs when there is some meaningful interference with an individual's possessory interest in tangible property.<sup>27</sup> Courts find a violation of the Fourth Amendment whenever a police officer restrains an individual's freedom to walk away.<sup>28</sup> Thus, the Court concludes that a seizure occurs when an individual remains under the control of law enforcement officials because any reasonable individual in that position would not feel free to leave.<sup>29</sup>

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protected by the Fourth Amendment from the unwanted ears of those who might pass by).

22. *See id.* at 361 (Harlan, J., concurring).

23. *Compare* *Oliver v. United States*, 466 U.S. 170, 179 (1984) (holding that open fields and the area immediately surrounding the home are not protected by the Fourth Amendment), *with* *Payton v. New York*, 445 U.S. 573, 601 (1980) (Powell, J., concurring) (emphasizing the sanctity of the home and characterizing it as the backbone of the Fourth Amendment's prohibition of unreasonable searches).

24. *See, e.g.,* *Winston v. Lee*, 470 U.S. 753, 759 (1985) (asserting that a compelled surgical intrusion into an individual's body for evidence may be unreasonable, even if likely to produce evidence of a crime).

25. *See Payton*, 445 U.S. at 589-90 (recognizing that the bright line drawn around a person's home deserves the most scrupulous protection from government invasion based on its roots in clear and specific constitutional terms); *see also* *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977) (suggesting that the intention of the Framers to protect persons, not places, from generalized searches should be given more weight in analyzing Fourth Amendment challenges).

26. *See, e.g.,* *Bd. of Educ. v. Earls*, 536 U.S. 822, 830 (2002) (asserting that "a student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety" and analogizing it to requirements for children to submit to physical examinations and vaccinations).

27. *Soldal v. Cook County*, 506 U.S. 56, 61 (1992).

28. *Terry v. Ohio*, 392 U.S. 1, 20 n.16 (1968).

29. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (citing "examples of circumstances suggesting a seizure including, the threatening presence of several officers, the display of a weapon by an officer, physical touching of the person of the citizen, or the

*C. A Search Occurs Within the Meaning of the Fourth Amendment When the Government Infringes Upon an Individual's Reasonable Expectation of Privacy*

When state actors infringe upon an expectation of privacy that society is prepared to consider reasonable, a search occurs within the meaning of the Fourth Amendment.<sup>30</sup> For example, the Court found that the government's use of a surveillance device unavailable to the general public to explore details of the home hidden from plain view constituted a search.<sup>31</sup> Similarly, the Court found that compelled surgical intrusion into an individual's body implicated expectations of privacy, such that the intrusion may be unreasonable even if likely to produce evidence of a crime.<sup>32</sup>

*D. Probable Cause Must Exist To Support a Search and Seizure or It Must Fall Into One of the Exceptions to Fourth Amendment Requirements*

Probable cause to search a person or property exists where the facts and circumstances would justify a reasonable person concluding that he or she will uncover items connected with criminal activity.<sup>33</sup> A court will excuse failure to comply with the warrant requirement if exigent circumstances exist; the Supreme Court has delineated additional categories of exceptions to the probable cause and warrant requirements of the Fourth Amendment.<sup>34</sup>

*1. The Supreme Court Set Forth Categories That Are Exempt From the Fourth Amendment Probable Cause and Warrant Requirements*

The Supreme Court announced specific exceptions to probable cause and warrant requirements to eliminate inconvenient barriers to effective law enforcement.<sup>35</sup> The major categories of exceptions to the probable cause and warrant requirements of the Fourth Amendment are consent searches,

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use of language or tone of voice indicating that compliance with the officer's request might be compelled").

30. *See* United States v. Jacobsen, 466 U.S. 109, 115 (1984) (explaining that an initial invasion into Jacobsen's package by employees of a freight company did not violate the Fourth Amendment because of the private nature of the actions).

31. *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that the use of Thermovision imaging in the home in order to detect whether a suspect was growing marijuana was an unlawful search because of its ability to explore details of the home that would previously have been unknowable without physical intrusion).

32. *Winston v. Lee*, 470 U.S. 753, 759 (1985).

33. *See Ornelas v. United States*, 517 U.S. 690, 694 (1996).

34. *See generally* *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967) (holding warrantless searches incident to arrest or hot pursuit are justified exceptions to the warrant requirement).

35. *See Terry v. Ohio*, 392 U.S. 1, 26-27 (1968).

emergency searches to protect life, property, or evidence, automobile searches, searches in close proximity of the borders, searches conducted in accordance with the plain view doctrine, and administrative searches.<sup>36</sup> Searches conducted in accordance with the Court's "special needs" test are another group of exceptions and serve as the focus of this Note because they are the exceptions claimed by the government to justify suspicionless DNA collection.<sup>37</sup>

## *2. The Court's Special Needs Exception Covers Many Categories of Cases That Do Not Easily Fit Into Any Other Exception*

The Supreme Court recognizes a special needs exception to the warrant and probable cause requirements to eliminate the requirement of individualized suspicion in certain instances.<sup>38</sup> This special needs test first appeared in Justice Blackmun's concurring opinion in *New Jersey v. T.L.O.* and states that a court should only apply a careful balancing of governmental and private interests in those extraordinary circumstances where the warrant and probable cause requirements are unreasonable.<sup>39</sup>

In *Griffin v. Wisconsin*, the Court introduced the following two-part framework: (1) the court must decide whether a special need for the search and seizure exists that is completely separate from the general needs of law enforcement; and (2) if a special need separate from law enforcement does exist, the court must then balance the gravity of the intrusion on the individual's expectation of privacy against the weight of the legitimate

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36. See *Texas v. Brown*, 460 U.S. 730, 739 (1983) (articulating the "plain view doctrine as allowing police, when they observe a piece of evidence in plain view during a lawful search, to seize such evidence because the owner's remaining interests in the object are merely of possession and ownership"); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (upholding regulatory schemes allowing warrantless searches of pervasively regulated industries or businesses, such as liquor and firearm dealers or underground mines); *United States v. Brignoni-Ponce*, 422 U.S. 873, 877 (1975) (recognizing that the Immigration and Nationality Act gives federal officers authority to stop and interrogate any person reasonably believed to be an alien without a warrant); *Schneekloth v. Bustamonte*, 412 U.S. 218, 249 (1973) (concluding that the determination of voluntariness required for consenting to a search did not necessitate proof of knowledge of a right to refuse); *Carroll v. United States*, 267 U.S. 132, 153 (1925) (justifying the automobile search exception based on the mobility of a vehicle such that it can be quickly moved out of the jurisdiction, and stating that requiring a warrant in such circumstances is impracticable); *Hopkins v. City of Sierra Vista*, 931 F.2d 524, 529 (9th Cir. 1991) (finding that the warrantless entry into a house may be justified where police believed someone was inside beating another person).

37. See *United States v. Sczubelek*, 255 F. Supp. 2d 315, 323 (2003) (mem.) (finding the DNA Act reasonable because there was a special need for stocking CODIS that was separate from general law enforcement and that such a goal outweighs intrusion on defendant's diminished expectation of privacy).

38. See, e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (permitting exceptions for special needs, beyond the normal need for law enforcement, where the warrant and probable cause requirements are impracticable).

39. 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

governmental interests at stake.<sup>40</sup> In *Griffin*, the Court held that it was reasonable under the special needs doctrine to dispense with the warrant requirement because the governmental interests in safety outweighed a probationer's expectation of privacy in his home.<sup>41</sup>

More recently, the Supreme Court struck down two searches in cases where the Court did not find a special need beyond law enforcement.<sup>42</sup> In *Ferguson v. City of Charleston*, the Court held that suspicionless drug screenings of pregnant women at a hospital did not qualify as a special needs exception to the probable cause and warrant requirements of the Fourth Amendment.<sup>43</sup> The Court also struck down suspicionless sobriety checkpoints in *City of Indianapolis v. Edmond* as not justified, even in light of drunk driving concerns, because its primary purpose was to uncover evidence of criminal wrongdoing.<sup>44</sup> In these cases, the fact that the purpose for the searches was not completely separate from the needs of general law enforcement essentially meant failure under the special needs test.<sup>45</sup>

The Supreme Court also analyzed another ambit of case law under the special needs exception that instead of turning on the purpose turned on the interests prong of the test.<sup>46</sup> These cases involve searches in public schools and in prisons.<sup>47</sup>

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40. 483 U.S. at 874.

