University of Massachusetts Law Review

Volume 2
Issue 1 *Trends and Issues in Constitutional Law*

Article 6

January 2007

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INTRODUCTION

Fortunately for law enforcement officers, every human being leaves behind a small number of cells wherever he goes—including a crime scene.[1] Each cell contains deoxyribonucleic acid (DNA), a substance that carries the individual's genetic code. Genetic code is very likely unique to each human being, and law enforcement officers have used this fact since the 1980s to help solve crimes: They have compared DNA collected at crime scenes against DNA from known individuals to help either prove or disprove the individuals' presence at the crime scenes.[2]

In part to help law enforcement officers use crime scene DNA, every state has enacted a law allowing the state to create and to maintain a database of human DNA.[3] Because a larger DNA database makes for a better DNA database, every state also has enacted legislation aimed at increasing the number of individuals whose DNA its database catalogues. Many of these "DNA-indexing" statutes operate coercively, compelling certain classes of individuals (usually convicted felons) to provide their DNA.[4] Affected individuals often object that these statutes overreach Fourth Amendment

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[1] Shaila K. Dewan, *As Police Extend Use of DNA, a Smudge Could Trap a Thief*, N.Y. TIMES, May 26, 2004, at A1.

[2] Roberto Iraola, *DNA Dragnet —A Constitutional Catch?*, 54 DRAKE L. REV. 15, 16 (2005).

[3] *Id.* at 16–17.

[4] *See, e.g.*, 1994 N.Y. Laws 737, § 1 (codified as amended at N.Y. EXEC. LAW § 995-C(3) (McKinney 2004)) (requiring felons convicted of certain specified crimes to provide a DNA sample for inclusion in New York's DNA database).

bounds. Lawsuits in over thirty jurisdictions have challenged DNA-indexing statutes' constitutionality.[5] This Case Note focuses on one such case, *Nicholas v. Goord*.[6]

The Case Note proceeds as follows. Part I traces the historical and procedural facts underlying *Nicholas*. Part II describes the legal backdrop against which the United States Court of Appeals for the Second Circuit decided the case. Part III steps through the Second Circuit's majority opinion, and Part IV critiques the opinion. Part V concludes the Case Note by discussing the ramifications of *Nicholas* for future DNA-indexing cases.

I. FACTS

In *Nicholas v. Goord*, nine prison inmates challenged the constitutionality of New York's DNA-indexing statute.[7] Pursuant to that statute, government contractors extracted blood from each plaintiff, analyzed that blood for unique DNA strands, and then catalogued those unique strands in New York's DNA database.[8] The inmates claimed these actions violated their Fourth Amendment rights.[9] They sued under 42 U.S.C. § 1983 for damages and to have their DNA expunged from New York's DNA database. The Commissioner of the New York State Department of Correctional Services, the Director of the New York State Division of Criminal Justice Services, the private blood-testing company that extracted the prisoners' blood, and one of the company's employees were the named defendants.[10]

The inmates' lawsuit implicated several provisions of New York's DNA-indexing statute. The statute, as it existed at the time of the lawsuit, compelled all individuals who had been convicted of certain felonies to provide a DNA sample

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[5] *See* United States v. Kincade, 379 F.3d 813, 830–31 (9th Cir. 2004) (collecting cases).

[6] Nicholas v. Goord, 430 F.3d 652 (2d Cir. 2005).

[7] *Id.* at 652.

[8] *Id.* at 655–56.

