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NOTES

UNCONSTITUTIONAL CONDITIONAL RELEASE: A PYRRHIC VICTORY FOR ARRESTEES' PRIVACY RIGHTS UNDER *UNITED STATES V. SCOTT*

INTRODUCTION

In *United States v. Scott*, the Ninth Circuit held that the common criminal procedure practice of conditioning pretrial release on the arrestee's consent to warrantless searches was an unconstitutional violation of the Fourth Amendment's prohibition against unreasonable searches and seizures.¹ Some observers quickly heralded the decision as a "victory for the privacy rights of defendants awaiting trial while on their own recognizance"² and praised Judge Kozinski's majority opinion as "extremely well-written and well-reasoned."³ The dissent cautioned, however, that the majority's conclusion "is contrary to history, practice and commonsense; it carries monumental implications for the pretrial procedures employed by every state in our circuit, as well as the United States."⁴ The *Harvard Law Review* echoed these concerns by noting that "while the court's holding purported to protect privacy and liberty interests 'by preventing governmental end-runs around the barriers to direct commands,' its reasoning threatens that aim."⁵ The most obvious

1. 450 F.3d 863, 874-75 (9th Cir. 2006).

2. Pam Smith, *9th Circuit Curbs Warrantless Searches*, RECORDER, Sept. 12, 2005, at 1.

3. Posting of Steven Kalar to Ninth Circuit Blog, <http://circuit9.blogspot.com/2005/09/case-o-week-off-scott-free-fourth.html> (Sept. 12, 2005, 15:37 PST).

4. *Scott*, 450 F.3d at 875 (Bybee, J., dissenting).

5. Recent Cases, 119 HARV. L. REV. 1630, 1637 (2006) (footnote omitted); see also Melanie D. Wilson, *The Price of Pretrial Release: Can We Afford To Keep Our Fourth Amendment Rights?*, 92 IOWA L. REV. 159, 197 (2007) ("[T]he Ninth Circuit's decision in *United States v.*

implication of the Ninth Circuit's decision will be that arrestees in Nevada will no longer be forced to make a Hobson's choice between pretrial confinement on the one hand and pretrial release with the condition of warrantless searches on the other. This seemingly progressive decision may lead to the incongruous result that arrestees' "Fourth Amendment rights will be secure while they rest in the county jail" as courts will simply eliminate the conditional release option for those charged with drug offenses.⁶

The facts of the case are typical of the modern pretrial approach to drug arrests in both the federal and state levels.⁷ Raymond Scott was arrested in Douglas County, Nevada, for possession of methamphetamine and drug paraphernalia.⁸ He was released two days later on his own recognizance (OR) after he consented to the conditions of random drug testing and warrantless searches of his home.⁹ Douglas Swalm, an officer of the Department of Alternative Sentencing, received an anonymous tip that Scott had a handgun, a sawed-off shotgun, and drug paraphernalia in violation of his conditional release.¹⁰ Swalm, accompanied by other law enforcement personnel, went to Scott's home to conduct a compliance visit.¹¹ Scott provided a urine sample that tested positive for methamphetamine, use of which was a violation of his OR release.¹² The officers then searched Scott's home for weapons and discovered a sawed-off shotgun, another violation of his OR release.¹³ Scott was subsequently charged with several firearm violations in district court, but the judge granted Scott's motion to suppress all the evidence of the violations, holding that the predicate search required probable cause in order to be legitimate.¹⁴ The government appealed the decision to the Ninth Circuit Court of Appeals, and that court upheld the district court's decision.¹⁵

Scott was wrongly decided.").

6. *Scott*, 450 F.3d at 889 (Bybee, J., dissenting).

7. *See infra* Part I.A.

8. *Scott*, 450 F.3d at 875 (Bybee, J., dissenting).

9. *Id.* at 875-76.

10. *Id.* at 876.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 875 (majority opinion).

Part I of this Note provides the historical backdrop for the *Scott* decision, including a brief outline of the emergence of the modern pretrial system. Part II provides a comprehensive survey of the few state and federal cases that have dealt with pretrial release conditioned on consent to warrantless searches and random drug testing. Part III closely examines the Ninth Circuit's rationale in *Scott* and challenges *Scott's* legal underpinnings. Part III.A examines the Ninth Circuit's analysis of the consent exception and concludes that the Ninth Circuit misapplied the unconstitutional conditions doctrine. Part III.B briefly examines the special needs exception to the Fourth Amendment and argues that the Ninth Circuit mischaracterized the status of pretrial arrestees by claiming that they are equivalent to free citizens and have identical privacy expectations. This Note argues that the correct understanding of pretrial arrestees' status is that they are in the "quasi-custody" of the state. "Quasi-custody" most accurately reflects a pretrial arrestee's diminished privacy expectation and would allow the state to conduct limited warrantless searches based on reasonable suspicion under the special needs exception.¹⁶ Finally, Part III.C examines the totality of the circumstances test in light of recent Supreme Court decisions and argues that under the new Court guidance, the reasonableness balancing test tips in favor of the government's ability to condition OR release on consent to warrantless searches.

I. BACKGROUND

A. *Evolution of the American Pretrial System*

In the American pretrial release system, pretrial detention and bail¹⁷ were historically the only two options afforded to criminal defendants.¹⁸ This traditional system was heavily criticized for being

16. See *infra* Part III.B.1.

17. The right to bail in all noncapital cases was established in the Judiciary Act of 1789. See Scott C. Wells, Note, *Criminal Procedure—United States v. Evans: District of Arrest or District of Prosecution?—Determining the Proper Tribunal for Review of Pretrial Bail Decisions in the Multi-district Context*, 18 W. NEW ENG. L. REV. 487, 488 (1996).

18. See CHRIS W. ESKRIDGE, PRETRIAL RELEASE PROGRAMMING: ISSUES AND TRENDS 17 (1983).

inherently inequitable and discriminatory.¹⁹ The constitutional safeguard against excessive bail, found in the Eighth Amendment,²⁰ through time became a hollow right because courts often deliberately set bail above defendants' means in order to detain them until trial.²¹ In 1966, the Bail Reform Act overhauled the traditional pretrial system.²² The 1966 Act, in response to mounting criticism that the bail system was simply "de facto pretrial detention through the imposition of insurmountable secured bond requirements," made "own recognizance," or "OR," release the primary pretrial option for all noncapital cases.²³ The pertinent part of the 1966 Bail Reform Act provided:

Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required.²⁴

The Act was a progressive step forward, but it largely ignored the perceived social epidemic of criminal activity by those released from custody while awaiting trial.²⁵

The Bail Reform Act of 1984 responded to the increasingly "alarming problem of crimes committed by persons on release" and "the need to consider community safety in setting nonfinancial pretrial conditions of release."²⁶ Both President Ronald Reagan and Chief Justice Warren Burger urged Congress to amend the 1966

19. See JOHN S. GOLDKAMP ET AL., *PERSONAL LIBERTY AND COMMUNITY SAFETY: PRETRIAL RELEASE IN THE CRIMINAL COURT* 3 (1995); see also ESKRIDGE, *supra* note 18, at 23.

20. U.S. CONST. amend. VIII ("Excessive bail shall not be required").

21. ESKRIDGE, *supra* note 18, at 20-21.

22. Pub. L. No. 89-465, 80 Stat. 214 (1966) (codified as amended at 18 U.S.C. §§ 3141-3151 (1982) (repealed 1984)).

23. Michael Harwin, *Detaining for Danger Under the Bail Reform Act of 1984: Paradoxes of Procedure and Proof*, 35 ARIZ. L. REV. 1091, 1093 (1993).

24. Bail Reforming Act of 1966, Pub. L. No. 89-465 § 3(a), 80 Stat. 214 (codified as amended at 18 U.S.C. § 3146(a) (1982) (repealed 1984)).

25. See Harwin, *supra* note 23, at 1093.

26. S. REP. NO. 98-225, at 3 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3185.

Bail Reform Act to address the problem of crimes committed by those on pretrial release.²⁷ In § 3142(b) of the amended statute, Congress explicitly embraced the notion that pretrial detention could be based on judicial concern that the defendant's release could jeopardize public safety.²⁸ Congress's decision to allow the defendant's potential danger to the community to be a factor in release decisions "mark[ed] a significant departure from the basic philosophy" of the 1966 Bail Reform Act, which was solely designed "to assure the appearance of the defendant at judicial proceedings."²⁹ Congress opted to give more discretion to judges to make more appropriate pretrial release determinations by granting judges the right to weigh the defendant's dangerousness to the community against the defendant's liberty interests.³⁰ The legality of denying pretrial release based solely on the defendant's perceived dangerousness to the community was upheld by the Supreme Court in *United States v. Salerno*.³¹

Another section of the 1984 Bail Reform Act, codified at 18 U.S.C. § 3142(c), allows courts to impose conditions on a defendant when granting pretrial release, and it is Nevada's version of this section that was at issue in *Scott*.³² Particularly, § 3142(c)(1)(B)(xiv) provides for a "catch-all provision"³³ that allows judges to impose "any other condition that is reasonably necessary to assure the appearance of the person as required and ... the safety of any other person and the community."³⁴ Section 3142(c)(1)(B)(ix) allows release to be conditioned on the defendant's consent to "refrain from

27. *Id.* at 5.