41. *Id.* at 873-74; *see also* *United States v. Knights*, 534 U.S. 112, 121 (2001) (holding that reasonable suspicion, not probable cause, was sufficient to compel a search of a probationer where such a search was specifically part of the conditions of probation imposed on him by the sentencing judge).

42. *See Ferguson v. City of Charleston*, 532 U.S. 67, 82-83 (2001) (finding that the policy of a public hospital to conduct suspicionless drug screenings of pregnant women did not fit within the closely guarded category of special needs); *City of Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000) (reiterating that the Court will never approve a sobriety checkpoint program whose primary purpose is to detect evidence of ordinary criminal wrongdoing because it is not a special need beyond the normal need for law enforcement that justifies the lack of individualized suspicion).

43. *Ferguson*, 532 U.S. at 84 (finding the involvement of law enforcement pervasive in implementing the drug-screening program based on the incorporation of the police's operational guidelines and the attention to the chain of custody of the results and the range of possible criminal charges).

44. *Edmond*, 531 U.S. at 42; *cf. Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding a sobriety checkpoint program because it clearly aimed to reduce the immediate hazard posed by the presence of drunk drivers on the highways).

45. *Compare Edmond*, 531 U.S. at 44 (striking down a vehicle drug checkpoint program because it was designed to discover and interdict illegal narcotics, which was a purpose the Court concluded was virtually indistinguishable from ordinary aspects of crime control), *with Griffin*, 483 U.S. at 874 (upholding the warrantless search of probationer as valid because of the state's special need to supervise probationers and suspicion of criminal conduct).

46. *See, e.g., Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657-58 (1995).

47. *See, e.g., Bd. of Educ. v. Earls*, 536 U.S. 822, 831 (2002); *Tribble v. Gardner*, 860 F.2d 321, 325 (9th Cir. 1988) (reiterating settled law that prisoners lose only those rights in conflict with serving legitimate penological needs, such as securing the safety of guards and other inmates).

*a. There Is a Special Needs Exception When Dealing With the Rights of Schoolchildren in the State's Custodial Care*

In *Vernonia School District 47J v. Acton*, the Court upheld random drug testing of student athletes by balancing the substantial need of teachers and administrators to obtain order in schools and the safety of students against the lower expectation of privacy student athletes have in public schools and the minor invasiveness of the urine collection scheme.<sup>48</sup> A few years later, in *Board of Education v. Earls*, the Court once again upheld the constitutionality of a school's suspicionless drug testing policy in light of a student's limited privacy interest in a public school environment, where the State is responsible for maintaining discipline, health, and safety.<sup>49</sup>

*b. There Is a Special Needs Exception When Dealing With the Privacy Rights of Incarcerated Prisoners*

The Court applied similar reasoning when upholding restrictions on prison inmates' constitutional rights in light of a state's interest in maintaining order in its prison system.<sup>50</sup> In *Turner v. Safley*, the Supreme Court announced a four-factor test to determine whether restrictions on prisoners' rights were a constitutional violation or a reasonable penological policy.<sup>51</sup> This Note will analyze the constitutional claim of a group of persons whose rights are in between those of free citizens and those of prisoners or schoolchildren: individuals on supervised release from prison and probationers.

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48. *Vernonia*, 515 U.S. at 665 (cautioning against suspicionless drug testing by stating that the most significant element in this case was that the policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted in its care).

49. *Earls*, 536 U.S. at 830 (elaborating on the limited privacy expectation of students in the public school system by stating how schoolchildren are routinely required to submit to physical exams and vaccinations against disease).

50. *See Hudson v. Palmer*, 468 U.S. 517, 525 (1984) (characterizing lawful incarceration as carrying with it the loss of those rights inconsistent with legitimate penological objectives, such as losing protection against unreasonable searches and seizures inside one's prison cell because it is in conflict with the need for institutional security).

51. *Turner v. Safley*, 482 U.S. 78, 99-100 (1987) (describing the relevant factors as: (1) whether there is a valid, rational connection between the regulation and legitimate governmental interests put forward to justify it; (2) whether there are alternative means of exercising the asserted constitutional right that remain open to the inmates; (3) whether and the extent to which accommodation of the asserted right will have an impact on prison staff and other inmates' liberty; and (4) whether the regulation represents an exaggerated response to prison concerns, the existence of a ready alternative that fully accommodates the prisoner's rights at a minimal cost to valid penological interests being evidence of unreasonableness).

## ANALYSIS

Until the Supreme Court reconsiders the issue of the constitutionality of the DABEA as applied to the Fourth Amendment, the special needs test remains the controlling test for analyzing the issues raised in *Banks*.<sup>52</sup>

I. THE DISTRICT COURT MISAPPLIED THE SPECIAL NEEDS TEST WHEN IT  
UPHELD THE CONSTITUTIONALITY OF THE DABEA IN *BANKS V.*  
*GONZALES*

The court in *Banks* misapplied the purpose prong of the special needs test when it found that the purposes behind the 2004 amendments to the DABEA were divorced from general law enforcement and instead were to build a DNA database to more accurately identify suspects for assistance in solving both past and future serious crimes.<sup>53</sup> The court also incorrectly applied the interests prong of the test, stating that the intrusion on plaintiffs' Fourth Amendment privacy protections was nominal when compared to the governmental interests served.<sup>54</sup> There must be a special need outside of the general demand for law enforcement and a situation where the governmental interests asserted outweigh the infringement on the plaintiffs' privacy rights in order to determine that the district court's holding was correct.<sup>55</sup>

*A. The Purposes Behind the 2004 Amendments Directly Relate to the Law  
Enforcement Objectives of Assisting in the Solving of Crime*

The suspicionless search and seizure to which the *Banks* plaintiffs are subject under the 2004 amendments to the DABEA are per se unreasonable unless the government can prove that there is a purpose beyond the normal need for law enforcement in taking blood samples for DNA analysis from all convicted felons, regardless of their crimes.<sup>56</sup> The special needs test is a

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52. See generally H. Brendan Burke, Comment, *A "Special Need" for Change: Fourth Amendment Problems and Solutions Regarding DNA Databanking*, 34 STETSON L. REV. 161, 164 (2004) (recognizing that the Ninth Circuit went against the great weight of case law in applying a totality of the circumstances test in *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004) because the special needs test remained Supreme Court precedent on the issue).

53. See H.R. REP. NO. 106-900(I), at 27 (2000) (announcing that one of the underlying concepts behind CODIS is to create a database of convicted offender profiles and use it to solve crimes for which there are no suspects).

54. See *Banks v. Gonzales*, 415 F. Supp. 2d 1248, 1266 (N.D. Okla. 2006) (en banc) (concluding that a special need existed beyond normal law enforcement, and that the governmental interests in identifying suspects and crime solving outweighed the plaintiffs' privacy interests).

55. See *id.* (indicating that the asserted governmental needs are difficult to justify because they debatably cannot be distinguished from a general interest in crime control, which does not fall under a special needs exception).

56. See *Roe v. Marcotte*, 193 F.3d 72, 79 (2d Cir. 1999) (upholding the DNA statute

difficult one to pass because the previously asserted interests accepted by the court and furthered by the 2004 amendments—identification for purposes of crime solving, identification for purposes of violation of supervised release, and combating recidivism—all arguably relate to normal law enforcement objectives.<sup>57</sup> The goal of the search and seizure of plaintiffs is to link them to a specific past or future crime by their indexed DNA.<sup>58</sup> This purpose falls within the sphere of general crime control that has always required a measure of individualized suspicion.<sup>59</sup>

The government states that the key function of the DABEA is not general crime control but, instead, is merely identification.<sup>60</sup> However, it is difficult to see the distinction in this claim.<sup>61</sup> The goal of the DABEA is to take blood samples from all convicted felons, analyze the DNA, and store the results in a nationwide database for use in solving past and future crimes.<sup>62</sup>

Moreover, this interest in identification is not an interest separate from general law enforcement but, instead, is exactly what law enforcement aims to accomplish.<sup>63</sup> The cases that the Supreme Court used to carve out the special needs exception are cases in which officials conducted the search in question for purposes other than solving and punishing crime.<sup>64</sup>

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because of “the high rate of recidivism among the sexual offenders in addition to the fact that DNA evidence is particularly useful in investigating sexual offenses and identifying the perpetrators because of the nature of the evidence left at the scenes of these crimes”).