[9] *Id.*

[10] *Id.* at 652, 656.

for inclusion in New York's DNA database.[11] It forbade the State of New York from cataloguing medically significant DNA,[12] and further restricted the government to cataloguing only those strands of an individual's DNA "having value for law enforcement identification purposes."[13] Once catalogued, however, the government could use a record in its DNA database for any of several purposes: to help solve any crime,[14] identify human remains,[15] exonerate a criminal defendant,[16] or conduct research.[17] To keep government actors from misusing database records, the statute criminalized any unauthorized use or unauthorized disclosure of a record.[18] The statute also required the government to expunge an individual's DNA record if the individual received a pardon or if his conviction was overturned.[19] But the statute permitted the government to keep an individual's DNA record indefinitely if he left custody in almost any other manner, including through normal release.[20]

When *Nicholas* came before a magistrate judge, the defendants filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6).[21] The magistrate judge, assessing the plaintiffs' Fourth Amendment claim under a "special needs" test,[22] recommended that the motion be granted.[23] A district judge then reached the same conclusion by a different route. He assessed the plaintiffs' Fourth Amendment claim under a balancing test[24] instead of the special needs test, but he

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[11] N.Y. EXEC. LAW § 995-c(3) (McKinney 2004).
[12] *Nicholas*, 430 F.3d at 655.
[13] N.Y. EXEC. LAW § 995-c(5).
[14] *Id.* § 995-c(6)(a).
[15] *Id.* § 995-c(6)(a).
[16] *Id.* § 995-c(6)(b).
[17] N.Y. EXEC. LAW section 995-c(6)(c) (McKinney 2004).
[18] *Id.* § 995-f.
[19] *Id.* § 995-c(9).
[20] *See id.* (requiring the government to expunge a record only "[u]pon receipt of notification of a reversal of a conviction, or of the granting of a pardon . . . [or] other appropriate circumstances").
[21] Nicholas v. Goord, 430 F.3d 652, 655 (2d Cir. 2005).
[22] *See infra* notes 46–49 and accompanying text.
[23] *Nicholas*, 430 F.3d at 656–57.
[24] *See infra* note 45 and accompanying text.

ultimately dismissed the case.[25] The plaintiffs appealed.[26] Before the United States Court of Appeals for the Second Circuit heard their appeal, several of the plaintiffs finished serving their prison sentences and were released from the government's custody.[27]

II. LEGAL BACKGROUND

The Fourth Amendment protects citizens from unreasonable searches and seizures.[28] For a search[29] to be reasonable, an agent of the government ordinarily must receive permission to conduct it. Permission may come in either of two forms: an individual may voluntarily consent to be searched, or a magistrate may issue a search warrant.[30] Although a search warrant obviates the need for voluntary consent, its availability actually serves to limit the government's power. The government usually *must* obtain a warrant if it fails to gain consent,[31] and relatively few circumstances exist under which the government may obtain a warrant. As the Fourth Amendment decrees, "no Warrants shall issue, but upon probable cause."[32]

The Court has interpreted the Fourth Amendment to contain a "few specifically established and well-delineated exceptions" to the requirement of either voluntary consent or a warrant.[33] The Court developed these exceptions in a series of cases beginning with *Terry v. Ohio*.[34] *Terry* came before

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[25] *Nicholas*, 430 F.3d at 657.

[26] *Id.* at 655, 657.

[27] *Id.* at 666 n.25, 671 n.32.

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

[29] A search is constitutionally indistinguishable from a seizure. *Nicholas*, 430 F.3d at 673 n.1 (Leval, J., concurring). For simplicity, this Case Note refers either to a search or a seizure as a "search."

[30] *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973) (granting permission through voluntary consent); Mincey v. Arizona, 437 U.S. 385, 390 (1978) (granting permission through a search warrant).

[31] *E.g.*, *Mincey*, 437 U.S. at 390.

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

[33] *Nicholas*, 430 F.3d at 660 (quoting *Mincey*, 437 U.S. at 390).