28. See Bail Reform Act of 1984, Pub. L. No. 98-473, § 203(a), 98 Stat. 1976 (codified at 18 U.S.C. § 3142(b) (Supp. II 1984)).

29. S. REP. NO. 98-225, at 3.

30. See *id.* at 5.

31. 481 U.S. 739, 748 (1987) (holding that "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest").

32. See *United States v. Scott*, 450 F.3d 863, 882 & nn.4-5 (9th Cir. 2006) (Bybee, J., dissenting).

33. S. REP. NO. 98-225, at 16.

34. 18 U.S.C. § 3142(c)(1)(B)(xiv) (2000). The court in *Scott* dealt explicitly with Nevada's version of 18 U.S.C. § 3142(c)(1)(B)(xiv). NEV. REV. STAT. ANN. § 178.484(8) (West, Westlaw through 2005 73d Reg. Sess.) (granting trial courts the ability to "impose such reasonable conditions on the person as it deems necessary to protect the health, safety and welfare of the community and to ensure that the person will appear at all times and places ordered by the court"); see *Scott*, 450 U.S. at 882 (Bybee, J., dissenting).

excessive use of alcohol, or any use of a narcotic drug or other controlled substance.”³⁵ The 1984 Bail Reform Act was drafted at a time when the federal government had just begun to wage the so-called war on drugs, so it is not surprising that illegal drugs are twice mentioned as a factor for the court to consider in pretrial release decisions.³⁶

In response to the growing drug crisis, courts have increasingly used the catch-all provision in § 3142(c)(1)(B)(ix), or the state law equivalent, to demand that a defendant consent to random drug tests and warrantless searches to ensure compliance with the pretrial condition of refraining from drug use.³⁷ Courts have viewed this option as a viable solution to growing concerns about jail overcrowding in general and the rise of drug-related arrests in particular.³⁸ The goal of this pretrial procedure mirrored the goal of the 1984 Bail Reform Act in that it aimed to closely monitor those charged with drug offenses to reduce the possibility of renewed drug-related crime pending trial.³⁹ The program offered courts the ability to avoid the harshness of pretrial detention while still maintaining some level of control over the arrestee that would not be possible in an unsupervised release situation.⁴⁰

35. 18 U.S.C. § 3142(c)(1)(B)(ix) (2000).

36. *See id.* § 3142(g)(1)-(3)(A).

37. A Department of Justice report estimated that sixty-eight percent of pretrial programs report using drug testing as a tool in pretrial supervision. *See* John Clark & D. Alan Henry, U.S. DEPT OF JUSTICE, MONOGRAPH NO. NCJ 199773, PRETRIAL SERVICES PROGRAMMING AT THE START OF THE 21ST CENTURY: A SURVEY OF PRETRIAL SERVICES PROGRAMS 39 (2003), available at <http://www.pretrial.org/pretrialsurvey.pdf>.

38. *See id.* at 39, 45 (estimating that approximately forty-four percent of jails in jurisdictions with pretrial programs are over capacity); *see also* Jennifer Latson, *NN Jail's Space Crisis*, DAILY PRESS (Newport News, Va.), Sept. 5, 2006, at A1 (reporting that the Newport News City Jail is designed to hold 248 inmates but is currently housing 693 inmates, and that eighty-four percent of these inmates are awaiting trial). Overcrowding jails across the country have been attributed to the federal “war on drugs.” *See id.*

39. *See* BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT OF JUSTICE, MONOGRAPH NO. NCJ 176340 INTEGRATING DRUG TESTING INTO A PRETRIAL SERVICES SYSTEM: 1999 UPDATE xiii (1999), available at <http://ncjrs.gov/pdffiles1/bja/176340-1.pdf> [hereinafter INTEGRATING DRUG TESTING].

40. *See id.*

B. Pretrial Services Systems

Jurisdictions began creating pretrial services systems in the late 1960s to fill the “legislative ‘gap’” that the 1966 Bail Reform Act created by demanding that judicial officers make individualized determinations when deciding whether to release a defendant.⁴¹ The federal government first began experimenting with pretrial services systems in 1974 by establishing ten demonstration agencies.⁴² Responding to the success of these demonstrations, Congress passed the Federal Pretrial Services Act of 1982⁴³ to establish a federal pretrial services agency.⁴⁴ The mission of the U.S. Probation and Pretrial Services System is “[t]o assist the federal courts in the fair administration of justice[,] [t]o protect the community[, and] [t]o bring about long-term positive change in individuals under supervision.”⁴⁵ These pretrial services agencies began incorporating drug testing, partly as a response to the 1984 Bail Reform Act, with a pilot program in the District of Columbia sponsored by the National Institute of Justice.⁴⁶ The program tested defendants when arrested solely to give the judicial officer a more objective basis for assessing the defendant’s risk at the bail hearing.⁴⁷ If the defendant tested positive for drugs, the court would order pretrial drug monitoring to reduce the risk of pretrial misconduct.⁴⁸ The success of this testing program spurred the Bureau of Justice Assistance to fund similar programs in various counties.⁴⁹ In 1995, President Bill Clinton

41. Peggy M. Tobolowsky & James F. Quinn, *Drug-related Behavior as a Predictor of Defendant Pretrial Misconduct*, 25 TEX. TECH L. REV. 1019, 1024 (1994).

42. See Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076, 2086 (codified as amended at 18 U.S.C. §§ 3161-3174 (2000)); see also U.S. Courts, Beginnings of Probation and Pretrial Services, <http://www.uscourts.gov/fedprob/history/beginnings.html> (last visited Mar. 12, 2007).

43. Pretrial Services Act of 1982, Pub. L. No. 97-267, 96 Stat. 1139 (codified as amended at 18 U.S.C. §§ 3152-3155 (2000)).

44. See U.S. Courts, *supra* note 42; see also JOHN SCALIA, DEPT OF JUSTICE, NO. NCJ 168635, FEDERAL PRETRIAL RELEASE AND DETENTION, 1996, at 8 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fprd96.pdf>.

45. See U.S. Courts, Mission, <http://www.uscourts.gov/fedprob/mission.html> (last visited Mar. 12, 2007).

46. See INTEGRATING DRUG TESTING, *supra* note 39, at 1.

47. See *id.*

48. See *id.*

49. See *id.*; see also James K. Stewart, *Quid Pro Quo: Stay Drug-free and Stay on Release*, 57 GEO. WASH. L. REV. 68, 73-74 (1988). See generally GOLDKAMP ET AL., *supra* note 19

directed Attorney General Janet Reno to implement a drug testing program for all federal arrestees in order to respond to the problem of arrestees who are "hooked on drugs and still committing crimes to support their habit" by reacting to the problem at "the earliest possible stage in a person's interaction with the criminal justice system—following arrest."⁵⁰

The results of these efforts have led to a federal pretrial system that combines drug screening with drug monitoring.⁵¹ These separate and distinct programs work in unison to ensure that the judicial officer has an objective way to, first, determine whether the arrestee who is involved with drugs is an appropriate candidate for pretrial release, and then, monitor that arrestee to ensure compliance so as to "break the chain between drug use and criminal activity for people who are under criminal supervision."⁵² As this pretrial procedure gained prominence in both the federal and state systems throughout the 1990s, arrestees initiated several legal challenges to its constitutionality.⁵³ Courts uniformly rejected these challenges so long as the judge who set the pretrial conditions had made an individualized determination of the arrestee's potential danger to the community or risk of flight.⁵⁴ Against this historical backdrop, the Ninth Circuit decided *Scott*.

II. THE CONSTITUTIONALITY OF THE PRETRIAL SYSTEM UNDER STATE AND FEDERAL PRECEDENT

Because the Supreme Court has not yet addressed the constitutionality of warrantless searches and random drug testing for pretrial arrestees and the issue has not been examined by any federal court of appeals,⁵⁵ this Note briefly examines several lower court decisions, which reveal a clear trend of courts upholding the constitutionality of pretrial release conditions.

(analyzing pretrial drug testing in Boston, Dade County, and Maricopa County).

50. See INTEGRATING DRUG TESTING, *supra* note 39, at 1-2 (quoting President Bill Clinton).

51. See *id.* at 2.

52. See Remarks on Ending Drug Use and Drug Availability for Offenders and Exchange with Reporters, 34 WEEKLY COMP. PRES. DOC. 47, 48 (Jan. 12, 1998).

53. See *infra* Part II.

54. See *infra* Part II.

55. See *United States v. Scott*, 450 F.3d 863, 864 (9th Cir. 2006).

A. Initial Federal Response

One of the earliest challenges to the practice of mandatory urinalysis as a condition of pretrial release in federal court was found in the 1987 case of *Berry v. District of Columbia*.⁵⁶ Berry claimed that mandatory urinalyses as a condition of release violated his Fourth Amendment rights because it amounted to an unreasonable search and seizure.⁵⁷ The district court held that a mandatory urinalysis did not raise issues of a “constitutional dimension,”⁵⁸ but the D.C. Circuit reversed, stating that “[m]andatory urinalysis clearly implicates rights secured under the Fourth Amendment.”⁵⁹ The testing could not be found constitutionally reasonable absent proof of a “positive correlation between drug use and pretrial criminality or non-appearance.”⁶⁰ Remanding the case, the D.C. Circuit provided guidance by stating that a testing program would “more likely than not be found reasonable” if there was an “individualized determination that an arrestee will use drugs while released pending trial.”⁶¹ The court also cautioned that the district court “must consider the scope of the particular intrusion, the manner in which it is conducted ... and the place in which it is conducted.”⁶² Finally, the testing must not be “more degrading than is reasonably necessary.”⁶³ Although the D.C. Circuit did not itself decide whether

56. 833 F.2d 1031 (D.C. Cir. 1987). Plaintiff Tyrone Berry was arrested several times in 1984 for drug charges. *See id.* at 1032. He was released on his own recognizance on the condition that he submit to urinalysis drug tests. *Id.* Berry failed to submit to the drug testing and was later arrested on separate drug charges. *Id.* The court then released him into third-party custody with the same urinalysis condition. *Id.* Berry tested positive for illegal drugs once, then failed to report for later scheduled tests. *Id.* The court ultimately set a \$2000 surety bond that Berry was unable to pay, so he was jailed. *Id.* at 1032-33.