57. See H.R. REP. NO. 106-900(I), at 27 (2000) (stating that the stored DNA samples and “DNA analyses may be used for law enforcement identification purposes and virtually nothing else”).

58. See *Banks*, 415 F. Supp. 2d at 1264 (listing the interests asserted by the government that are served by the DNA Act, one being to solve both past and future crimes).

59. See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000) (holding that the Indianapolis narcotics checkpoint program contravened the Fourth Amendment because its purpose was to uncover evidence of ordinary criminal wrongdoing while employing no individualized suspicion).

60. See *Nicholas v. Goord*, 430 F.3d 652, 668 (2d Cir. 2005) (“[R]ecognizing that identification of felons is related to law enforcement, but that it was not a purpose that automatically condemned the New York DNA-indexing statute” because it did not try to “determine that a particular individual had engaged in some specific wrongdoing.”).

61. See *United States v. Miles*, 228 F. Supp. 2d 1130, 1137 (E.D. Cal. 2002), *rev’d* 2005 U.S. App. LEXIS 5913 (9th Cir. Apr. 8, 2005) (noting that “the Supreme Court only justified suspicionless searches of inmates, probationers, or supervisees when the government referenced some interest in institutional security, order, and discipline, but never for law enforcement objectives”).

62. See UNITED STATES DEP’T OF JUSTICE, USING DNA TO SOLVE COLD CASES 4 (2002) (stating that increasing the number of convicted offender DNA profiles against which officials can compare forensic DNA evidence makes the DNA database system a more powerful tool for law enforcement).

63. See, e.g., Debra A. Herlica, *DNA Databanks: When Has a Good Thing Gone Too Far?*, 52 SYRACUSE L. REV. 951, 967 (2002) (citing case law that made exceptions to the need for probable cause or articulable suspicion of ongoing criminal activity when the action did not have a primary purpose of catching criminals).

64. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995) (including

However, the primary purpose served by the DABEA is to have a nationally accessible databank with the DNA prints of all convicted felons, regardless of their offenses, to *promote general crime control and law enforcement*.<sup>65</sup> Thus, the purpose behind the DABEA and the 2004 amendments, which extended the DNA testing to nonviolent and nonsexual felons, does not fall within the exception to the warrant and individualized suspicion requirements for “special needs” outside of general law enforcement.<sup>66</sup>

*B. The Asserted Governmental Interests in Banks Do Not Fall Within Any of the Regulatory or Safety Categories That the Supreme Court Carved Out as Special Needs Exceptions*

The situation in *Banks* is distinguishable from previous special needs exception cases because the challenged 2004 amendments have no regulatory or safety purpose, but rather Congress enacted them to assist in catching criminals without individualized suspicion.<sup>67</sup> This justification fails the first prong of the special needs test analysis because it does not fall into any of the well-defined exceptions to the Fourth Amendment warrant requirement.<sup>68</sup>

*1. The Privacy Rights of Plaintiffs in Banks Differ From Those of Schoolchildren Subject to the Special Needs Exception of Running a State Education System*

The *Banks* case differs from *New Jersey v. T.L.O.* because the plaintiffs in *Banks* were not subject to the control of the public education system, but

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random urine testing of high school student athletes to prevent injury and drug dependency in the ambit of special needs exception cases); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 670-71 (1989) (holding that blood and urine tests of railroad employees to prevent railroad accidents falls within the special needs exception to the warrant and probable cause requirements).

65. See Claire S. Hulse, *Dangerous Balance: The Ninth Circuit's Validation of Expansive DNA Testing of Federal Parolees*, 35 GOLDEN GATE U. L. REV. 31, 33 (2005).

66. See *Hopkins v. City of Sierra Vista*, 931 F.2d 524, 529 (9th Cir. 1991) (remanding case to determine whether the warrantless entry into a house was justified where police believed an assault to be in progress because, in such exigent circumstances, the warrant requirement became impractical); *United States v. Ramsey*, 431 U.S. 606, 620 (1977) (construing border searches as exceptions to the warrant and probable cause requirements because the Fourth Amendment stems from the right of the sovereign to control over who and what may enter the country subject to constitutional limitations).

67. See *Vore v. U.S. Dep't of Justice*, 281 F. Supp. 2d 1129, 1136 (D. Ariz. 2003) (distinguishing the DNA act from unconstitutional programs because the DNA samples were collected to supply the CODIS database with profiles and did not, on their own, give any evidence of crime).

68. See *United States v. Lindsey*, 877 F.2d 777, 782 (9th Cir. 1989) (holding that a person concealing dangerous explosives in a home where the suspect may have been suspicious of police presence constituted exigent circumstances to justify officers entering the home without a warrant to search and seize any illegal weapons found inside).

rather are adults complying with terms of release in society.<sup>69</sup> Justice Blackmun's concurring opinion in *T.L.O.* announced that the special needs exception applied to situations where exceptional circumstances exist, beyond the normal need for law enforcement, that make the warrant requirement impracticable.<sup>70</sup> Such a situation is clearly present in public schools, where school officials must maintain order and protect students from everyday dangers, such as drug use.<sup>71</sup> No such situation exists when dealing with adults who served their time and reentered society.<sup>72</sup>

*Banks* also differs from both *Vernonia* and *Earls* because both decisions upholding urine testing of students relied heavily on the school's custodial responsibility and authority and the safety of the students.<sup>73</sup> The public school environment, where the State has the responsibility of maintaining health, discipline, and safety, limited students' privacy interests.<sup>74</sup> However, plaintiffs' privacy interests in *Banks* are not so restricted because they are on release or probation terms and integrating themselves back into the general population of society.<sup>75</sup>

More importantly, the Court noted in both *Vernonia* and *Earls* that it put weight on the limited involvement of law enforcement officials in finding that there was a special needs exception in those contexts.<sup>76</sup> However, in

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69. *But see* *New Jersey v. T.L.O.*, 469 U.S. 351, 348-50 (1985) (Powell, J., concurring).

70. *Id.* at 352 (Blackmun, J., concurring) (explaining that as a practical matter, conducting a stop and frisk could not be subjected to the warrant requirement because a law enforcement officer must be able to take immediate steps to ensure his safety).

71. *But see id.* at 350 (Powell, J., concurring).

72. *See id.* at 340-41 (recognizing that while probable cause and the warrant requirement are indicative of a reasonable search under the Fourth Amendment, neither is required for a finding of reasonableness in the public school context).

73. *See* *Bd. Of Educ. v. Earls*, 536 U.S. 822, 838 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (stating that schoolteachers and administrators stand *in loco parentis* over the minor children entrusted to them and that this subjects the children to greater controls and more limited privacy rights to protect their health and well-being).

74. *See Earls*, 536 U.S. at 831 (citing *T.L.O.*, 469 U.S. at 350) (reiterating that "apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers from violence by few students whose conduct in recent years has prompted national concern," which in turn limits students' privacy rights).

75. *Compare Vernonia*, 515 U.S. at 654 (indicating unemancipated minors lack some of the most fundamental rights because they are subject to the control of their parents or guardians), *with Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (asserting that "prison cases are instructive for the court because the constitutional rights of parolees are even more extensive than those of inmates" and the right to bodily privacy is fundamental and applies to a parolee submitting to drug testing), *and Tribble v. Gardner*, 860 F.2d 321, 325 (9th Cir. 1988) (striking down a prison policy of suspicionless digital rectal cavity searches because the policy compromising the prisoner's bodily integrity did not serve a legitimate penological need).