[34] Terry v. Ohio, 392 U.S. 1 (1968).

the Court after a police officer patted down the outer layer of clothing on an individual whom the officer reasonably suspected of concealing a gun.[35] The officer had not obtained a warrant before patting down the man's clothing.[36] The Court held the pat down to be a constitutionally cognizable search, but it refused immediately to hold the search unconstitutional for lack of a warrant. Instead, the Court analyzed the search's constitutionality through a balancing test. The Court weighed the officer's invasion of the suspect's privacy against the officer's reasonable suspicion of a concealed gun and the danger that a hidden lethal weapon could pose to the officer and to the general public.[37] The Court upheld the search.[38]

The Court went one step further in *United States v. Martinez-Fuerte*[39] where it upheld a warrantless search even though the search had been based on no suspicion at all.[40] *Martinez-Fuerte* arose after the United States Border Patrol caught two individuals attempting to smuggle undocumented aliens through a permanent, clearly advertised checkpoint near the U.S.-Mexico border.[41] The Border Patrol caught the individuals by searching their vehicles, but it had not possessed any particularized suspicion when it commenced the search; "the flow of traffic tend[ed] to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens."[42] Despite the absence of a warrant and the absence even of suspicion, the Court once again refused immediately to hold the search unconstitutional. Rather, it once again assessed the search's constitutionality under a balancing test. Noting that a requirement even of reasonable suspicion would

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[35] *Id.* at 6–7.

[36] *See id.*

[37] *See id.* at 23–24, 28, 29–30 (assessing the reasonableness of the decision to search and the reasonableness of the extent of the search).

[38] *Id.* at 30–31.

[39] United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

[40] *Id.* at 545, 562, 566.

[41] *Id.* at 545–47 (describing the checkpoint and the systematic inspections).

[42] *Id.* at 557.

have been impractical under the circumstances, the Court upheld the search because the government's interest in securing the nation's borders outweighs a driver's interest in privacy.[43]

The Court's warrantless search jurisprudence took a new turn in *New Jersey v. T.L.O.*[44] Before *T.L.O.*, the Court had assessed a warrantless search simply by balancing the government's interest in conducting the search against an individual's countervailing interest in privacy.[45] The majority of the Court actually continued to apply this test in *T.L.O.*, but Justice Blackmun argued persuasively in concurrence to modify the test.[46] He noted that the Fourth Amendment's Framers had emphasized the importance of a search warrant.[47] To be true to the Framers' intent, the Court therefore should require the government to obtain a warrant except in the rare circumstances when the relatively long process of obtaining a warrant would frustrate the government's very need for it.[48] Although Justice Blackmun would continue to employ a Fourth Amendment balancing test, he would invoke the test only after the Court ensured that "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[49]

During the sixteen years following *T.L.O.*, the Court repeatedly invoked Justice Blackmun's "special needs" test to assess warrantless searches.[50] The Second Circuit followed

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[43] *Id.* at 557, 561–62.

[44] New Jersey v. T.L.O., 469 U.S. 325 (1985).

[45] *See, e.g.*, *Martinez-Fuerte*, 428 U.S. 543, 561–62 (balancing the government's interest to search against a driver's privacy interest).

[46] *T.L.O.,* 469 U.S. at 351–53 (Blackmun, J., concurring).

[47] *Id.* at 351 (quoting United States v. Place, 462 U.S. 696, 722 (1983) (Blackmun, J., concurring)).

[48] *Id.*

[49] *Id.*

[50] *See* Griffin v. Wisconsin, 483 U.S. 868, 873–80 (1987) (invoking the special needs test to uphold the warrantless search of a probationer's home); City of Indianapolis v. Edmond, 531 U.S. 32, 42–45, 46–47 (2000) (holding that a roadside police checkpoint for narcotics did not serve an ordinary law enforcement need); Ferguson v. City of Charleston,

suit.[51] Recently, however, the Court cast doubt upon the special needs test's continued validity. The Court muddied the waters in *United States v. Knights*.[52] In *Knights*, a man on probation challenged the constitutionality of a warrantless search.[53] A police officer had searched the probationer's home because he reasonably suspected the home contained evidence linking the probationer to a recent arson.[54] Rather than applying the special needs test, the Court simply balanced the probationer's privacy interest against the government's search interests.[55] As the Court reasoned, the probationer enjoyed only a reduced privacy interest, even in his home, because as a probationer he remained under the state's supervision.[56] On the other side of the balance, the government possessed a strong interest to operate the penal system of which the probationer was part.[57] The police officer held a reasonable suspicion of the probationer's guilt at the time of the search.[58] In light of these factors, the Court upheld the search.[59] The Court explicitly left open the question of whether the government may conduct an entirely suspicionless search of a probationer's home.[60]