57. *Id.* at 1033.

58. *Id.*

59. *Id.* at 1034. The Supreme Court ultimately confirmed the D.C. Circuit’s view that mandatory urinalyses implicates the Fourth Amendment. *See Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 616-17 (1989) (holding that although urinalysis does not entail an intrusion into the body, it is nevertheless a search under the Fourth Amendment because it “can reveal a host of private medical facts” and therefore is an intrusion upon a person’s reasonable expectation of privacy).

60. *Berry*, 833 F.2d at 1035.

61. *Id.*

62. *Id.* at 1036 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

63. *Id.* (quoting *Storms v. Coughlin*, 600 F. Supp. 1214, 1222 (S.D.N.Y. 1984)).

mandatory urinalysis was constitutional,⁶⁴ the court clearly signaled that a pretrial testing program could be constitutional as long as the government followed certain procedural safeguards.

B. States' Interpretations

Only California, Indiana, Maine, and the District of Columbia have ruled on the constitutionality of random drug testing and warrantless searches for pretrial arrestees. The leading decision was the 1995 California Supreme Court case *In re York*.⁶⁵ The court in *York* held that "neither the statutory nor the constitutional provisions upon which [the arrestees] rely prohibit a court, in appropriate circumstances, from conditioning OR release upon a defendant's agreement to comply with these challenged terms."⁶⁶ Echoing the holding in *Berry*, the court held that although a judge may constitutionally condition an arrestee's pretrial release on consent to warrantless searches and random drug testing, the judge must first make an "individualized determination as to the reasonableness of the conditions imposed ... based upon the circumstances presented in each [arrestee's] case."⁶⁷

The court reasoned that the Fourth Amendment proscribes "only *unreasonable* searches and seizures" and that it is not unreasonable to require those who are granted the privilege of pretrial release to live with conditions similar to those imposed on arrestees in pretrial confinement.⁶⁸ The court rejected the notion that an arrestee has the same privacy expectations as someone who has not been charged with a crime because a defendant "has no constitutional right to be free from confinement prior to trial."⁶⁹ Those on OR release have a "diminished liberty interest" and are more similar to probationers than to someone who has not been charged with any crime.⁷⁰

The *York* court noted that while the condition imposed did not relate directly to the likelihood of court appearance, it did "clearly

64. The D.C. Circuit found that the record before it contained insufficient evidence for it to make this determination. *Id.* at 1035.

65. *In re York*, 892 P.2d 804 (Cal. 1995).

66. *Id.* at 805.

67. *Id.* at 806.

68. *See id.* at 813.

69. *Id.*

70. *See id.*

relate to the prevention and detection of further crime and thus to the safety of the public.”⁷¹ This view harkens back to the change in the federal bail system that occurred when the 1984 Bail Reform Act explicitly embraced the notion that public safety ought to be a factor considered in setting conditions for pretrial release.⁷² Also embracing this notion, the *York* court went on to find a clear nexus between the condition of warrantless searches and random drug tests and the state’s legitimate interest in ensuring public safety.

In a later case, *Oliver v. United States*, the District of Columbia’s court of last resort followed the analysis in *York* when concluding that mandatory pretrial drug testing is constitutional.⁷³ That court, the D.C. Court of Appeals, held that the trial court had “discretionary authority ... to condition Oliver’s release on his submission to drug testing.”⁷⁴ The court noted that if a court has the power to insist that the defendant abstain from illegal drug use, “it must necessarily have the authority to test compliance with that order through drug testing.”⁷⁵ The court found that the government’s interest was “compelling” while the intrusion on individual liberty was only “minimal.”⁷⁶

In finding the nexus between random drug testing and the state’s compelling interest in crime prevention, which was essential to the program’s legality, the *Oliver* court relied on “numerous empirical studies” linking drug use to the probability of recidivism.⁷⁷ Furthermore, the court was satisfied that urinalysis was the “least restrictive” means that could be employed because it was “less intrusive than blood tests, and less restrictive than constant supervision and incarceration.”⁷⁸

The constitutionality of random drug screens as a condition of bail was again upheld by an Indiana court in the 2002 case *Steiner v.*

71. *Id.* at 810.

72. See 18 U.S.C. § 3142(e) (2000). This provision was upheld in *United States v. Salerno*, 481 U.S. 739, 746-52 (1987). State legislatures, including California’s, have adopted the 1984 Bail Reform Act’s idea that decisions about bail and OR release should be based not only on ensuring appearance at trial but also on public safety. See, e.g., CAL. PENAL CODE §§ 1270, 1271(c), 1272(b), 1275 (West 2004).

73. See 682 A.2d 186, 193 (D.C. 1996).

74. *Id.* at 189.

75. *Id.*

76. *Id.* at 190.

77. *Id.* at 191-92.

78. *Id.* at 192.

State.⁷⁹ As in *Berry*, the court did not rule on the constitutional question, but did indicate that an individualized determination would be required for any drug testing program to be reasonable.⁸⁰

A final case, from the Supreme Court of Maine, upheld warrantless searches and random drug testing of pretrial arrestees based on both the persuasive precedent of *York* and on a reason no other court had addressed, the special needs exception. In *State v. Ullring*,⁸¹ the court held:

There are situations in which the history and personal situation of the defendant, including the charges against him or her, justify a determination by a judicial officer that a random search condition is both necessary and the least restrictive alternative that will ensure the defendant's appearance and the integrity of the judicial process.⁸²

The court stressed that the defendant consented to the search, thus placing the burden on the defendant to prove that the condition was unreasonable.⁸³ The court claimed that while warrantless searches are usually unconstitutional, they can be constitutional if "special needs" made probable cause and warrants "impractical."⁸⁴ As in *York*, the *Ullring* court explicitly likened pretrial arrestees to probationers; it went on to hold that the needs and purposes of both the bail and probation systems presented "special needs" that justified warrantless searches.⁸⁵

The overwhelming weight of state and federal precedent points to the constitutionality of random pretrial drug testing and warrantless searches of pretrial arrestees' homes for drugs as long as those conditions are based on an individual determination of the arrestee's likelihood of continued drug use while awaiting trial. Despite the bulk of persuasive precedent, the majority in *Scott*

79. 763 N.E.2d 1024, 1027-28 (Ind. Ct. App. 2002).

80. *Id.* at 1028.

81. 741 A.2d 1065 (Me. 1999).

82. *Id.* at 1073.

83. *Id.*

84. *Id.* at 1072 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (holding that warrantless searches of probationer's home were valid because the special needs of probation enforcement made the warrant requirement impracticable)).

85. *Id.*

deemed the warrantless search unreasonable and thus a violation of Scott's Fourth Amendment rights.

III. THE MAJORITY'S RATIONALE IN *SCOTT* CRITIQUED

The Supreme Court's Fourth Amendment jurisprudence is frequently attacked by scholars as inconsistent, result-oriented, and confused.⁸⁶ The Supreme Court initially held that the text of the Fourth Amendment required a warrant based on probable cause for all governmental searches and seizures "subject only to a few specifically established and well-delineated exceptions."⁸⁷ The Court has since generally shed the warrant requirement and replaced it with the far more ambiguous "reasonableness" standard that allows the state much more flexibility.⁸⁸ The well-delineated exceptions to the warrant requirement have become so numerous that they have swallowed the rule.⁸⁹ The majority in *Scott*, however, perceived some vitality remaining in the rule when it examined and rejected three potential exceptions to the Fourth Amendment's warrant requirements: consent, special needs, and totality of the circumstances.⁹⁰

86. See, e.g., Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 897 (2002) ("[T]he Court's use of history in Fourth Amendment cases has been unpredictable and inconsistent."); Kathryn R. Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387, 1390 (2003) (noting that "sometimes the Court has stated that reasonableness requires case-by-case analysis, but at other times it has required bright-line rules" and that examination of the Court's "different rhetorical framings reveals the tremendous breadth that the Court has in constructing Fourth Amendment reasonableness, an evolving standard").

87. See *Katz v. United States*, 389 U.S. 347, 357 (1967).

88. See Urbonya, *supra* note 86, at 1391 ("[T]he Court created so many exceptions to the warrant requirement that the 'requirement' became only a 'general rule.'"). The Supreme Court has become fond of saying that the "touchstone of the Fourth Amendment is reasonableness." See *Samson v. California*, 126 S. Ct. 2193, 2201 n.4 (2006); *United States v. Knights*, 534 U.S. 112, 118 (2001); see also *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (stating that the "touchstone" of Fourth Amendment analysis is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security" (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968))); Note, *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Search Doctrine*, 119 HARV. L. REV. 2187, 2204 (2006) (stating that "the Court has become increasingly willing to undertake a free-floating 'reasonableness' inquiry that considers the 'totality of the circumstances'").