76. *Earls*, 536 U.S. at 833; *Vernonia*, 515 U.S. at 658 (discussing the degree of the intrusion and noting that only a limited number of school personnel saw the results of students' urine tests and the results were not turned over to law enforcement authorities or used for any internal disciplinary function); *cf. Ferguson v. City of Charleston*, 532 U.S. 67, 82 (2001) (discussing indications that the program's primary purpose was for law

*Banks* the extraction of blood from plaintiffs is directly entangled with law enforcement and aimed at the prosecution and solving of past and future crimes.<sup>77</sup> The stated interest in identification is merely a secondary purpose served by the statute, which the Supreme Court has held is not dispositive of the special needs analysis.<sup>78</sup> As the Ninth Circuit stated, it would be “intellectually dishonest” to try to divorce the special needs of the DNA database from the normal needs of law enforcement.<sup>79</sup>

## 2. *The Searches Conducted on Plaintiffs in Banks Differ From Special Needs Exceptions Near the Borders and Ports of Entry*

One category of special needs exception cases deals with searches near the United States borders.<sup>80</sup> Courts have long upheld various types of searches near the border, on both persons and their property, because of Congress’s broad authority to regulate commerce between the United States and foreign nations.<sup>81</sup> This authority also stems from a longstanding belief in the sovereign’s right to protect itself and that which enters its borders.<sup>82</sup> The plaintiffs in *Banks* clearly differ from plaintiffs in such border cases because they are United States citizens currently residing in this country.<sup>83</sup>

In border search exception cases, the Court narrowly defined what could be included in that special needs exception.<sup>84</sup> It has repeatedly held that the

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enforcement and noting the lack of a special need shown by the program being developed by prosecutors, police, and hospital staff to discover and produce evidence of a specific individual’s criminal wrongdoing).

77. See *Ferguson*, 532 U.S. at 84 (condemning the urinalysis program because of the extensive involvement of law enforcement officials); *Banks v. Gonzales*, 415 F. Supp. 2d 1248, 1266 (N.D. Okla. 2006) (en banc) (conceding that the asserted governmental interests of identification for purposes of crime solving and violations of supervised release, and combating recidivism, all arguably relate to law enforcement).

78. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 46 (2000) (finding that a lawful secondary purpose of keeping impaired motorists off the highways does not justify a checkpoint program set up to discover illegal narcotics).

79. See *Vore v. United States Dep’t of Justice*, 281 F. Supp. 2d 1129, 1136 (D. Ariz. 2003) (inferring from legislative history that the purposes of the DNA Act were to match DNA samples from crime scenes where there are no suspects, to increase the accuracy of the criminal justice system, and to prevent violent felons from repeating their crimes in the future).

80. See, e.g., *United States v. Ramsey*, 431 U.S. 606, 619 (1977).

81. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975).

82. See *Ramsey*, 431 U.S. at 620 (finding that no different constitutional standard should apply to searching envelopes just because they were mailed and not carried into the country, since the critical fact at issue was that the envelopes crossed the border and entered this country).

83. Cf. *Brignoni-Ponce*, 422 U.S. at 875.

84. See *Ramsey*, 431 U.S. at 617 (addressing the fact that the same Congress that passed the act for broad customs authority later passed the Fourth Amendment, indicating that Congress did not find warrantless searches and seizures at the border unreasonable within the Amendment).

plenary customs power differs from the more limited power of the government to enter and search any particular dwelling house, store, building, or other place without a warrant.<sup>85</sup>

The special need to protect the borders is strongest when dealing with searches of persons or vehicles 100 miles from the border and with suspicious international mail entering the country.<sup>86</sup> Plaintiffs in *Banks* fit into none of the situations in which a special need to protect the borders and sovereignty of this country allow searches upon less than probable cause.<sup>87</sup>

### *3. Courts Should Differentiate Plaintiffs in Banks From Owners of Regulated Businesses*

The courts have long held that just as the warrant requirement applies to an individual's home, person, and possessions, it also applies to a person's place of business.<sup>88</sup> The Supreme Court announced an exception to the warrant requirement in the closely guarded special needs of heavily regulated businesses, such as liquor stores, firearms dealing, and underground mining.<sup>89</sup> Unlike the plaintiffs in *Banks*, these businesses have a long history of government oversight and no reasonable expectation of privacy.<sup>90</sup> The element that distinguishes these closely regulated enterprises from ordinary businesses and persons, such as the plaintiffs in *Banks*, is the long tradition of government supervision of which any person

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85. See *id.* at 616 (contrasting the constitutional difference between the government entering and searching any ship or vessel, where there is reason to suspect goods subject to duty are concealed, from the more limited power to enter a citizen's home).

86. See *Brignoni-Ponce*, 422 U.S. at 884 (holding that officers require more leniency when patrolling the border because of the problems illegal aliens cause in the country but must still point to articulable facts to justify stopping a vehicle and questioning its occupants).

87. See *Banks v. Gonzales*, 415 F. Supp. 2d 1248, 1251 (N.D. Okla. 2006) (en banc) (naming five plaintiffs in the case, all of whom were serving terms of probation or supervised release in the Northern District of Oklahoma).

88. See *Mancusi v. DeForte*, 392 U.S. 364, 369 (1968) (recognizing a long-settled rule that a citizen has standing to object to a search of his office, as well as of his home, because a person has an expectation that he will not be disturbed except by personal or business invitees).

89. *Donovan v. Dewey*, 452 U.S. 594, 600 (1981); *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973) (acknowledging that a businessman entering into a regulated industry, in effect, consents to the restrictions the government places upon him and both the burdens and benefits of his trade); *United States v. Biswell*, 406 U.S. 311, 315 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (finding that business people in the liquor industry should already be aware that it is subject to high regulation when entering into it because of the long history of laws governing inspection of liquor distilleries, even contemporaneous with the passing of the Fourth Amendment).

90. See, e.g., *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (observing that the owner of a plumbing and electrical business did not voluntarily subject himself to warrantless searches of the premises because that industry did not fall under the highly regulated areas often allowing exceptions to warrant requirements).

who chooses to enter such a business must already be aware.<sup>91</sup>

*4. There Are No Exigent Circumstances Present to Justify a Special Needs Exception to the Warrant Requirement for the Searches of Plaintiffs in Banks*

The Court has created another category of special needs to excuse the warrant requirement in situations where exigent circumstances are present.<sup>92</sup> In these cases, the courts have consistently held that, for warrantless entry into and search of a person's home to be valid, officers must have probable cause to believe that contraband or evidence of a crime exists inside, they must know of exigent circumstances at the time of the intrusion, and they must not have had sufficient time to secure a warrant.<sup>93</sup>

The searches conducted on the plaintiffs in *Banks* do not fall within the exigent circumstances category of a special needs exception.<sup>94</sup> First, the probation office has no probable cause, given the totality of the circumstances known at the time it ordered the blood collection, to believe that it will find evidence of a crime.<sup>95</sup> Second, no court could find any exigencies present for collecting and analyzing the plaintiffs' DNA in *Banks*.<sup>96</sup> With the large passage of time between the actual crimes plaintiffs committed and the order for their DNA collection, a court should find that the officials lacked exigent circumstances to justify the warrantless intrusion into plaintiffs' privacy interests.<sup>97</sup>

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91. *Cf. Banks*, 415 F. Supp. 2d at 1251 (explaining that the courts convicted all five plaintiffs of crimes that, prior to the 2004 amendments, would not have subjected them to forced DNA collection under the DABEA).

92. *See, e.g., United States v. Lindsey*, 877 F.2d 777, 780 (9th Cir. 1989) (reiterating the rule that "entry into a person's home is so intrusive that such searches always require probable cause regardless of whether" a special needs exception excuses the warrant requirement).

93. *See, e.g., Hopkins v. City of Sierra Vista*, 931 F.2d 524, 527 (9th Cir. 1991).

94. *Cf. Lindsey*, 877 F.2d at 781 (emphasizing the exigencies present when officers are dealing with guns, dangerous explosives, or apprehension of a drug courier because of the immediacy of danger to the officers or others).

95. *See Banks*, 415 F. Supp. 2d at 1251 (providing that the court sentenced the most recently convicted plaintiff, two years earlier, to five years probation and that no plaintiff recently committed any crimes or probation violations).

96. *Cf. White ex rel. White v. Pierce County*, 797 F.2d 812, 815-16 (9th Cir. 1986) (finding an exigency present when officers received a report of severe welts on the back of a seven-year-old child and observed the parent scold the boy when he tried to show his back to the officers).

97. *Cf. Lindsey*, 877 F.2d at 781-82 (construing the hour delay before the officers secured plaintiffs' home as reasonable given that the officers knew of the exigent circumstances prior to moving in on the location and had no idea that enough time would allow for obtaining a warrant because they had no way to know backup officers would be delayed in arriving at the scene).