The DNA-indexing statutes fit squarely into the hole left open by *Knights* because they authorize suspicionless searches of individuals in government custody.[61] Although

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532 U.S. 67, 79–86 (2001) (invoking the special needs test to strike down suspicionless, systematic drug tests of pregnant women in a hospital).

[51] *See* Roe v. Marcotte, 193 F.3d 72, 78–82 (2d Cir. 1999) (invoking the special needs test to uphold Connecticut's DNA-indexing statute).

[52] United States v. Knights, 534 U.S. 112 (2001).

[53] *Id.* at 116.

[54] *See id.* at 115 (describing the circumstances that gave rise to the officer's reasonable suspicion).

[55] *See id.* at 118–21 (invoking a general balancing test).

[56] *Id.* at 119–20.

[57] *Id.* at 120–21.

[58] *Id.* at 122.

[59] *Id.*

[60] *Id.* at 120 ("[W]e need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion.").

[61] To be sure, the Court did decide a case shortly after *Knights* that involved a suspicionless seizure. *See* Illinois v. Lidster, 540 U.S. 419

the Court shunned Justice Blackmun's special needs test in *Knights* in favor of a balancing test, the Court did not openly reject the special needs test. The resulting ambiguity has inspired sharp disagreement among federal circuit courts assessing the constitutionality of DNA-indexing statutes. The Third,[62] Fifth,[63] and Eleventh[64] Circuits have opted to assess the statutes' validity under a balancing test. The Seventh[65] and Tenth[66] Circuits have chosen the special needs test. The Ninth Circuit has resolutely failed to choose a test, deadlocking on the issue while sitting en banc.[67] Interestingly, every circuit court to consider a DNA-indexing statute has upheld it.[68]

III. HOLDING

In *Nicholas v. Goord*, the United States Court of Appeals for the Second Circuit upheld New York's DNA-indexing statute under the special needs test.[69] Reviewing the district court's judgment *de novo*,[70] the court commenced its analysis by noting that the statute authorized searches that were

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(2004). But the seizure at issue in that case occurred in the context of a highway traffic checkpoint in which police officers seized ordinary citizens who were not in the government's custody. *Id.* at 422. The case therefore sheds no light into whether the government may conduct a suspicionless search of an individual who is in the government's custody.

[62] United States v. Sczubelek, 402 F.3d 175, 184 (3d Cir. 2005).

[63] Groceman v. U.S. Dep't of Justice, 354 F.3d 411, 413 (5th Cir. 2004) (per curiam).

[64] Padgett v. Donald, 401 F.3d 1273, 1279–80 (11th Cir. 2005).

[65] Green v. Berge, 354 F.3d 675, 678 (7th Cir. 2004).

[66] United States v. Kimler, 335 F.3d 1132, 1146 (10th Cir. 2003).

[67] *Compare* United States v. Kincade, 379 F.3d 813, 832 (9th Cir. 2004) (O'Scannlain, J.) (plurality opinion) (voting for the balancing test), *with id.* at 840 (Gould, J., concurring) (voting for the special needs test) *and id.* at 857 (Reinhardt, J., dissenting) (invoking the special needs test) *and id.* at 872–73 (Kozinski, J., dissenting) (arguing against the balancing test) *and id.* at 875 (Hawkins, J., dissenting) (voting for the special needs test).

[68] Nicholas v. Goord, 430 F.3d 652, 658 (2d Cir. 2005).

[69] *Id.* at 672.