89. See *supra* note 88.

90. *United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006).

A careful analysis of the Ninth Circuit's rationale reveals that the majority made several radical departures from traditional Fourth Amendment analysis.⁹¹ First, the majority misused the doctrine of unconstitutional conditions when it dismissed the argument that Scott waived his Fourth Amendment rights by consenting to the bail conditions.⁹² Second, the majority explicitly redefined the status of a pretrial arrestee in order to recognize greater privacy expectations than an arrestee truly has.⁹³ Finally, the court incorrectly required too onerous a burden to show that special needs existed, demanding empirical proof despite conceding that congressional findings had been made.⁹⁴ These legal conclusions deserve close scrutiny because together they work to tip the totality of the circumstances balancing test in favor of the pretrial arrestee and clear the path for the holding that probable cause must exist anytime the government wishes to search the home of a pretrial arrestee.

A. Consent and Unconstitutional Conditions

Perhaps the most compelling argument that the condition of warrantless searches and random drug tests should be permissible is that the defendant consented to these restrictions when he waived his Fourth Amendment rights. A person can consent to give up constitutional rights, including the Fourth Amendment right against searches and seizures, so long as the consent is truly voluntary.⁹⁵ To be voluntary, consent must not be "coerced, by explicit or implicit means, by implied threat or covert force."⁹⁶ The issue of consent looms large in *Scott* because if it is determined that

91. For an excellent discussion challenging the Ninth Circuit's rationale in *Scott*, see generally Wilson, *supra* note 5, which was published during the editing of this Note.

92. *Scott*, 450 F.3d at 866-68.

93. *See id.* at 873-74 (distinguishing a pretrial arrestee from a probationer, whose reasonable expectations of privacy are lower).

94. *See id.* at 870-72.

95. *See* DARIEN A. MCWHIRTER, SEARCH, SEIZURE, AND PRIVACY 10 (1994); *see also* Kaupp v. Texas, 538 U.S. 626, 631 (2003) (holding that police who woke a teenager from his own bed at 3:00 a.m., stating only that they needed "to go and talk" did not gain voluntary consent and that his compliance was "mere submission to a claim of lawful authority"); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (holding that determinations of the voluntariness of a search must be based on "the totality of all the surrounding circumstances"); *Zap v. United States*, 328 U.S. 624, 628 (1946) (holding that Fourth Amendment rights "may be waived").

96. *Schneckloth*, 412 U.S. at 228.

Scott voluntarily waived his constitutional right against warrantless searches by accepting the government's offer of OR release, then Fourth Amendment concerns largely become moot.⁹⁷

1. Consent and the Imprecise Doctrine of Unconstitutional Conditions

The *Scott* majority attempted to defuse the consent issue by invoking the doctrine of unconstitutional conditions.⁹⁸ This doctrine stands for the proposition that "even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights."⁹⁹ In other words, the doctrine of unconstitutional conditions "declares that whatever an express constitutional provision forbids government to do directly it equally forbids government to do indirectly."¹⁰⁰ On its face, the doctrine of unconstitutional conditions seems ready-made for the criminal procedure practice at issue in *Scott*. The government was, at the very least, inducing Scott to give up his constitutional right against unreasonable searches and seizures in exchange for the discretionary benefit of OR release. Such a governmental offer appears to place the defendant "between the rock and the whirlpool"¹⁰¹ of having to choose between the evils of pretrial detainment on the one hand and pretrial release absent constitutional safeguards on the other.

97. See *Scott*, 450 F.3d at 887 (Bybee, J., dissenting); see also Matthew S. Roberson, Note, "Don't Bother Knockin'... Come on In!": The Constitutionality of Warrantless Searches as a Condition of Probation, 25 CAMPBELL L. REV. 181, 192 (2003) ("Consent effectively removes the issue of reasonableness from Fourth Amendment discussions.").

98. See *Scott*, 450 F.3d at 866-68.

99. Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6-7 (1988); see also Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421-22 (1989) (defining the doctrine as a problem that arises when "government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference").

100. William W. Van Alstyne, *The Demise of the Right-privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-46 (1968).

101. *Frost & Frost Trucking Co. v. R.R. Comm'n of Cal.*, 271 U.S. 583, 593 (1926).

The majority in *Scott* relied on only one case, *Dolan v. City of Tigard*,¹⁰² and two academic articles¹⁰³ to support its use of the doctrine of unconstitutional conditions.¹⁰⁴ As a preliminary matter, the majority's reliance on these three sources raises an eyebrow. Both academic articles, though certainly highly esteemed, were written almost two decades ago and thus do not take into account the doctrine's subsequent evolution. The court's reliance on *Dolan* is also problematic because *Dolan* involved property rights and regulatory takings¹⁰⁵ and is easily distinguishable from the criminal procedure issue in *Scott*.

Beyond these preliminary concerns, the majority's decision to use the doctrine requires a closer analysis. Many have criticized the doctrine of unconstitutional conditions.¹⁰⁶ Perhaps the most famous opponent of the doctrine was Justice Oliver Wendell Holmes, Jr., who declared, "[i]f the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way."¹⁰⁷ He most famously said that though a policeman has a constitutional right "to talk politics ... he has no constitutional right to be a policeman."¹⁰⁸ In other words, the State's "greater power to exclude might be said to include the lesser power to admit on condition."¹⁰⁹

Justice Sutherland, Holmes's contemporary on the bench, was an early champion of the doctrine. Sutherland believed, "[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the United States

102. 512 U.S. 374 (1994).

103. The court relied on articles by Richard Epstein and Kathleen M. Sullivan. See Epstein, *supra* note 99; Sullivan, *supra* note 99.

104. See *United States v. Scott*, 450 F.3d 863, 866-67 (9th Cir. 2006).

105. See *Dolan*, 512 U.S. at 377.

106. See, e.g., Sullivan, *supra* note 99, at 1416 (noting that the doctrine is "riven with inconsistencies"); Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 SAN DIEGO L. REV. 337, 338 (1989) (arguing that the doctrine is "far too crude and general a way to address the multiple possible collisions between constitutional protections and the modern regulatory state"); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 620 (1990) (reasserting the claim that the doctrine is "too crude and too general to provide help in dealing with contested cases").

107. *W. Union Tel. Co. v. Kansas*, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting).

108. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (1892).

109. RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 7 (1993).

Constitution may thus be manipulated out of existence.”¹¹⁰ Ultimately, Sutherland’s views seem to have prevailed and the doctrine of unconstitutional conditions thrived during the *Lochner* Era as a tool to invalidate laws that stifled corporations’ freedoms.¹¹¹ Under the Warren Court, the doctrine took on renewed popularity as a way of protecting individual liberties, especially First Amendment Rights.¹¹² The Rehnquist Court also applied the doctrine, most notably to the Takings Clause, to protect property rights.¹¹³ Today, the doctrine remains viable but frustratingly elusive because there is no clearly defined unifying theory that explains why “conditional offers are sometimes constitutionally permissible and sometimes not.”¹¹⁴ The theory continues to “roam[] about constitutional law like Banquo’s ghost, invoked in some cases, but not in others.”¹¹⁵ Despite the best efforts of scholars, the doctrine of unconstitutional conditions continues to be controversial and elusive.¹¹⁶ This frustration was best summarized by Justice Stevens in his dissent in *Dolan*: “Although it has a long history, the ‘unconstitutional conditions’ doctrine has for just as long suffered from notoriously inconsistent application; it has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question.”¹¹⁷

2. The Tension Between Unconstitutional Conditions and Criminal Waiver

These inconsistencies raise an important preliminary question: is criminal procedure an appropriate area of the law in which to apply the unconstitutional conditions doctrine? The majority in *Scott* thought it was, stating, “[t]he doctrine [of unconstitutional

110. *Frost & Frost Trucking Co. v. R.R. Comm’n of Cal.*, 271 U.S. 583, 594 (1926).

111. *See Sullivan*, *supra* note 99, at 1416.

112. *Id.*

113. Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 887-88 (1995).

114. Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 3 (2001).

115. Epstein, *supra* note 99, at 10-11.

116. *See Berman*, *supra* note 114, at 3.

117. *Dolan v. City of Tigard*, 512 U.S. 374, 407 n.12 (1994) (Stevens, J., dissenting) (citation omitted).

conditions] is especially important in the Fourth Amendment context.”¹¹⁸ Similarly, in an early article, Howard E. Abrams wrote that the Supreme Court “by intellectual abstinence, declined to extend the doctrine of unconstitutional conditions to criminal procedure, its most natural setting.”¹¹⁹ Abrams argued that rights to a “trial by jury, to confront one’s accusers, and to refuse to testify against oneself” were “enshrined as the supreme law of the land ... because they were thought to be so important that they should not be denied even if a legislature thinks there is a good reason for doing so.”¹²⁰

On the other hand, Judge Callahan’s dissent in *Scott* claimed that “no court has ever suggested that Fourth Amendment rights cannot be temporarily limited by agreement, at least not when the agreement is rationally related to changes in the individual’s legal status.”¹²¹ Indeed, the Supreme Court appears to agree. It has rejected the concerns of critics like Abrams and has refused to extend the doctrine to criminal procedure.¹²² The Court has explicitly said that, “[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.”¹²³ For example, the right to a jury trial is “waived all the time through plea bargaining, without a

118. *United States v. Scott*, 450 F.3d 863, 867 (9th Cir. 2006).