*5. The 2004 Amendments in Banks Are Much More Comparable to the Schemes That Failed the Special Needs Analysis in Edmond and Ferguson*

The 2004 amendments in the present case are more analogous to the suspicionless searches that the Court struck down in both *Ferguson* and *Edmond* than the policies upheld in the other special needs exception cases dealing with schoolchildren, incarcerated prisoners, regulated businesses, and border searches.<sup>98</sup> Just as the Court held that it would never approve of a checkpoint program with the primary purpose of detecting criminal wrongdoing, the courts should similarly strike down the 2004 amendments to the DABEA applied to nonviolent and nonsexual offenders as unconstitutional suspicionless searches with the general purpose of solving past and future crimes.<sup>99</sup> Just as the Charleston program in *Ferguson* had the primary purpose of threatening arrest and prosecution to force pregnant women into treatment, the primary purpose of the 2004 amendments is to indefinitely threaten nonviolent and nonsexual offenders with the possibility of future arrests and prosecution.<sup>100</sup> Congress did not enact the 2004 amendments for any safety or regulatory purpose, and, just as the Supreme Court held in *Edmond* and *Ferguson*, these amendments are unconstitutional because the primary purpose of enacting them is indistinguishable from the general interest in crime control.<sup>101</sup>

*C. Even if Courts Find That a Special Need Exists for the 2004 Amendments to the DNA Indexing Statute, the Intrusion on Privacy Rights Outweighs the Asserted Governmental Interests*

If the courts decide that the stated purposes of the 2004 amendments—creating an identification system of convicted felons, deterrence of future crime, and assistance in solving past and future crimes—are completely divorced from an interest in general law enforcement and crime control, the statistics regarding nonviolent offenders like the plaintiffs in *Banks* do not

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98. See *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001) (holding that the Charleston program did not fit within the closely guarded category of special needs given its primary purpose of using the threat of arrest and prosecution in order to force pregnant women into treatment and the extensive involvement of law enforcement); *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000) (determining that the Indianapolis narcotics checkpoint program contravened the Fourth Amendment because its primary purpose was to uncover evidence of ordinary criminal wrongdoing against particular individuals).

99. See *Edmond*, 531 U.S. at 41 (suggesting that the Court would never credit the general interest in crime control as a justification for a regime of suspicionless stops).

100. See *Ferguson*, 532 U.S. at 82-83 (clarifying that while the ultimate goal of the drug screening program may have been to get the women into substance abuse treatment and off drugs, the immediate and unconstitutional objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal).

101. See generally Herlica, *supra* note 63, at 967 (characterizing DNA statutes as having a general crime enforcement purpose rather than a special need because of the lack of proof of deterrent effect).

add up to bolster these stated interests.<sup>102</sup> Statistics show that ninety-seven percent of the cases in which investigators used DNA evidence to link a defendant with a crime involved murder or rape; however, law enforcement officials later arrest less than one percent of all nonviolent offenders on murder and rape charges.<sup>103</sup> Given these statistics, the government's interest in taking DNA samples from nonviolent offenders, as permitted by the 2004 amendments, is a noncompelling interest that the plaintiffs' expected privacy rights supercede.<sup>104</sup>

If the courts find that a special need does exist in the context of testing nonviolent offenders' DNA, then it may obviate the individualized suspicion requirement and employ instead a special needs balancing test.<sup>105</sup> This is a fact-specific assessment of the intrusion on the Fourth Amendment rights of persons searched weighed against the promotion of governmental interests.<sup>106</sup> The *Banks* District Court was the first to balance specifically the privacy rights of persons convicted of nonviolent and nonsexual felonies under this test.<sup>107</sup>

*1. Plaintiffs in Banks, All of Whom Were Serving Terms of Probation or Supervised Release, Have More Privacy Rights at Stake Than Incarcerated Prisoners*

Plaintiffs in *Banks* were on terms of probation or supervised release when subjected to compulsory blood extraction for DNA analysis.<sup>108</sup> The government regularly argues that plaintiffs' status as convicted felons

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102. *But see* *Jones v. Murray*, 962 F.2d 302, 308 (4th Cir. 1992) ("While the court acknowledges that DNA data may have greater utility for violent crimes, it still finds that its utility in ALL cases still justifies the minor intrusion.").

103. *See* *Roe v. Marcotte*, 193 F.3d 72, 79 (2d Cir. 1999) (defending the DNA statute with studies showing a high rate of recidivism among sexual offenders and how taking DNA samples from these prisoners will deter them from committing future crimes of a similar nature).

104. *See* *Jones*, 962 F.2d at 313 (Murnaghan, J., dissenting in part) (disagreeing with the court's holding that the DNA testing of nonviolent offenders is justified because prisoners do not lose an expectation of privacy with regard to the intrusion on their bodies involved in blood testing procedures).

105. *See* *Banks v. Gonzales*, 415 F. Supp. 2d 1248, 1268 (N.D. Okla. 2006) (en banc) (applying the special needs balancing test to determine that the government's interest in collecting DNA from plaintiffs in order to maintain convicted offender profiles in this case outweighs plaintiffs' minimal privacy interest in their identifying information).

106. *See id.* at 1267 (citing *Nicholas v. Goord*, 430 F.3d 652, 669 (2d Cir. 2005)) (articulating the balancing test between the asserted governmental interest and intrusion on the privacy rights of the individual that must occur in each case once a special need beyond law enforcement has been established).

107. *Id.*

108. *Id.* at 1251 (discussing one plaintiff in particular who pled guilty to one count of using a false social security number and thus was sentenced to fourteen months custody and three years supervised release).

restricts the privacy interests they have in their DNA.<sup>109</sup> However, the Ninth Circuit has held that even prisoners retain the fundamental right to privacy in their bodies while incarcerated.<sup>110</sup> If prisoners retain that privacy right, then certainly plaintiffs on release in *Banks* retain that same level of dignity in their own person, if not more.<sup>111</sup>

Even a more narrow analysis of the 2004 amendments under the *Turner* factors used for analyzing prisoners' rights would lead to the conclusion that the privacy intrusion outweighs the governmental interests asserted in the present case. The 2004 amendments, as applied to plaintiffs in *Banks*, fail the first *Turner* factor because, considering the known statistics on recidivism and DNA success at crime solving, there is no valid, rational connection between the amendments and the legitimate governmental interests of convict identification put forward to justify them.<sup>112</sup> Second, there are no ready alternatives for this group of plaintiffs to exercise this asserted right to privacy and bodily integrity if this scheme of DNA collection and analysis continues.<sup>113</sup> Third, accommodating plaintiffs' constitutional rights to privacy and bodily integrity will not have any greater negative effect, but likely a lesser one, on law enforcement officials, other felons, and plaintiffs' family members.<sup>114</sup> Finally, the readily available, cheaper, and less invasive alternative of fingerprinting will still further the asserted governmental interest in creating an index of convicted felon identities without the overwhelming privacy intrusion into plaintiffs' bodily integrity and on plaintiffs' family members who likely have similar genetic makeup.<sup>115</sup>

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109. *See Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (concluding that probationers do not enjoy the absolute liberty to which every citizen is entitled as to searches of their homes but only conditional liberty properly dependent on observance of special probation restrictions for purposes of deterrence and public safety).

110. *See Tribble v. Gardner*, 860 F.2d 321, 325 (9th Cir. 1988).

111. *See, e.g., Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (observing that "a parolee has at least as much protection as he had within prison walls" and the right to bodily privacy is fundamental for all persons).

112. *See Jones v. Murray*, 962 F.2d 302, 308 (4th Cir. 1992) (indicating a less than one percent chance of arresting any nonviolent offender later on a rape or murder charge because of the unlikelihood of finding a DNA sample at a nonviolent crime scene).

113. *See Beard v. Banks*, 126 S.Ct. 2572, 2580 (2006) (finding that the absence of any alternative to exercise the asserted constitutional right provides some evidence that the regulations are unreasonable, but is not itself conclusive without looking also at the problems that might arise in trying to accommodate the asserted right).

114. *See id.*

115. *See id.* (upholding the policy because neither the statement nor the deposition described any alternative method of accommodating the claimant's constitutional complaints that fully met the prisoner's rights at a minimal cost to valid penological interests).