[70] *Id.* at 657.

constitutionally cognizable under the Fourth Amendment.[71] Because the statute implicated the Fourth Amendment, the court recognized that it needed to assess the statute's constitutionality under either the special needs test or the general balancing test.[72] Although the Second Circuit adopted the special needs test only six years earlier,[73] the court revisited the issue in light of several intervening Supreme Court cases and the fairly even split among its sister circuit courts.[74]

To guide its decision, the court examined past warrantless search cases. It focused particularly upon suspicionless search cases.[75] After surveying the modern suspicionless search cases, the court held that the analysis in every modern suspicionless search case conforms to the special needs test.[76] Moreover, *Knights* had not altered the playing field.[77] As the court elucidated, *Knights* involved a search undertaken with reasonable suspicion; the case was inapposite to suspicionless search cases.[78] To comply with the relevant line of authority, the court adopted the special needs test.[79]

After the court adopted the special needs test, it applied a version of the test to New York's DNA-indexing statute.[80]

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[71] *Id.* at 658 ("[T]he extraction and analysis of plaintiffs' blood for DNA-indexing purposes constituted a search implicating the *Fourth Amendment.*").

[72] *Id.*

[73] *See* Roe v. Marcotte, 193 F.3d 72, 78–82 (2d Cir. 1999) (invoking the special needs test to uphold Connecticut's DNA-indexing statute).

[74] *Nicholas*, 430 F.3d at 659–60.

[75] *Id.* at 660–63.

[76] *Id.* at 661 ("What unifies these cases, despite their varied contexts, is that in each instance, the Court found that the suspicionless-search regime at issue served some special need distinct from normal law-enforcement needs."). As a note, the Supreme Court has applied a general balancing test in one Fourth Amendment case since *Nicholas*. *See* Samson v. California, 126 S. Ct. 2193 (2006). However, *Samson* does not overrule *Nicholas*: it adjudicates the Fourth Amendment rights of a parolee rather than a prison inmate. United States v. Amerson, 483 F.3d 73, 79 n.5 (2d Cir. 2007).

[77] *Nicholas*, 430 F.3d at 665, 666.

[78] *Id.* at 665–66.

[79] *Id.* at 667.

[80] *Id.* at 667–72.

Unlike Justice Blackmun's special needs test, the court's formulation of the test does not require the process of obtaining a warrant to cause the warrant to be impractical to obtain.[81] Instead, the court's test examines only whether the government possesses a need, apart from ordinary law enforcement, to conduct a suspicionless search.[82] The court held that New York's DNA-indexing statute served such a need: "to assist in solving crimes."[83] As the court explained, using a DNA database to help solve crimes serves a need apart from ordinary law enforcement because, "at the time of collection, the [DNA] samples . . . provide no evidence in and of themselves of criminal wrongdoing, and are not sought for the investigation of a specific crime."[84]

The court then considered the searches' reasonableness under its articulation of the special needs test.[85] The court ruled that New York had possessed a strong interest to build and maintain a DNA database because the database improved the accuracy of evidence in some criminal proceedings, helped to catch ex-convicts who perpetrated new crimes, and discouraged recidivism.[86] On the other side of the balance, the statute infringed on a prison inmate's privacy interest in two ways: First, the statute required a prison inmate to give up bodily fluids;[87] and second, the statute authorized New York to "analyze[] DNA for information and maintain[] DNA records indefinitely."[88]

The court separately considered the two invasions of privacy. First, the court assessed the degree to which the mandatory extraction of an inmate's bodily fluids invades his

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[81] *Id.* at 672. The court held a warrant was impractical to obtain under New York's statute only because "[o]btaining a warrant requires probable cause, which obviously does not exist in the context of suspicionless searches." *Id.* at 671 (internal citation omitted).

[82] *Id.* at 667–69.

[83] *Id.* at 668.

[84] *Id.* at 669 (quoting Nicholas v. Goord, Report-Recommendation, 2003 U.S. Dist. LEXIS 1621, at 13 (S.D.N.Y. Feb. 6, 2003).