119. Howard E. Abrams, *Systemic Coercion: Unconstitutional Conditions in the Criminal Law*, 72 J. CRIM. L. & CRIMINOLOGY 128, 128 (1981) (footnote omitted).

120. *Id.* at 150-51.

121. *Scott*, 450 F.3d at 896 (Callahan, J., dissenting).

122. *See, e.g.*, *Ricketts v. Adamson*, 483 U.S. 1, 10 (1987) (holding that Fifth Amendment defense of double jeopardy is waivable); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (holding that a guilty plea waives Fifth Amendment right to confront one’s accusers and Sixth Amendment right to a jury trial); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (holding that a defendant may waive Sixth Amendment right to counsel). *But see* *United States v. Knights*, 534 U.S. 112, 118 n.4 (2001). In *Knights*, the Court mentioned that the doctrine of unconstitutional conditions could be a potential limit to one’s consent, but then made no further comment on the possibility. *See id.* By not rejecting the doctrine outright, the *Knights* Court implicitly suggested that the Court could be willing to extend the doctrine of unconstitutional conditions to the criminal procedure setting, given the right facts. *See* Wilson, *supra* note 5, at 207 (“[W]hile the unconstitutional conditions doctrine has been sparingly applied to invalidate a criminal defendant’s ‘choice’ between two competing constitutional rights, the Supreme Court appears to have accepted the doctrine and certainly has never expressly rejected its application.”).

123. *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995); *see also* *Peretz v. United States*, 501 U.S. 923, 936 (1991) (holding that the “most basic rights of criminal defendants are ... subject to waiver”).

second thought being given to the unconstitutional conditions doctrine.”¹²⁴ Defendants waive these constitutional rights in order to gain some discretionary benefit, such as a more favorable plea bargain or the dropping of charges, yet the Court has refused to apply the doctrine of unconstitutional conditions to these types of bargains and has instead embraced the doctrine of criminal waiver.¹²⁵ The doctrines of unconstitutional conditions and criminal waiver address exactly the same issue, yet the underlying presumptions could not be more different.¹²⁶ Criminal waiver presumes that the individual is in the best position to decide whether to barter away a constitutional right for a governmental benefit, while unconstitutional conditions paternalistically presumes that the government always has an unfair advantage that makes any deal coercive.¹²⁷ “[C]riminal waiver turns the doctrine of unconstitutional conditions on its head.”¹²⁸

In light of the important place of criminal waiver, the *Scott* majority’s reliance on the unconstitutional conditions doctrine for a criminal procedure issue seems misplaced. But the elusive nature of the doctrine,¹²⁹ and the Supreme Court’s perhaps confused Fourth Amendment jurisprudence,¹³⁰ leave open the possibility that the Court might one day apply the doctrine in a modern criminal case, perhaps even one similar to *Scott*. With that caveat in mind, it is necessary to consider how the modern version of the doctrine of unconstitutional conditions would properly be applied to the facts

124. Merrill, *supra* note 113, at 875; see Marcy Jena King, *Priceless Process-nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV., 113, 114-15 (“Almost every feature of the criminal litigation process, including rights and requirements previously considered inalienable, have become bargaining chips.”).

125. See Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 832 (2003) (noting that although the “Court routinely invalidates deals involving First Amendment rights, it takes exactly the opposite approach in the criminal context, where individuals are free to use their constitutional rights as bargaining chips”); see also Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281, 336 (2003) (stating that most waivers occur in the criminal setting and that the language of the Fourth Amendment is perfectly “compatible” with voluntary waiver).

126. See Mazzone, *supra* note 125, at 802.

127. See *id.* at 832.

128. *Id.*

129. See *supra* Part III.A.1.

130. See *supra* note 86 and accompanying text.

of *Scott*. A useful starting point for this analysis is the Court's most recent interpretation of the doctrine in *Dolan*.

3. Applying the Dolan Test

In *Dolan*, the city of New Tigard approved Dolan's building permit only on the condition that Dolan consent to dedicating a portion of her land for a flood plain and as a pedestrian pathway.¹³¹ The Court invalidated the proposed exaction by relying on the doctrine of unconstitutional conditions,¹³² stating that, "[u]nder the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right ... in exchange for a discretionary benefit conferred by the government *where the benefit sought has little or no relationship to the property.*"¹³³ The emphasized portion of the Court's definition of unconstitutional conditions represents a modification of the traditional definition of the doctrine. The Court now required an "essential nexus" between the benefit and the right,¹³⁴ and also demanded that there be a "rough proportionality" between the benefit and the right.¹³⁵ Although in *Dolan*, the "essential nexus" and "rough proportionality" tests worked to invalidate a condition, they in fact severely limited the doctrine of unconstitutional conditions, because the Court was now "more concerned with the nature and value of the right, and the government's rationale for requiring the citizen to give it up, than it [was] with problems of consent."¹³⁶ By focusing more on the nature of the right than on the power imbalance or level of coercion, the Court implicitly rejected Epstein's theory that the doctrine of unconstitutional conditions is aimed at leveling the playing field when an individual seeks to strike a bargain with the government's monopoly.¹³⁷

Dolan's nexus requirement thus undercut the *Scott* majority's reasoning that the doctrine of unconstitutional conditions was

131. *Dolan v. City of Tigard*, 512 U.S. 374, 379-80 (1994).

132. *See id.* at 396.

133. *Id.* at 385 (emphasis added).

134. *Id.* at 386 (quoting *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987)).

135. *Id.* at 391.

136. Merrill, *supra* note 113, at 861.

137. *See id.* at 860-64; *see also* Epstein, *supra* note 99, at 16-25.

meant to ensure voluntary consent when dealing with the government.¹³⁸ Indeed, even prior to the *Dolan* decision, Professor Sullivan noted that “focusing on coercion alone misses the point;” in an unconstitutional condition question, the “germaneness” of the condition is perhaps the more important factor.¹³⁹ The majority in *Scott* relied on Sullivan’s article and yet, significantly, failed to analyze the “germaneness” factor when concluding that there was an unconstitutional condition. This “germaneness” factor means simply that, after *Dolan*, the real question is not whether the individual consented, but rather whether there was an essential link between the right infringed and the benefit sought.

Aside from the importance of this link, expressed in the nexus and proportionality requirements, there seems to be another element at play in the application of the unconstitutional conditions doctrine, and perhaps even in the threshold question of whether the doctrine will be applied at all. That element is the distinction between constitutional rights that are simply private entitlements and those that are public goods.¹⁴⁰ The notion that some constitutional rights are like public goods is essential to understanding the unconstitutional conditions doctrine, according to professor Merrill, who suggests that the doctrine must be examined as a “Public Goods Model” that focuses on the “effects on third parties.”¹⁴¹ This theory helps “explain why some constitutional rights are protected by a more robust version of the unconstitutional conditions doctrine than are other rights.”¹⁴² The explanation, according to Merrill, lies in the level of public benefit associated with various rights.¹⁴³ This might be what Professor Sullivan meant when she stated that the unconstitutional conditions doctrine protects “[p]referred constitutional liberties.”¹⁴⁴

Under this understanding of the doctrine, it may be useful to determine the level of public benefit associated with the Fourth

138. See Merrill, *supra* note 113, at 864 (stating that “the *Dolan* decision must be counted against the proposition that government coercion is the key to understanding the unconstitutional conditions doctrine”).

139. Sullivan, *supra* note 99, at 1456-57.

140. Merrill, *supra* note 113, at 862.

141. *Id.* at 870.

142. *Id.* at 874.

143. *Id.*

144. Sullivan, *supra* note 99, at 1490 (emphasis added).

Amendment. Clearly, the individual asked to waive the right against unreasonable searches and seizures values it highly, but there are few public benefits.¹⁴⁵ The “collective impact” of waiver of the Fourth Amendment is minimal because the “waiver by one defendant is seldom binding on another.”¹⁴⁶ This interpretation of the Fourth Amendment helps to explain why some commentators have called the Fourth Amendment “a kind of second-class protection” that is not as highly regarded as other constitutional rights.¹⁴⁷ It is the lack of collective impact and public good that helps explain why courts allow criminal defendants to freely barter away their individual Fourth Amendment rights.¹⁴⁸

Of course, the Court could determine that the Fourth Amendment deserves special protection and that there are very real public goods concerns at issue.¹⁴⁹ Yet, even if the Court did apply the unconstitutional conditions doctrine in its most robust form, it would probably still uphold a condition like the one in *Scott* because there is arguably a link between the benefit and the right that would satisfy the nexus requirement. In attaching the condition to release, the government is endeavoring to ensure that the benefit of OR release is not abused and that the conditions of release are met—a purpose indicative of a satisfactory nexus. In this case, the least restrictive way of ensuring compliance is to have random drug tests and

145. Merrill, *supra* note 113, at 875.

146. *Id.* at 879; *see also* *Georgia v. Randolph*, 126 S. Ct. 1515, 1526 (2006) (holding that “a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident”).