2. *There is No Sufficient Legitimate Governmental Interest Behind the 2004 Amendments to the DABEA to Justify the Privacy Intrusion*

Congress originally passed federal DNA testing to create a database that would hold the identification of the worst offenders.<sup>116</sup> The ninety-seven percent of cases in which DNA evidence linked a defendant with a crime involving murder and rape justifies this original purpose.<sup>117</sup> The 2004 amendments, however, which extended the DNA Act to nonviolent and nonsexual offenders, are not justified for the two following reasons: (1) the low likelihood of recovering a DNA sample from the scene of a nonviolent crime; and (2) less than one percent of all nonviolent offenders are later arrested on murder or rape charges.<sup>118</sup> These statistics substantially reduce the importance of the governmental interests in conducting this type of search on the *Banks* plaintiffs given the small success rate of solving past and future crimes dealing with nonviolent offenders.<sup>119</sup>

Furthermore, even if the government argues that these statistics still suggest a significant threat to the public, the Supreme Court has held that the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.<sup>120</sup> Instead, courts must consider the nature of all the rights invaded in light of their connection to the particular law enforcement practices at issue.<sup>121</sup>

In his dissenting opinion in *Jones*, Judge Murnaghan cites United States Justice Department Statistics from the record that showed that police officers later arrest only 0.4 percent of nonviolent felons on rape charges and only 0.8 percent on murder charges.<sup>122</sup> Surprisingly, officers later

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116. See generally Hulse, *supra* note 65, at 33 (addressing the fact that Congress originally created the DABEA to index murderers and rapists because investigators found more useful DNA samples given the nature of these particular crimes).

117. See *Jones*, 962 F.2d at 308 (justifying the original purpose of the DNA Act as applied to violent offenders by giving statistics of the success rate of solving violent crimes by matching offenders' DNA to the scene).

118. See Minn. Dep't of Pub. Safety Bureau of Criminal Apprehension Forensic Science Laboratory, Guide to DNA Analysis, <http://www.dps.state.mn.us/bca/Lab/Documents/Lab-Intro.html> (last visited April 1, 2007) (instructing that DNA samples from violent crimes against persons and relatives of missing persons are the best ones to submit for analysis and comparison to CODIS profiles).

119. See *Jones*, 962 F.2d at 314 (recognizing the extremely rare chances of catching a nonviolent offender because normally he or she will not subsequently commit a violent crime from which police can recover a DNA sample useful for analysis).

120. See *Ferguson v. City of Charleston*, 532 U.S. 67, 86 (2001).

121. See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000) (stating that if the Court were to decide the case at a high level of generality in apprehending drunk drivers from the highways, there would be little check on the ability of the authorities to conduct suspicionless searches by constructing roadblocks for almost any conceivable law enforcement purpose).

122. *Jones*, 962 F.2d at 314 (Murnaghan, J., dissenting in part).

arrest only 0.4 percent of nonviolent drug offenders for rape and only 0.3 percent for murder.<sup>123</sup> This statistic is startling considering officers usually believe this group of offenders more likely than others to commit additional violent crimes. Regardless if the courts find the government's asserted interests in taking and analyzing the DNA of nonviolent offenders unrelated to law enforcement objectives, testing nonviolent offenders does not further these goals any more than testing free citizens as evidenced by these statistics.<sup>124</sup>

The *Banks* District Court misinterpreted the weight of these asserted governmental interests in crime solving and deterrence and should have held that the suspicionless searches of plaintiffs violated their Fourth Amendment rights under the balancing prong of the special needs test.<sup>125</sup> Unlike the immediacy of the interest in student safety present in both *Earls* and *Vernonia*, there is no such legitimate safety concern in dealing with the nonviolent and nonsexual offenders in *Banks*.<sup>126</sup> This safety concern for students and the custodial position of the schoolteachers and administrators, in light of the students restricted privacy rights, justified the minimally intrusive urine collection in both *Earls* and *Vernonia*.<sup>127</sup> In *Banks*, there is no concrete evidence that collecting DNA from nonviolent and nonsexual offenders actually promotes the stated governmental interest in solving future crime.<sup>128</sup> Furthermore, as mentioned before, probationers and supervised releasees retain more privacy rights than incarcerated inmates in state prison systems or minor children entrusted to the school system.<sup>129</sup>

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123. *Id.* at 314-15.

124. *See id.* (recognizing that the testing of all citizens, regardless of criminal record, would give similar statistical likelihood of solving future crimes).

125. *See Banks v. Gonzales*, 415 F. Supp. 2d 1248, 1267-68 (N.D. Okla. 2006) (en banc) (holding that the asserted governmental interests in the general need for maintenance of identifying information of convicted felons carried the same weight regardless of whether or not the crime was nonviolent or nonsexual).

126. *See Bd. of Educ. v. Earls*, 536 U.S. 822, 834 (2002) (stating that the growing nationwide drug epidemic among the nation's youth makes the war against drugs a pressing concern in every school and justifies steps taken by school administrators, through drug screenings, to combat drug use by minor children in public schools); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995) (deciding that the student urine sample collection is necessary and an "important enough" justification of state interests in enforcing drug laws with school children safety because of the detrimental effects of addiction on youth).

127. *See Earls*, 536 U.S. at 836-37; *Vernonia*, 515 U.S. at 660.

128. *See Jones v. Murray*, 962 F.2d 302, 308 (4th Cir. 1992) (recognizing that the greater utility for use of DNA data lies where the future crime is violent and that those crimes can statistically relate more directly to inmates now incarcerated for violent crimes).

129. *See Earls*, 536 U.S. at 831 (affirming that securing order and safety in the school environment sometimes requires that students be subjected to greater controls by school officials standing in custodial positions, including minor violations of privacy interests); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (determining that, as a parolee, plaintiff had, at a minimum, the same right to bodily privacy that the courts found for prison

*3. The Physical Taking of Plaintiffs' Blood in Banks Is Grossly More Intrusive Than Fingerprinting and Is Not Outweighed by the Asserted Governmental Interests*

One argument that the government seems to rely on in *Banks* can arguably undermine its asserted interests. The district court in *Banks* relies on a passage from *Jones* that discusses the accuracy of DNA printing and how a suspect may try to change his or her physical appearance or take on a new identity but cannot escape his or her DNA print.<sup>130</sup> This is hard to argue with because no person can escape his or her DNA makeup, no matter how much he or she changes physical appearance.<sup>131</sup> However, if the government's primary justification for Fourth Amendment intrusion is difficulty of manipulating evidence, then the already existing, less intrusive process of fingerprinting felons is accurate enough and also impossible for a suspect to change or manipulate.<sup>132</sup>

The district court erred in its balancing analysis in *Banks* by assuming that blood extraction procedures caused minimal intrusion and were equivalent, in this context, to fingerprinting.<sup>133</sup> The court concluded that if all alleged criminals are fingerprinted, and if fingerprinting and DNA extraction are the same, then expanding DNA analysis to nonviolent and nonsexual offenders actually convicted of crimes is a justified minimal intrusion in light of governmental interests in crime control.<sup>134</sup> Fingerprinting is less intrusive, safer, and has fewer risks than DNA indexing.<sup>135</sup> Every person has a unique fingerprint.<sup>136</sup> However, not all

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inmates in shielding their unclothed body from the view of strangers).

130. *Banks*, 415 F. Supp. 2d at 1264 (citing *Jones*, 962 F.2d at 307) (asserting that DNA evidence is more accurate and more difficult to evade than traditional forms of evidence, such as photographs and fingerprinting).

131. See generally Minn. Dep't of Pub. Safety, *supra* note 118, at 1 (discussing the origin of DNA testing being referred to as DNA fingerprinting because DNA profile comparisons, like fingerprint comparisons, produce a unique pattern that can identify an individual).

132. See SUMMARY OF NIST STANDARDS FOR BIOMETRIC ACCURACY, TAMPER RESISTANCE, AND INTEROPERABILITY 1 (2002) (relying on Immigration and Naturalization Service data in stating that one index fingerprint can provide a ninety percent probability of verification with a one percent probability of false acceptance for verification on a sample of six thousand fingers).

133. See *Hayes v. Florida*, 470 U.S. 811, 817 (1985) (holding that petitioner's detention for the purpose of fingerprinting was subject to the constraints of the probable cause and warrant requirements of the Fourth Amendment because it permits seizures for the purpose of fingerprinting only if there is reasonable suspicion that the suspect has committed a criminal act and fingerprinting will reasonably negate or prove it).

134. See *id.* at 817-18.

135. See Daniel Levy, M.D., *Venipuncture Risks*, Aug. 18, 2003, available at <http://health.allrefer.com/health/venipuncture-risks.html> (emphasizing the risks of blood extraction, including excessive bleeding, fainting, hematoma, infection, and multiple puncture wounds to locate veins).