[85] *Id.* at 669–71.

[86] *Id*. at 669.

[87] *Id*.

[88] *Id.* at 670.

reasonable expectation of privacy.[89] The court held that such an extraction constitutes only a minimal invasion; "inmates are routinely subject to medical procedures, including blood draws."[90] The court weighed this minimal intrusion against the government's strong interest in collecting an inmate's DNA, and it upheld the statute's mandatory DNA extractions.[91]

Next, the court assessed the degree to which the analysis of, and indefinite storage of, an inmate's DNA markers intrudes on his reasonable expectation of privacy.[92] Because New York's statute forbade the government from analyzing or maintaining medically significant strands of DNA, the court described a DNA record as strongly resembling a fingerprint; both devices merely serve as a means by which to identify a person.[93] The government already maintains a constitutionally permissible fingerprint database, to which even a mere arrestee's fingerprints may permanently be added.[94] Given that the government may forever keep the fingerprints of a mere arrestee, the government's indefinite storage of a convicted felon's DNA constituted a "relatively minimal" invasion of privacy.[95] Thus, New York's DNA-indexing statute was valid in its entirety. The court affirmed the district court's judgment.[96]

IV. ANALYSIS

The Court of Appeals for the Second Circuit was correct to adopt the special needs test in *Nicholas*. However, in applying that test, the court unfortunately strayed from Supreme Court precedent by refusing to stipulate that, for a

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[89] *Id.* at 669.
[90] *Id.*
[91] *Id.*
[92] *Id.* at 670.
[93] *Id.* at 671.
[94] *Id.*
[95] *Id.* at 671.
[96] *Id.* at 672.

warrantless search to be reasonable, a warrant must be impractical to obtain.

A. Propriety of the Special Needs Test

The circuit courts have split on whether to analyze the constitutionality of DNA-indexing statutes under a balancing test or the special needs test.[97] The courts' disagreement centers on whether the Supreme Court's holding in *United States v. Knights* extends from a reasonable-suspicion search of a probationer to a suspicionless search of a prison inmate. In *Nicholas*, the Court of Appeals for the Second Circuit correctly rejected *Knights*'s applicability. The court then properly followed controlling authority when it adopted the special needs test.

As the Supreme Court has repeatedly held, a reasonable-suspicion search differs from a suspicionless search in a constitutionally significant manner.[98] Since *Nicholas* involved a suspicionless search while *Knights* involved a reasonable-suspicion search, the cases turned on constitutionally distinct facts. Because the cases turned on constitutionally distinct facts, the Second Circuit was correct to hold that *Knights* did not bind its decision of which test to use.[99]

When the Second Circuit ultimately adopted the special needs test, it correctly followed controlling authority. The Supreme Court often has invoked the special needs test, either implicitly or explicitly, to adjudicate suspicionless search cases.[100] Because *Knights* did not overrule this authority, the Court of Appeals for the Second Circuit was correct to follow it in *Nicholas*. Also, although a court's own

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[97] *See* cases cited *supra* notes 62–67 and accompanying text.

[98] *See, e.g.*, United States v. Knights, 534 U.S. 112, 120 n.6 (2001) (considering a reasonable-suspicion search; reserving judgment on whether a suspicionless search would pass constitutional muster).

[99] *See* United States *ex rel.* Kustas v. Williams, 194 F.2d 642, 643 (2d Cir. 1952) (refusing to apply as precedent a Supreme Court case turned on constitutionally distinct facts).

[100] *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32, 42–45, 46–47 (2000).

earlier decisions do not bind it absolutely, the Second Circuit's decision in *Nicholas* to abide by its six-year-old precedent had the positive effect of contributing to the predictability of law.