147. ROBERT M. BLOOM, *SEARCHES, SEIZURES, AND WARRANTS* 113 (2003); *see also* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 230, 233 (1993) (arguing that although the “Fourth Amendment ranks as a fundamental right deserving strict judicial protection,” the evidence of the Supreme Court’s “disinterest in Fourth Amendment freedoms is abundant”).

148. Merrill, *supra* note 113, at 879.

149. *See id.* at 888. Perhaps the Court would consider the public good of ensuring privacy rights for as many citizens as possible to avoid any slippery slope into a police state. *See* *Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979) (stating that “if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry ... those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protections was”). Although it may be easy to deride Fourth Amendment protections as tools of defense attorneys to free “dangerous felons,” it is fundamental that “the Constitution does not tolerate the tactics of a police state.” Maclin, *supra* note 147, at 197-98.

warrantless searches of the arrestee's home for drugs. Otherwise, it would be far too easy for the defendant to violate the conditions of release with impunity. These conditions, as one state court noted, are "both necessary and the least restrictive alternative that will ensure the defendant's appearance and the integrity of the judicial process."¹⁵⁰

This argument that the pretrial release program did not impose an unconstitutional condition ironically finds support in the two hypothetical situations that the *Scott* majority employed to bolster its conclusion that the government *did* violate the doctrine of unconstitutional conditions. The court argued: "The right to keep someone in jail does not in any way imply the right to release that person subject to unconstitutional conditions—such as chopping off a finger or giving up one's first-born."¹⁵¹ These two rather extreme examples highlight the uncontroversial fact that not all pretrial conditions would meet the *Dolan* "nexus" and "rough proportionality" tests. Certainly, the chopping off of a finger would fail the nexus test because the deprivation of the right to bodily integrity bears no relationship to the benefit of pretrial release. Furthermore, while treating the child as collateral bail may meet the nexus test because the deprivation would help ensure the defendant's court attendance, it would miserably fail the rough proportionality test. These examples of unconstitutional conditions only throw into stark relief the more closely related and more proportional condition of pretrial drug testing. The *Scott* court was right to emphasize that in order for a condition to be constitutional, there must be an individualized determination that narrowly tailors the pretrial condition to the defendant, but the court's expansive holding was not necessary to uphold this requirement, which had already been demanded by every court that had ruled on pretrial conditional release.¹⁵²

B. Special Needs

A growing exception to the Fourth Amendment's probable cause requirement is the "special needs" doctrine. This doctrine holds that

150. *State v. Ullring*, 741 A.2d 1065, 1073 (Me. 1999).

151. *United States v. Scott*, 450 F.3d 863, 866 n.5 (9th Cir. 2006).

152. *See supra* Part II.

if special needs exist "beyond the normal need for law enforcement" that make the probable cause requirement "impracticable," then searches based on something less than probable cause are allowable.¹⁵³ In other words, the Court has determined that, "where the 'Government seeks to *prevent* the development of hazardous conditions,'" the probable cause standard "may be unsuited to determining the reasonableness of administrative searches."¹⁵⁴ The special needs exception has been used to permit suspicionless drug testing for certain narrow classes of individuals, such as high school students,¹⁵⁵ railway workers,¹⁵⁶ and customs employees.¹⁵⁷ The Supreme Court in *Griffin v. Wisconsin* determined that the need to verify whether a probationer was complying with the terms of probation also represented a "special need" that justified warrantless searches of the probationer's home by the probation officer without probable cause.¹⁵⁸ The Court stressed that Griffin's status as a probationer was crucial in the special needs analysis because probationers and parolees "do not enjoy 'the absolute liberty to which every citizen is entitled, but only ... conditional liberty properly dependent on observance of special [probation] restrictions.'"¹⁵⁹ The status of pretrial arrestees thus must be fully fleshed out in order to determine whether a special needs exception would be appropriate in *Scott*.

1. *The Legal Status of Pretrial Arrestees*

The state courts consistently equated a pretrial arrestee's status to that of a probationer and thus relied on the well established line of Supreme Court cases dealing with probationer's rights as

153. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment)).

154. *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 828 (2002) (quoting *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 667-68 (1989)).

155. *See id.* at 828-29.

156. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989).

157. *See Von Raab*, 489 U.S. at 673-75.

158. *See* 483 U.S. 868, 873-74 (1987) ("A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.").

159. *Id.* at 874 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

dispositive.¹⁶⁰ The Ninth Circuit rejected this comparison and treated an arrestee's rights as the same as those of a normal citizen because arrestees "are ordinary people who have been accused of a crime but are presumed innocent."¹⁶¹ The majority insisted that "[p]robationers are different" and that a pretrial arrestee's "privacy and liberty interests were far greater than a probationer's."¹⁶² The dissent, on the other hand, believed that arrestees "may be treated differently than ordinary citizens without violating the presumption of innocence."¹⁶³ The dissent acknowledged that there are important differences between a pretrial arrestee and a probationer but claimed that the "distinction is not constitutionally relevant" in determining whether one's Fourth Amendment rights have been violated.¹⁶⁴ The dissent never explicitly categorized pretrial arrestees' status, opting instead to claim that arrestees' privacy expectations are "somewhat greater than that of a probationer, parolee, or presentence releasee, but it is less than that of an 'ordinary citizen.'"¹⁶⁵

Neither the majority's position nor the dissent's is intellectually satisfying. The status of pretrial arrestees has long represented a point of contention as courts have wrangled for a definition that truly encapsulates pretrial arrestees' unique position in the criminal justice system. The lack of a clear definition of a pretrial arrestee's status is a lacuna in criminal law that must be filled. A clear definition of a pretrial arrestee's status would make either a "special needs" or a "totality of the circumstances" analysis more consistent and fair.

The controversy over pretrial arrestees' status first developed in the context of pretrial detainees, that is, those not released on bail or their own recognizance.¹⁶⁶ Pretrial detainees are considered "a special category of inmates" who retain the "same rights as other citizens except to the extent necessary to assure their appearance

160. See *supra* Part II.B.

161. *United States v. Scott*, 450 F.3d 863, 871 (9th Cir. 2006).

162. *Id.* at 873-74.

163. *Id.* at 883 (Bybee, J., dissenting).

164. *Id.*

165. *Id.* at 885.

166. See JOHN W. PALMER & STEPHEN E. PALMER, *CONSTITUTIONAL RIGHTS OF PRISONERS* 39-40 (7th ed. 2004).

at trial and the security of the institution.”¹⁶⁷ Pretrial detainees’ hybrid status has created a patchwork of constitutionally permissible restrictions on their rights as long as the restrictions are not aimed to punish.¹⁶⁸ Courts have thus held that strip searches of pretrial detainees must be “based upon reasonable suspicion that [the] particular detainee is concealing weapons or contraband.”¹⁶⁹ Some courts have held that pretrial detainees do not have a constitutional right to receive a minimum number of visitors per week or to have the visits last a minimum length of time because the prison created these restrictions for security reasons, not to punish.¹⁷⁰

The fact that a pretrial detainee can be lawfully confined and thus have many rights restricted in the name of institutional security does not squarely answer the question of what the rights are of a pretrial arrestee who is not detained. The dissent in *Scott* suggested that the pretrial arrestee ought to have the same diminished expectation of privacy that a pretrial detainee has because pretrial arrestees “are separated from confinement only by a few hundred dollars or a signature on a consent form.”¹⁷¹ Essentially, this view holds that a pretrial arrestee who is released pending trial has the same diminished privacy expectations as a pretrial arrestee who is confined and therefore that all the administrative (and warrantless) searches and seizures that are allowed to ensure the good order and discipline of a prison can be lawfully

167. *Id.*; see also *Bell v. Wolfish*, 441 U.S. 520, 546-47 (1979) (holding that “preserving internal order and discipline are essential goals that may require limitation or retraction of retained constitutional rights of both convicted prisoners and pretrial detainees” and that “[p]rison officials must be free to take appropriate action”).

168. See *Bell*, 441 U.S. at 537-38; PALMER & PALMER, *supra* note 166, at 40; see also *Occhino v. United States*, 686 F.2d 1302, 1306 (8th Cir. 1982) (holding that “shackling and searches to which appellant was subject were not in disproportion to the legitimate objectives of pretrial detention”).

169. PALMER & PALMER, *supra* note 166, at 40.

170. See *Jordan v. Wolke*, 615 F.2d 749, 754 (7th Cir. 1980) (upholding the prison’s blanket policy against visitors since the restriction was not meant to be a punishment); *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 758 (3d Cir. 1979) (holding that the Fourteenth Amendment right to due process is not denied when contact visits for county jail inmates was prohibited due to security concerns rather than as a method of punishment); *Cooper v. Morin*, 424 N.Y.S.2d 168, 170-71 (N.Y. 1979), *cert. denied*, 446 U.S. 984 (1980) (holding that detainees are “entitled to contact visits of reasonable duration” based on the New York Constitution, but not based on the United States Constitution).