136. See Andre A. Moenssens, *Is Fingerprint Identification a Science?*, available at

persons have unique DNA markers.<sup>137</sup> Identical twins have an indistinguishable genetic makeup, and, therefore, their DNA markers are impossible to tell apart.<sup>138</sup> However, even identical twins have unique fingerprints from each other.<sup>139</sup> Risking a violation of an innocent person's rights because his or her DNA is indistinguishable from a convicted sibling's is not justified considering the fact that identical twins are not that rare.<sup>140</sup> Thus, the government's argument that DNA analysis is more accurate and no more intrusive than fingerprinting is extremely misleading. Moreover, the risks and intrusiveness of inserting a needle under the plaintiffs' skin to draw blood is far greater than that on the students who were required to urinate into a cup while a school administrator waited outside the stall.<sup>141</sup>

*4. The Intrusiveness of DNA Analysis Further Outweighs Governmental Interests Because of the Amount of Information Learned About the Person Through DNA Use and Maintenance of the Database*

The Fourth Circuit, as cited by the district court in *Banks*, recognized that the search resulting from taking blood samples is perhaps a greater intrusion than fingerprinting.<sup>142</sup> Yet, the Fourth Circuit further stated that blood tests are commonplace and the intrusion occasioned by them is not significant.<sup>143</sup> The Fourth Circuit's argument is misleading because the

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[http://forensic-evidence.com/site/ID/ID00004\\_2.html](http://forensic-evidence.com/site/ID/ID00004_2.html) (last visited Apr. 3, 2007) (asserting that the friction ridge patterns on the skin exhibit so much variety of detail that no two patterns are ever found to be exactly the same on the different digits of one certain individual or of multiple individuals); Edward P. Richards, *Phenotype v. Genotype: Why Identical Twins Have Different Fingerprints*, available at [http://www.forensic-evidence.com/site/ID/ID\\_Twins.html](http://www.forensic-evidence.com/site/ID/ID_Twins.html) (last visited Apr. 3, 2007) (explaining that fingerprints are part of an individual's phenotype, which arises from the interaction of the individual's genes and the developmental environment of the uterus).

137. Richards, *supra* note 136 (discussing how identical twins develop when a single fertilized egg splits in two, leading to two embryos with identical DNA because they came from a duplicative combination of the same egg and sperm).

138. *Id.*

139. *Id.*

140. See Words Work Consulting, Inc., *Multiple Births*, available at <http://wordswork.com/samples/medical/faq-multiple.html> (last visited April 3, 2007) (acknowledging that the occurrence of identical twins has remained stable throughout the world at between one in every 250 births and one in every 300 births).

141. *Compare* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995) (holding that a drug test involving urinating into a cup to be minimally intrusive), *with* *Winston v. Lee*, 470 U.S. 753, 759 (1985) (concluding that a surgical intrusion under someone's skin is too great of a privacy intrusion, even if it is likely to produce evidence of a crime).

142. See *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992).

143. See Brief for Appellant at 8, *United States v. Kraklio*, No. 06-1369, 2006 WL 842113 (8th Cir. Mar. 3, 2006) (adopting the view that the suspicionless intrusion on the individual for DNA collection and analysis bears no salient traits of the upheld safety or regulatory searches and yields a permanent record that exists long after the individual returns to society and reintegrates as an ordinary citizen).

blood extraction in question does not take an open or everyday marker of identity, but rather a wholly personal genetic profile of the individual.<sup>144</sup> Moreover, it is important to note that the urine collected for analysis in both *Vernonia* and *Earls* only revealed information about the presence of certain illegal drugs and did not reveal the depth of detail obtained when one's DNA is analyzed and permanently stored in the DNA database.<sup>145</sup>

When the Court of Appeals for the Second Circuit upheld the New York DNA-indexing statute in *Nicholas v. Goord*, it did so on the narrow reasoning that the statute did not provide for sensitive information to be analyzed or kept in its database.<sup>146</sup> The court held this despite conceding that the second intrusion to which offenders are subjected, the analysis and maintenance of their DNA, was potentially far greater than the initial extraction because the state analyzes the DNA for information and maintains DNA records indefinitely.<sup>147</sup>

In the same respect, the *Banks* plaintiffs will have their genetic information stored for an indefinite period in a national database, accessible by agencies all over the country, for nonviolent and nonsexual crimes, placing them in the same category as violent offenders for which Congress originally created the database.<sup>148</sup> Clearly, this is not rolling a person's finger in ink and then pressing it on paper, a more painless and less physically intrusive procedure.<sup>149</sup> Taking an individual's blood, by force or threat of prosecution if necessary, because of a past nonviolent or nonsexual crime that will never likely result in solving past or future crimes is a suspicionless intrusion on his or her body.<sup>150</sup>

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144. See, e.g., Jonathan Kravis, *A Better Interpretation of "Special Needs" Doctrine After Edmond and Ferguson*, 112 YALE L. J. 2591, 2598 (2003) (arguing against the constitutionality of the DNA database because the massive amounts of information about an individual that is revealed through DNA analysis provides enough weight for courts to decide that the intrusion outweighs the benefits).

145. See *Bd. of Educ. v. Earls*, 536 U.S. 822, 833 (2002); *Vernonia*, 515 U.S. at 658.

146. 430 F.3d 652, 670 (2d Cir. 2005) (rebutting the potentially broad level of information revealed by DNA analysis under the language of the New York statute because the language of the statute provides only for the analysis of identifying markers and nothing else, such as medical conditions and other sensitive intelligence).

147. *Id.* (discussing the greatest concern among the judges as dealing with law enforcement officials turning DNA samples into profiles capable of being searched repeatedly throughout the course of an individual's life, even though the person has committed no new crimes).

148. See, e.g., Hulse, *supra* note 65, at 33 (discussing the groups of felons that the DABEA was originally created to index, including murderers, rapists, robbers, and kidnapers).

149. See generally Gilbert J. Villaflor, *Capping the Government's Needle: The Need to Protect Parolee's Fourth Amendment Privacy Interests From Suspicionless DNA Searches in United States v. Kincade*, 38 LOY. L.A. L. REV. 2347 (2005) (asserting that the Ninth Circuit's characterization of the intrusion of a blood test as minimal diverts attention from the true depth of information obtained about the individual through the blood sample).

150. See DNA Analysis Backlog Elimination Act, 42 U.S.C. § 14135 (2006) (providing

*D. The DNA Database is Further Unconstitutional as Applied to the Privacy Rights of Innocent Family Members That It Inevitably Implicates*

In *Banks*, the plaintiffs were five individuals serving terms of probation or supervised release for convictions of nonviolent and nonsexual crimes. While permitting restrictions on prisoners' privacy rights, the Supreme Court has repeatedly reaffirmed the principle that "prisons are not beyond the reach of the Constitution."<sup>151</sup> Moreover, if the Constitution protects people inside of prisons, it certainly protects persons outside of prison walls on supervised release or probation.<sup>152</sup> With the district court upholding the 2004 amendments as justified intrusions on these plaintiffs' privacy rights, a closer look is needed to analyze exactly whose rights the DNA database violates.<sup>153</sup> The plaintiffs in *Banks* brought a Fourth Amendment challenge against the 2004 amendments, but their family members who had committed no crimes, because of the genetic traits of DNA analysis, may also have had privacy rights at stake.<sup>154</sup>

*1. The DNA Database Reaches Privacy Rights of Innocent Family Members of Indexed Persons Because of the Close Genetic Ties Between Family Members*

Close genetic ties between family members may result in an individual's DNA potentially revealing information about that individual's family members.<sup>155</sup> Thus, the DNA testing that implicates the Fourth Amendment rights of nonviolent and nonsexual offenders may also implicate those same rights of the offender's family members, who have no history of criminal activity.<sup>156</sup> A daunting outcome reached by the Fourth Circuit in *Jones* construed previous decisions as instructing that blood testing can be

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for punishment of a class A misdemeanor or in accordance with title 18, United States Code, if an individual fails to cooperate with DNA collection under the statute).

151. *Hudson v. Palmer*, 468 U.S. 517, 523 (1984); *see Jones v. Murray*, 962 F.2d 302, 313 (4th Cir. 1992) (Murnaghan, J., dissenting in part) (recognizing that while restricted, prisoners still retain many constitutional rights and that the lacking expectation of privacy in a prison cell does not extend to losing the reasonable expectation of privacy in a prisoner's bodily fluids).