B. Requiring a Warrant to be Impractical to Obtain

Although the court was correct to invoke the special needs test, it strayed from Supreme Court precedent when applying the test. Under Justice Blackmun's special needs test, a warrantless search is presumptively unreasonable unless: (1) the search serves a special government need aside from ordinary law enforcement; and (2) because of that need, a warrant is impractical to obtain.[101] The latter requirement is important because it narrows the government's ability to search without a warrant. By doing so, it gives effect to the Framers' intent to enshrine probable cause as the usual standard for the government to meet before it searches an individual.[102]

Under the Second Circuit's formulation of the special needs test, however, a search is presumptively unreasonable unless the search serves a special government need aside from ordinary law enforcement.[103] For all searches serving purposes outside the solitary realm of law enforcement, this test collapses into a mere balancing test. Under the balancing test, the government may sidestep the Warrant Clause so long as its interests in conducting a search outweigh an individual's privacy interest.[104] Yet such a low threshold runs counter to Supreme Court precedent. The Supreme Court turned away from such a balancing test because its laxity undermines the Framers' intent to require a warrant and probable cause in all but impractical circumstances. To

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[101] *See* New Jersey v. T.L.O., 469 U.S. 325, 351 (Blackmun, J., concurring).

[102] *See supra* notes 47-48 and accompanying text.

[103] *See id.* at 667 (discussing Roe v. Marcotte, 193 F.3d 72, 74, 78, 79 (2d Cir. 1999)).

[104] *See* cases cited *supra* notes 67–69.

follow the Court's controlling line of precedent and to abide by the Framers' intent, the Second Circuit should have stipulated that a warrantless search is presumptively unreasonable unless, under the circumstances surrounding the search, a warrant is impractical for the government to obtain.

Separately, in dictum, the court leaves language that would become troubling if another court were to pick it up. The court notes that New York's DNA-indexing statute called for suspicionless searches, which fail probable cause.[105] Because a magistrate may issue a warrant only upon a showing of probable cause, no warrant could issue to implement the statute.[106]

This language is troubling because, if a court were ever to adopt it, all reasonable-suspicion searches and suspicionless searches under a statute like New York's DNA-indexing statute would immediately satisfy the special needs test's impracticality requirement. Under such analysis, the requirement of impracticality would be almost meaningless. The government would become much freer to search individuals without a warrant or probable cause, undermining the Fourth Amendment.[107] A court would be more faithful to the Framers' intent by following Justice Blackmun's articulation of the special needs test. Under that articulation, a warrant is not impractical to obtain merely because a search fails probable cause; rather, as in *T.L.O.*, the time-consuming process of obtaining a warrant must defeat the government's very need for it.[108]

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[105] *Nicholas*, 430 F.3d at 671.

[106] *Id.*

[107] *See supra* notes 47–48 and accompanying text.

[108] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 30 (1968). There, the Court held:

> Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for

V. CONCLUSION

In *Nicholas v. Goord*, the United States Court of Appeals for the Second Circuit adjudicated a Fourth Amendment challenge to New York's DNA-indexing statute. The statute authorized suspicionless, warrantless searches of convicted felons' DNA. To assess the statute's constitutionality, the court had to invoke either a Fourth Amendment balancing test or a "special needs" test to assess the statute's constitutionality. Nimbly untangling a messy knot of precedent, the court properly followed the Supreme Court and paid heed to its own prior rulings by choosing to apply the special needs test.

When it applied the special needs test, however, the court strayed from Supreme Court precedent by refusing to consider a warrantless search to be presumptively unreasonable unless the warrant were impractical to obtain. This omission opens the door to a host of warrantless searches that would strike against the Fourth Amendment Framers' intent to enshrine probable cause and a warrant as the usual prerequisites to a constitutionally valid search. The Second Circuit instead should have clarified that a warrantless search is presumptively unreasonable unless the time-consuming process of obtaining a warrant would defeat the government's very need for it.

In coming years, DNA-indexing statutes likely will be a prominent and growing issue in the law. With hope, future courts will adopt the well-reasoned aspects of *Nicholas v. Goord* but will cast aside the case's more questionable analysis.

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the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.