171. *United States v. Scott*, 450 F.3d 863, 886 (9th Cir. 2006) (Bybee, J., dissenting).

applied to all pretrial arrestees. This argument suffers from one glaring flaw—the only reason the Supreme Court has upheld warrantless searches for those in pretrial confinement is to ensure the administrative security of the prison system, not as a form of punishment.¹⁷² This reasoning suggests, that because the government does not have administrative security concerns when it releases a pretrial arrestee, the pretrial arrestee should not have to suffer from any of the same deprivations. Just because “individuals confined in prison pending trial have no greater privacy rights than other prisoners”¹⁷³ does not mean that arrestees who are not imprisoned have the same privacy rights as prisoners. As the majority notes, searches “justified by institutional needs such as prison security and escape prevention” are “inapplicable when a defendant is awaiting trial outside of a detention facility.”¹⁷⁴

Despite this flaw in the dissent’s argument, there is something intuitively correct in the dissent’s assertion that “individuals charged with a crime and released before trial are not like ordinary citizens.”¹⁷⁵ As Justice Scalia noted, “[t]he fact of prior lawful arrest distinguishes the arrestee from society at large.”¹⁷⁶ The majority’s rationale that a pretrial arrestee must be treated as an ordinary citizen because of the presumption of innocence is thoroughly unconvincing¹⁷⁷ because the Supreme Court has explicitly held that the presumption of innocence is simply a trial right that has “no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.”¹⁷⁸ This view of the presumption of innocence is necessary for practical reasons; otherwise, a pretrial defendant would never be allowed to be confined prior to a guilty verdict regardless of the severity of the crime charged.

A different perspective from the more extreme positions of the majority and dissent strikes the proper legal balance: the Supreme Court should explicitly hold that all pretrial arrestees, whether

172. See *supra* notes 167-70 and accompanying text.

173. *Scott*, 450 F.3d at 878 (Bybee, J., dissenting).

174. *Id.* at 873 n.14 (majority opinion).

175. *Id.* at 886 (Bybee, J., dissenting).

176. *Thornton v. United States*, 541 U.S. 615, 630 (Scalia, J., concurring).

177. See *Scott*, 450 F.3d at 874.

178. *Bell v. Wolfish*, 441 U.S. 520, 533 (1979).

released or confined, are in the "quasi-custody" of the government. This view reflects the reality of pretrial arrestees because once arrested, arrestees no longer enjoy the same rights as ordinary citizens.¹⁷⁹ The dissent noted that "a defendant released on his own recognizance, even though he has not been charged with a crime, is considered to be 'in custody' for some purposes."¹⁸⁰ The dissent suggested the quasi-custodial status of pretrial arrestees when it wrote, "[i]mportantly, the common law seems to have regarded the difference between pretrial incarceration, bail, and other ways to secure a defendant's court attendance as different 'methods of retaining control over a defendant's person[,] which was in custody.'"¹⁸¹

The Supreme Court seems to consider the "quasi-custody" status of an individual an important element in most special needs cases. For example, the Court held that high school students are under the "custodial responsibility and authority" of the government and that this status helped justify suspicionless drug testing.¹⁸² The Court also stressed that students have a reduced expectation of privacy because they are "subjected to greater controls" in the name of "maintaining discipline, health, and safety."¹⁸³ This reasoning harkens back to *Griffin*, in which the Court emphasized that probationers were in "an ongoing supervisory relationship—and one that is not, or at least not entirely, adversarial."¹⁸⁴ It is important to recall that the officer who conducted the warrantless inspections in *Scott* worked for the Department of Alternative Sentencing and was not a police officer.¹⁸⁵ The officer's motives were primarily to ensure that Scott was complying with his release conditions; he was not conducting a police investigation, even though he was accompanied

179. Most obviously, arrestees' right to freely travel is severely abridged.

180. *Scott*, 450 F.3d at 886 (Bybee, J., dissenting) (citing *Hensley v. Municipal Ct.*, 411 U.S. 345, 349 (1973)).

181. *Id.* (quoting *Albright v. Oliver*, 510 U.S. 266, 277-78 (1994) (Ginsburg, J., concurring)).

182. *Bd. of Educ. v. Earls*, 536 U.S. 822, 830-31 (2002).

183. *See id.*; *see also* *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 657 (1995) (discussing the reduced privacy interests of student athletes because of their voluntary participation in student athletics).

184. *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987). It is important to acknowledge that most aspects of the federal and state pretrial systems, like the probation system in *Griffin*, are at least in part nonadversarial. *See supra* Part I.B.

185. *See Scott*, 450 F.3d at 876 (Bybee, J., dissenting).

by various police officers.¹⁸⁶ Again, the pretrial services mission is not only to protect the community but also to ensure the fair administration of justice and to help bring positive change into the lives of those under suspicion.¹⁸⁷ Scott's status as a pretrial arrestee who was in an ongoing quasi-custodial relationship with the criminal justice system gives credence to the government's claim that there are "special needs" that justify warrantless searches. Explicitly acknowledging the quasi-custodial status of pretrial arrestees would avoid granting pretrial arrestees unfettered rights that fail to account for the very real dangers that they pose to society, to themselves, and to the administration of justice.

2. *The Ninth Circuit's Waffle*

The majority in *Scott* rejected the government's special needs argument, but in many ways, left open the possibility that a special needs argument could be recognized in the future if the government can prove empirically that there is a "demonstrated problem" of drug use leading to nonappearance.¹⁸⁸ The court, in its quest to find the "primary" or "ultimate" purpose[] of the pretrial supervision program,¹⁸⁹ conceded that the government's stated goal of "ensuring that pretrial releasees appear in court" would qualify as a special need exception, but that the government did not prove that drug use by Scott would likely lead to his nonappearance.¹⁹⁰ Requiring empirical proof that there is a nexus between drug use and nonappearance places an unprecedented burden on the government. Although the Supreme Court has mentioned in dicta that empirical evidence "would shore up" a special needs claim, the Court has stressed that empirical evidence is "not in all cases necessary."¹⁹¹ For example, in *Earls*, the Court allowed general concerns about the "nationwide epidemic of drug use" to help justify special

186. *See id.*

187. *See supra* note 45 and accompanying text. The mission of the pretrial system is almost indistinguishable from the mission of the probation system as described in *Griffin*; both systems strive to protect the "public interest" while keeping in mind the "welfare" of the individual under their supervision. *See Griffin*, 483 U.S. at 876.

188. *Scott*, 450 F.3d at 870 (quoting *Chandler v. Miller*, 520 U.S. 305, 319 (1997)).

189. *Id.* at 869.

190. *Id.* at 870-71.

191. *Chandler*, 520 U.S. at 319.

needs.¹⁹² The Court rejected the argument that the government must show a “particularized or pervasive drug problem” in order to institute random drug testing for students participating in extracurricular activities.¹⁹³ The claim of the majority in *Scott* that “[h]ere, there is no obvious connection between drug use and appearance in court sufficient to obviate the need for a showing of factual nexus” is at odds with its later admission that the United States Congress had made explicit legislative findings making that very connection.¹⁹⁴ Other courts have had no problem seeing this same connection between drug use and nonappearance at trial.¹⁹⁵ The combination of judicial and congressional findings suggests at the very least that there is a rational basis for concluding that the condition was reasonably designed to assure that Scott appeared at trial.¹⁹⁶

The majority seemed to have sensed that its special needs analysis was not on the firmest of footing: The 2006 opinion so far discussed in this Note is in fact an amended version of an older, brasher opinion,¹⁹⁷ which the Ninth Circuit withdrew when it rejected a request to rehear *Scott* en banc.¹⁹⁸ This amended opinion attempted to narrow the court’s holding by adding a series of new footnotes throughout the opinion that severely limited the court’s special needs analysis.¹⁹⁹ For example, footnote eight attempted to narrow the ruling to apply only to Nevada’s version of § 3142 by stating that, “[h]ad defendant been on bail under the federal system, such a legislative finding, coupled with the fact that Scott was arrested for a drug-related crime, may have warranted a different

192. *Bd. of Educ. v. Earls*, 536 U.S. 822, 836 (2002).

193. *Id.* at 835.

194. *See Scott*, 450 F.3d at 871 nn.7-8; *see also* 18 U.S.C. § 3142(c)(1)(B)(ix)-(x) (1994). The court reconciled these statements by stating that it was considering only the Nevada statute, which, unlike Congress, had not made explicit legislative findings. *See Scott*, 450 F.3d at 871 n.8.

195. *See Scott*, 450 F.3d at 895 (Callahan, J., dissenting). The dissent pointed to a First Circuit opinion for the proposition that “about one-third of the defendants who do not appear for their pretrial hearings are charged with narcotics violations.” *Id.* at 895-96 (citing *United States v. Jessup*, 757 F.2d 378, 397-98 (1st Cir. 1985)).

196. *See id.* at 896 (Callahan, J., dissenting).

197. *See United States v. Scott*, 424 F.3d 888 (9th Cir. 2005).

198. *See United States v. Scott*, No. 04-10090, 2006 U.S. App. LEXIS 14154 (9th Cir. June 9, 2006).