152. *See United States v. Kincade*, 345 F.3d 1095, 1102 n.20 (9th Cir. 2003) *rev'd en banc*, 379 F.3d 813 (9th Cir. 2004).

153. *See Michelle Hibbert, DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 WAKE FOREST L. REV. 767, 782 (1999).

154. *See id.* at 783 (discounting the FBI's use of mitochondrial DNA for analysis because it provides a lesser degree of uniqueness, as shown by all of a woman's offspring having the same mitochondrial DNA sequence, thus creating potential privacy interests for family members).

155. *See id.*

156. *See id.* (speculating about the implications on nonindexed family members with a situation in which a sibling commits a crime and is compelled to provide a DNA sample, and later officers lift a DNA fingerprint from a crime scene that leads not to the convicted sibling, but to his non-indexed brother or sister).

reasonable under the Fourth Amendment, even with respect to free persons, where the governmental interests advanced by the slight intrusion outweigh its significance.<sup>157</sup>

In a 1995 Indiana case, an indexed convicted felon was initially a principal suspect in a rape and robbery, but his DNA in the database did not sufficiently match that recovered from the crime scene.<sup>158</sup> The tests on his DNA sample instead suggested that the perpetrator was his close relative.<sup>159</sup> Eventually, police arrested the indexed felon's brother and a court convicted him of rape.<sup>160</sup> Some may consider the brother's conviction a success because it put a rapist behind bars, but this case is an example of why the government's justifications of deterrence and prevention of recidivism through use of DNA databases do not pass muster.<sup>161</sup> Through the DNA database, the government had access to nonindexed family members of a convicted felon.<sup>162</sup> Although many jurisdictions have stated that the importance of crime prevention justifies the possibility of intruding on the rights of free citizens, the Supreme Court has steadfastly rejected this claim in its *Edmond* and *Ferguson* decisions.<sup>163</sup>

## *2. Implicated Innocent Family Members' Privacy Expectations Further Outweigh Asserted Governmental Interests in the DNA Database Under the Balancing Test*

If a court applies the special needs balancing test to the nonindexed family members of convicted felons in the database, the privacy intrusion on their Fourth Amendment rights outweighs the governmental interest in crime solving and prevention even more than in the case of probationers

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157. *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992) (discussing prior case law that authorizes the minor intrusion of blood extraction with "little risk, trauma, or pain" even from free citizens, when outweighed by governmental interests in detecting diseases or drug use).

158. *Flowers v. Indiana*, 654 N.E.2d 1124, 1124 (Ind. 1995) (per curiam) (addressing the scenario leading up to the adjudication of the plaintiff on rape and robbery charges, which began when his brother, a prime suspect in the rape, provided a sample of his blood, with the resulting DNA analysis directing police to the plaintiff, who was not a convicted felon).

159. *Id.*

160. *Id.*

161. *See* *Hibbert*, *supra* note 153, at 784 (inferring possible public sentiment towards any injustice in the intrusion on the plaintiff's Fourth Amendment privacy rights because it resulted in taking a rapist off the streets).

162. *See id.* (noting that the governmental justifications for compulsory DNA collection do not apply to indexed individual's family members because they have committed no crime that warrants that level of privacy intrusion).

163. *See Ferguson v. City of Charleston*, 532 U.S. 67, 86 (2001) (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 42-43 (2000)) (holding that the gravity of the threat of drunk driving alone cannot justify law enforcement engaging in searches of vehicles without individualized suspicion to obtain evidence of ordinary criminal wrongdoing).

and supervised releasees.<sup>164</sup> A person retains the right to be safe and secure from governmental intrusion into his bodily integrity.<sup>165</sup> The Supreme Court has persistently upheld this right with regard to free citizens with no prior convictions, incarceration, or probation terms, as one that the government cannot violate unless there is probable cause or reasonable articulable suspicion that criminal activity is afoot.<sup>166</sup> If no individualized suspicion that a person is involved in a criminal activity exists with regard to free citizens, a search of their identity or bodily fluids contravenes the Fourth Amendment.<sup>167</sup> In the present case of DNA databanks, an identical twin of a databanked felon will have his or her exact genetic makeup searched every time a government official accesses the database.<sup>168</sup> Even nonidentical twins and ordinary siblings may have their respective genome and identifying DNA sequence searched if they are related to a convicted felon in the DNA database.<sup>169</sup> Because the use and maintenance of a DNA database infringes on the rights of innocent family members, the *Banks* District Court erred in holding that the privacy rights at stake do not outweigh the asserted governmental interests.<sup>170</sup>

#### CONCLUSION

The United States District Court for the Northern District of Oklahoma misapplied the special needs test to the challenge brought by plaintiffs in *Banks v. Gonzales*.<sup>171</sup> The 2004 amendments to the DABEA, as applied to

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164. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-83 (1975) (reasoning that the constitutionality of seizures of free persons involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty).

165. See *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) (establishing the right to bodily privacy by stating that the “desire to shield one’s unclothed figure from the view of strangers . . . is impelled by elementary self-respect and personal dignity”).

166. See *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) (asserting that the inestimable right of personal security granted by the Fourth Amendment belongs as much to the citizen walking the streets as to the person hiding his affairs within his home).

167. See *id.* at 21 (emphasizing that the police officer must be able to point to specific and articulable facts that, taken together with rational inferences from those facts, warrant a particular intrusion on a person’s rights).

168. See UNITED STATES DEP’T OF JUSTICE, *supra* note 62, at 5 (indicating that DNA analysis and the database are powerful tools because each person’s DNA is unique, with the exception of identical twins).

169. See *Hibbert*, *supra* note 153, at 782 (discussing the fact that even siblings who are not identical twins will share DNA and “have some 1:256 chance of having the exact same DNA across four loci”).

170. See *Banks v. Gonzales*, 415 F. Supp. 2d 1248, 1267-68 (N.D. Okla. 2006) (en banc) (finding that the asserted governmental interests in building a DNA database and creating a DNA identification index to assist in solving crimes outweighed plaintiffs’ Fourth Amendment rights, as probationers and supervised releasees, against unreasonable searches and seizures).

171. See *id.* at 1266 (holding that the interest in the desire to build a DNA database,

nonviolent and nonsexual offenders, are unconstitutional because they do not relate to special needs outside of general law enforcement and crime control.<sup>172</sup> Instead, the Attorney General and House Report remarking on the statute maintained that the purpose behind expanding the database is to make it much easier to match DNA fingerprints in cases where there are no suspects, and thus in effect to perform searches of individuals' identities without individualized suspicion.<sup>173</sup> This powerful tool directly relates to helping law enforcement combat crime without needing probable cause, or even a reasonable suspicion, that evidence of criminal wrongdoing exists.<sup>174</sup> Furthermore, this invasion of Fourth Amendment rights greatly outweighs the governmental interest in solving past and future crimes because of both the depth of information that is obtained and permanently stored, and the implications and intrusive outcomes it may have on nonindexed family members.<sup>175</sup> The Supreme Court should reconsider the issue of DNA databanking statutes in light of the 2004 amendments to the DABEA that extended the scope of the Act to nonviolent and nonsexual offenders. The Court should apply the special needs test and find that law enforcement violates the privacy interests of nonviolent and nonsexual offenders, as well as their family members, considering the nonlegitimate governmental interest in solving crime in the context of nonviolent crimes against property.<sup>176</sup>

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furthered by the 2004 amendments to the DABEA, is not tied to the type of crime committed and thus falls within the special needs exception as to all felonies).

172. See UNITED STATES DEP'T OF JUSTICE, *supra* note 62, at 4 (asserting that the tendency for states to include all convicted felons in their databases dramatically increases the database's utility for law enforcement to investigate criminal activity).

173. See *id.* (describing the process of using DNA to identify a suspect, by comparing evidence collected from the crime scene with a known standard).

174. See *United States v. Kincade*, 379 F.3d 813, 855 (9th Cir. 2004) (en banc) (Reinhardt, J., dissenting) (reiterating that when evaluating the reasonableness of a suspicionless search, where the immediate objective is to generate evidence for law enforcement purposes, the search is unconstitutional).

175. See Hibbert, *supra* note 153, at 782-83.

176. See UNITED STATES DEP'T OF JUSTICE, *supra* note 62, at 3 (assessing the success of solving previous crimes and preventing future ones in the context of the recidivistic nature of violent offenders).