199. *See, e.g., Scott*, 450 F.3d at 870-71 nn.7-8.

outcome.”²⁰⁰ The majority also noted that, “[t]he balance usually will be struck differently in cases where the defendant is required to report for drug-testing at a location away from his home.”²⁰¹ The majority blatantly retreated from its earlier opinion in footnote twelve when it conceded:

We do not hold that the government can *never* justify drug-testing as a condition of pretrial release. Such a condition may well be justified based on a legislative finding or an individualized finding that defendant’s ability to appear in court will be impaired absent drug-testing. Any unpublished dispositions of our court construing *Scott* as containing a categorical prohibition on drug-testing bail conditions are not precedential and are, in any event, superseded by this amended opinion.²⁰²

Even supporters of the majority’s opinion must be concerned about these footnotes because they open the door for future decisions that are adverse to the rights of pretrial arrestees. As a recent casenote stated, “[t]he importance of an opinion ... often lies not in the specific outcome it reaches, but rather in the framework it lays down for the resolution of future cases.”²⁰³ This piece expressed concern about the majority’s concession that consent is a salient factor that can weigh in favor of a search’s reasonableness.²⁰⁴ The Ninth Circuit essentially laid the groundwork for a subsequent court to find that ensuring pretrial arrestees’ attendance in court and their “quasi-custodial” status represents a special need that justifies random drug testing and warrantless searches.

C. Totality of the Circumstances Balancing Test: Knights and Samson

After rejecting the consent and special needs exceptions, the *Scott* majority quickly dismissed the totality of the circumstances test.²⁰⁵ The general “totality of the circumstances” balancing test was laid

200. *Id.* at 871 n.8.

201. *Id.* at 872 n.10.

202. *Id.*

203. *See Recent Cases, supra* note 5, at 1637.

204. *See id.*

205. *See Scott*, 450 F.3d at 872.

out in *United States v. Knights* and requires "assessing, on the one hand, the degree to which [the restriction] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."²⁰⁶ In many ways, the facts in *Knights* were similar to the facts in *Griffin* and *Scott*. *Knights* was a probationer who consented to random searches as a condition of his release.²⁰⁷ A police detective conducted a search of *Knights*'s home after he formed reasonable suspicion that *Knights* was involved in a recent arson.²⁰⁸ The detective discovered incriminating evidence, including a detonation cord, ammunition, and liquid chemicals, and *Knights* was arrested and charged.²⁰⁹ The District Court and the Ninth Circuit both held that the evidence must be suppressed because the search was "investigatory" rather than "probationary" and thus there was no special needs exception to excuse the lack of a warrant or probable cause.²¹⁰ The Supreme Court unanimously concluded that regardless of whether the special needs exception applied, "a lesser degree [of suspicion] satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable."²¹¹

In a way, the Court announced a new constitutional test that used the same underlying analysis found in the special needs cases but applied it "under a different paradigm" to "'ordinary' criminal case[s]."²¹² As Professor Urbonya noted: "Even though the *Knights* Court did not apply *Griffin*'s special needs analysis to the case, it ironically quoted *Griffin* (a 'special needs' case) repeatedly to characterize how it should strike the balance of interests (in this 'ordinary' criminal case)."²¹³ Given the Supreme Court's heavy

206. *Id.* at 873 (quoting *United States v. Knights*, 534 U.S. 112, 118-21 (2001)). *Knights* involved a probation order that conditioned release on the probationer's consent to warrantless searches of his "residence, vehicle, [and] personal effects." *Knights*, 534 U.S. at 114. The Court upheld the condition because probationers "do not enjoy 'the absolute liberty to which every citizen is entitled'" and thus the condition is reasonable under the Fourth Amendment so long as there is reasonable suspicion of a violation of the condition. *Id.* at 119 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)).

207. *Id.* at 114.

208. *Id.* at 115.

209. *Id.* at 115-16.

210. *Id.* at 116.

211. *Id.* at 121.

212. See Urbonya, *supra* note 86, at 1425.

213. *Id.*

borrowing from special needs jurisprudence for its totality balancing test, it is not surprising that the majority in *Scott* determined that the balancing test tipped in favor of the pretrial arrestees; its earlier consent and special needs analysis paved the way for this part of the opinion undermining the *Knights* test.²¹⁴ The majority undervalued the salient nature of Scott's consent and his status as a pretrial arrestee in weighing Scott's privacy interests.²¹⁵ The majority also gave little credence to the government's legitimate interests in protecting the public and securing attendance at trial when it relied on a lack of empirical evidence linking drug arrests with pretrial misbehavior.²¹⁶ Once these individual factors are given their proper weight, the totality of the circumstances balancing test would almost certainly tip in the government's favor.

After *Scott* was decided, the Supreme Court handed down its decision in *Samson v. California*, which further defined the contours of the totality of the circumstances test.²¹⁷ The *Samson* Court held that a "condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment."²¹⁸ The facts of *Samson* are almost identical to the facts in *Knights* except that the police's search of Samson was not even based on reasonable suspicion. Samson was stopped by a police officer who searched Samson's pockets "based solely on [his] petitioner's status as a parolee" and found methamphetamine.²¹⁹ In rejecting Samson's claim that the search was unreasonable, the Court, citing its reasoning in *Knights*, found that Samson's status as a parolee was "salient" in determining his "expectation of privacy."²²⁰ The Court also found that Samson's consent was salient because the condition was "clearly expressed" to petitioner" and he signed the order making him "unambiguously" aware of it."²²¹ The Court made no mention of the doctrine of unconstitutional conditions in its analysis and seemed to treat the bargain as a criminal

214. See *United States v. Scott*, 450 F.3d 863, 872-73 (9th Cir. 2006).

215. See *id.* at 873-74.

216. See *id.* at 874 n.15.

217. See 126 S. Ct. 2193, 2197 (2006).

218. *Id.* at 2196.

219. *Id.*

220. *Id.*

221. *Id.* at 2199 (quoting *United States v. Knights*, 534 U.S. 112, 119 (2001)).

waiver. Finally, the Court credited the government's "overwhelming interest" in supervising those in the "legal custody of the California Department of Corrections."²²² The Court did not demand empirical evidence linking the parolee's status with the likelihood of nonappearance; rather the Court held that merely "by virtue of his status," Samson was "more likely than the ordinary citizen to violate the law."²²³ All these conclusions severely undercut the *Scott* majority's rationale and suggests that the balancing test should favor the government.

Finally, the *Samson* Court considered where parolees ought to fit in the "continuum" of state-imposed punishments.²²⁴ Pretrial arrestees are not meant to be "punished" by the imposition of conditions on their release and this important requirement clearly places them outside the Court's continuum of punishment. Yet it is possible that this apparent inconsistency is not fatal. The reasoning behind the *Samson* and *Knights* opinions did not hinge entirely on the fact that parolees and probationers were being punished; punishment was just one of several factors the Court weighed. Clearly, those entering and those leaving the criminal justice system share more similarities than differences. Both groups remain "in the legal custody" of the state and must "comply with all of the terms and conditions" of release "including mandatory drug tests, restrictions on association with felons or gang members, and mandatory meetings with parole officers."²²⁵ Both groups can be seen as in the "quasi-custody" of the state, thus entitling the state to require compliance with conditions to ensure public safety.²²⁶ These similarities are striking enough to warrant extending the "continuum" to cover those entering the criminal justice system, like pretrial arrestees, as well as those who, like probationers, are leaving the system. If the continuum were extended so, it would

222. *Id.* at 2199-20. The *Samson* majority did examine some "empirical evidence" that "[r]ecidivism is a serious public safety concern in California and throughout the Nation" but this evidence seemed intended simply to "shore up" the legitimacy of the government's interest and was not dispositive. *Id.* at 2200 (quoting *Ewing v. California*, 538 U.S. 11, 26 (2003)). Even the dissent in *Samson* acknowledged that "one cannot deny that the [state's] interest itself is valid." *Id.* at 2207 (Stevens, J., dissenting).

223. *Id.* at 2197 (majority opinion) (quoting *Knights*, 534 U.S. at 120).

224. *Id.* at 2198.

225. *Id.* at 2199.

226. See *supra* Part III.B.1.

become apparent that pretrial arrestees would have a much greater expectation of privacy than parolees, but only slightly greater privacy expectations than those on probation. So, whereas suspicionless searches, like those in *Samson*, would clearly be unreasonable for pretrial arrestees, searches based on reasonable suspicion, like those in *Knights*, should be deemed reasonable. In this way, pretrial arrestees would be treated differently than ordinary citizens, but still retain more rights than many others on conditional release.

CONCLUSION

Any time courts balance interests in constitutional law, they must ensure that they give the proper weight to each factor. The majority's determination in *Scott* that a pretrial arrestee has the same privacy rights as an "ordinary citizen" and that the doctrine of unconstitutional conditions applied when waiving one's Fourth Amendment rights skewed the proper weights and distorted *Scott*'s expectation of privacy. In doing so, the court deemed unconstitutional a practice designed to ensure the release of the maximum number of arrestees. Ironically, the decision will undoubtedly create less robust privacy rights for arrestees because courts will be more reluctant to release drug offenders without some adequate assurances that they will not harm society by continued drug-related crime. Judges will thus increasingly require bail to ensure compliance. This practice in turn will increase the total number of arrestees who cannot afford bail and are subjected to pretrial confinement. In perhaps the greatest irony, the conditions this decision will foster stand in contrast to those of the 1966 Bail Reform Act period, in which arrestees were liberally allowed to be released with no consideration for the dangerousness they posed to the community. Instead, the *Scott* decision will mean a return to the pre-1966 system in which bail and confinement were the norm. This seemingly progressive decision could potentially have a regressive effect on criminal procedure, setting it back decades.

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